COUNTERPOINT

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Pennsylvania Supreme Court Overrules *Azzarello*, Only To Have PBI Suggested Jury Instructions Seek *Azzarello*'s Reinstatement (Volume 2 – Proper Suggested Standard Jury Instructions)

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*NOTE: The Co-Authors acknowledge the contributions to this article provided by James M. Beck, Esquire, Reed Smith, Philadelphia.

The first installment of this series discussed the key holdings of the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014): 1) that Pennsylvania's strict liability design defect law remains grounded in the Restatement (2d) of Torts §402A; 2) that the 1978 decision in *Azzarello v. Black Bros. Co.,* 391 A.2d 1020 (Pa. 1978), improperly attempted to segregate negligence concepts from strict liability design defect jurisprudence in a vain attempt at "social engineering"; 3) that *Azzarello* is overruled; and 4) that the key inquiry in strict liability design defect cases must be whether a "defective condition *unreasonably dangerous*" to the user existed.

The first installment further discussed the publication by the Pennsylvania Bar Institute ("PBI") of post-*Tincher* revisions to its "Pennsylvania Suggested Standard Civil Jury Instructions" for Products Liability (Chapter 16) ("Bar Institute SSJI"). As the PBI's opening "Note to the User" indicates, the Bar Institute SSJI are only suggested and are not submitted to the Pennsylvania Supreme Court for approval.[1]

More specifically, the first installment identified the numerous and wide-ranging problems with the Bar Institute SSJI, including: 1) they ignore the overruling of *Azzarello* by maintaining a core jury instruction drawn directly from *Azzarello*'s language; 2) they ignore the dictate of *Tincher* that a finding of a "defective condition unreasonably dangerous" to the user is the key inquiry in a strict liability trial in Pennsylvania and that the jury should be so instructed; 3) they make unfounded assertions of law on corollary issues the *Tincher* Court

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Walking a Mile in the Policyholder's Shoes: Common Subrogation Issues in the First-Party Property Insurance Context

By Matthew B. Malamud, Esquire and Andrea R. Procton, Esquire

Subrogation is an equitable doctrine which places the ultimate burden of a loss on the responsible party.[1] In this context, a party that is a secondarily liable and has paid the debt of an injured party (the subrogee) may be compensated by succeeding to the rights of the injured party (the subrogor) against the primarily liable party (the tortfeasor).[2] Subrogation can be used by insurance carriers in first-party property claims to reclaim payments made for damage caused by a third party.

Under Pennsylvania law, a carrier's right to subrogate arises after a policyholder has been fully compensated for a loss. However, as discussed below, this right may be limited. Additionally, determining (and proving) damages in a subrogation action can differ substantially from how damages are calculated in a first-party property claim.

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On The Inside

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expressly declined to address, but instead left to future courts to address incrementally; and 4) at every turn, the Bar Institute's departures from *Tincher* attempt to influence the development of Pennsylvania law in a one-sided fashion beneficial only to plaintiffs.

Finally, the first installment described the attempt by more than 50 legal organizations, business and insurance organizations, firms and experienced products liability lawyers to open a dialogue with the subcommittee that drafted the Bar Institute SSJI. That group sought engagement to discuss ways to make the Bar Institute SSJI reflect the actual holdings and rationales of *Tincher*, to accurately reflect the law as it is, and to eliminate the slanted advocacy embedded in the Bar Institute SSJI. The PBI subcommittee acknowledged receipt of the letter – and then ignored the outreach completely. The stonewalling continues, leaving no doubt that the subcommittee departed from its own stated goal of "ensuring the proposed instructions reflect the current law and case law"[2] and leaving no doubt that the subcommittee intended to publish legally erroneous, improper and biased "standard" instructions.

THE RESPONSE TO INTRANSIGENCE

In the face of the PBI subcommittee's intransigence and unwillingness to even discuss the pervasive flaws of the Bar Institute SSJI, a group of experienced practitioners formed. Together, the group totals more than 200 years of experience in litigating products liability cases at the trial and appellate court levels. For well over a year, the group has engaged in detailed research and discussions concerning pre-*Tincher* Pennsylvania law, *Tincher* itself, and how *Tincher* has been applied since it was decided in late 2014. *See*, *e.g.*, J. Beck, "Rebooting Pennsylvania Product Liability Law: *Tincher v. Omega Flex* & The End of *Azzarello* Super-Strict Liability," 26 Widener L.J. 93 (2017).

Under the umbrella of the Pennsylvania Defense Institute, the group decided collectively that the improper gloss of validity provided by the Bar Institute's sanctioning of clearly improper suggested jury instructions could not go unanswered. Thus was born an effort to draft and develop suggested standard jury instructions that accurately reflect the dictates of the Pennsylvania Supreme Court in *Tincher*, its progeny and those cases that were unaffected by the overruling of *Azzarello*.

The results of the group's many months of deliberation, drafting and redrafting are attached. These suggested standard jury instructions are meant not only for defense practitioners, as they forthrightly follow controlling law even where it is not what the defense would prefer. Primarily, these suggested standard instructions are offered as more accurate recitations of the law as it actually has been applied by the courts of the Commonwealth. PDI hopes that practitioners, courts and any who study or care about Pennsylvania's products liability law will find these instructions authoritative, useful and valuable.

These instructions also recognize that, by directly overruling *Azzarello*, the Supreme Court sent a message that the law on corollary issues must stand on sound reasoning independent of the social engineering embodied in *Azzarello* and its progeny. Subsequent decisions applying this law are cited in the "rationale" section for each suggested standard instruction.

These suggested standard instructions reflect not only the considered judgment and experience of the drafters and those who reviewed and offered valuable suggestions and input. They reflect the collective judgment of the Pennsylvania Defense Institute, the largest statewide voice for the defense bar, whose Board of Directors unanimously approved their publication. We invite other groups – even the PBI – to consider and endorse these suggested standard instructions.

PROPER SUGGESTED STANDARD JURY INSTRUCTIONS

For the convenience of practitioners and the courts, the attached suggested standard instructions follow where possible the organizational scheme of the Bar Institute SSJI. Numbered instructions are offered as direct alternatives to the corresponding Bar Institute SSJI.

A detailed "rationale" for each suggested standard instruction is provided and outlines the grounds, reasoning, and authority on which each suggested instruction stands. For many, the reasoning and rationale come directly from *Tincher* itself. For others, the instructions rest on precedent and authority untainted by *Azzarello*'s now-ended reign of error. Where *Tincher* has been interpreted by subsequent decisions, those decisions are noted. In all cases, the rationales provide a clear guide to the reasoning on which the suggested standard instructions are based; reasoning that any court or practitioner can confirm with minimal effort. Where these standard instructions disagree with the Bar Institute SSJI, the rationale discusses the basis for that disagreement.

Of course, these suggested standard

instructions are not intended to take the place of considered advocacy. As occurred prior *Tincher*, counsel should take the opportunity, where justified, to argue for the overruling of adverse controlling precedent, the so-called "heeding presumption" being one example. Nor are these suggested standard instructions intended to be applied reflexively to every case. In certain areas, such as "intended use/user", alternatives are provided. In every instance, courts should apply the same scrutiny and judgment to these suggested standard instructions that they should apply to the Bar Institute SSJI. The drafters of these instructions and PDI welcome that scrutiny, as both groups believe these suggested standard instructions are fundamentally fair, are far more faithful to the language and reasoning of *Tincher* than the Bar Institute SSJI, and will stand up to that scrutiny.

The instructions include the following:

16.10 General Rule of Strict Liability

16.20(1) Strict Liability – Design Defect – Determination Of Defect (Finding of Defect Requires "Unreasonably Dangerous" Condition)

16.20(2) Strict Liability – Design Defect – Determination Of Defect (Consumer Expectations)

16.20(3) Strict Liability – Design Defect – Determination Of Defect (Risk-Utility)

16.30 Strict Liability – Duty To Warn/Warning Defect

16.40 "Heeding Presumption" For Seller/Defendant Where Warnings Or Instructions Are Given (For Design Defect Cases)

16.50 Strict Liability – Duty To Warn – "Heeding Presumption" In Workplace Injury Cases

16.60 Strict Liability – Duty To Warn – Causation, When "Heeding Presumption" For Plaintiff Is Rebutted

16.90 Strict Liability – Manufacturing Defect – Malfunction Theory

16.122(1) Strict Liability – State Of the Art Evidence – Unknowability Of Claimed Defective Condition

16.122(2) Strict Liability – State Of The Art Evidence – Compliance With Product Safety Statutes Or Regulations

16.122(3) Strict Liability – State Of The Art Evidence – Compliance With Industry Standards

16.122(4) Strict Liability – Plaintiff Conduct Evidence

16.175 Crashworthiness – General Instructions

16.176 Crashworthiness – Elements

16.177 Crashworthiness – Safer Alternative Design Practicable Under The Circumstances

UNFINISHED BUSINESS

The publication of these suggested instructions does not mean the work of the drafters or PDI is finished. The drafting committee intends to monitor the development of products liability caselaw and to refine and adjust these suggested instructions accordingly. In addition, the work performed to date has revealed other topics beyond those addressed in *Tincher*, such as component part issues, where the committee feels courts and drafters may benefit from additional guidance. Accordingly, the committee intends to continue drafting and publishing additional instructions where appropriate. PDI and the drafters welcome any comments, criticism or input, understanding that both positive and negative comments help ensure the most accurate and comprehensive product.

ENDNOTES

[1]Note to the User, 2017 ed.

[2]Introduction to the 2016 Supplement

COMPLETE COPY OF PRODUCTS LIABILITY SUGGESTED STANDARD JURY INSTRUCTIONS ATTACHED AFTER FINAL ARTICLE.

Walking a Mile

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In this article, we address some of the common issues that arise in the context of subrogation in a first-party property claim.

NECESSARY PARTIES IN A SUBROGATION ACTION

Pennsylvania recognizes that once a carrier has paid its policyholder for a property damage claim, the carrier possesses a separate and independent cause of action against the party responsible for the damage.[3] The carrier may pursue this cause of action in its own name, or in the name of its policyholder.

Where a carrier and its policyholder seek damages for different injuries resulting from the same loss, they may pursue damages in separate and distinct actions.[4] Notably, in 2009, the Civil Procedural Rules Committee for the Supreme Court of Pennsylvania declined to adopt a proposed an amendment to Rule 1020 of the Pennsylvania Rules of Civil Procedure that would require joinder under such circumstances.

LIMITATIONS ON THE RIGHT OF SUBROGATION

1. Inherited Rights and Post-Adjustment Releases

A subrogee steps into the shoes of the subrogor.[5] In this context, the subrogee's rights are the same as, and can be no greater than, those of the subrogor.[6] A subrogee can only recover damages when the person or entity for whom it is substituted has a legitimate claim against a third party.[7] By way of example, if a policyholder's claim against a third party is barred by the applicable statute of limitations, any action by the subrogee is also time-barred.[8]

Similarly, post-adjustment releases between an insurance carrier and its policyholder can have unintended consequences on the carrier's subrogation rights. In *Republic Ins. Co. v. The Paul Davis Systems of Pittsburgh South, Inc.*[9], the carrier provided coverage for its policyholder's loss, which was caused in part by a contractors failure to take proper precautions while

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repairing the original damage. As part of the settlement of the claim, the carrier obtained a release in favor of the carrier and "any and all other persons" from "any and all actions" of "whatsoever kind or nature." The Pennsylvania Supreme Court held that such language was sufficiently broad to encompass an action by the policyholder against the contractor, which, therefore, barred the carrier's subrogation action.

Policyholder releases are not an uncommon phenomenon in first-party property claims. Where a right to subrogation may exist, carriers (and their counsel) must be cognizant of the language used in these releases in order to ensure that the release does not unintentionally prejudice these rights.

2. The Made Whole Doctrine

A policyholders damages may be in excess of their loss for any number of reasons; for example: applicable policy deductibles, limits of liability, or coverage exclusions and limitations. Where the policyholder has not been fully compensated for its damages, the carrier and its policyholder may split a single cause of action against the responsible third party. A policyholder is entitled to reimbursement of its uninsured losses, and a carrier is entitled to recover amounts paid on the claim, subject to the policyholder being "made whole."[10]

The made whole doctrine is intended to ensure that a policyholder is fully compensated for its injury in cases where there are insufficient funds to satisfy both the policyholder and their insurance carrier.[11] Thus, where a policyholder is entitled to recover for the same loss from more than one source (i.e. an insurance carrier and a responsible third party), it is only after the policyholder has been compensated for its entire loss that the carrier is entitled to enforce its subrogation rights.[12]

While the made whole doctrine is generally followed by Pennsylvania courts, there is some authority to suggest that application of the doctrine can be avoided by clear language making the carrier's right to recovery primary to that of the policyholder.[13] In any event, insurance carriers should be aware of this doctrine as a potential obstacle to their recovery in a subrogation action. In this context, failure to adhere to the made whole doctrine may expose an insurance carrier to extra-contractual liability. Under these circumstances, the policyholder may argue that that insurance carrier put its own financial interests ahead of the policyholder's interests by pursuing recovery before the policyholder is made whole.[14] However, this argument has been rejected by at least one federal court in Pennsylvania.[15]

As a practical matter, issues concerning application of the made whole doctrine may be avoided through the use of a joint allocation agreement. Such an agreement operates to determine the right of priority in subrogation cases. This issue may also be addressed through the use of a subrogation receipt that outlines how recovery proceeds will be allocated.

CALCULATING DAMAGES IN A SUBROGATION ACTION

Adjustment of first-party property claims typically occurs under unique circumstances, which may not translate to subsequent subrogation actions. For example, these claims are typically valued using estimates and proposals that may not always be sufficient proof of damages in a subrogation action. While these estimates may be proof of replacement or repair costs in a first-party property action, different evidence may be needed in a subrogation action. Subrogation actions require proof of *actual* damages

3. Real Property Damage

Under Pennsylvania law, damages to real property are measured by the cost of repairs.[16] However, were the damage is determined to be permanent, repair and replacement costs are irrelevant.[17] In these circumstances, the measure of damages is the decrease in the fair market value of the property.[18]

"Market Value" refers to "what a willing purchaser willing to buy feels justified in paying for property which one is willing but not required to sell."[19] In determining market value, one must consider multiple factors, such as time, place, circumstance, use, benefit, and depreciation.[20]

Market value information is not typically generated during the first-party claims handling process. However, such information may be important, if not necessary, to the insurance carrier's recovery in a subsequent subrogation action where the property is determined to be permanently damaged.

4. Personal Property Damage

Generally, damages to personal property are determined using the same principles applicable to damages to real property. However, this rule is not universal. For example, in Pennsylvania, there is authority to support the proposition that damage to household items (which may comprise a significant portion of a homeowners insurance claim) should be determined by considering the "actual value" to the owner, which accounts for replacement cost and expense and other particular considerations specific to the owner.[21] This is not the case in a first-party property claim, where payments are issued in the manner prescribed by the policy.

5. Losses of Business Income

As recognized by the Pennsylvania Supreme Court, proving a loss of business income (i.e. lost profits) presents certain inherent difficulties.[22] In this arena, Pennsylvania law requires only that the carrier present evidence that establishes a basis for the assessment of damages with a fair degree of probability.[23] Accordingly, in a subrogated tort action, damages for lost profits are allowed where (1) there is evidence to establish them with reasonable certainty, and (2) there is evidence to show that the loss was proximately caused by the tortious conduct.[24] There can be no recovery for a loss of business income claim that relies solely on speculation to prove the existence of a loss.[25]

The evidentiary standards related to proving a loss of business income are more flexible than those applicable to real and personal property damages. As such, the information obtained during the course of the adjustment of a first-party property claim will likely be sufficient to support a damages award.

CONCLUSION

Subrogation has only recently come into the spotlight in the first-party property insurance arena. It is a unique concept that serves an important claims function – recovery of money. In addition to being a source of revenue for carriers, subrogation also benefits policyholder by allowing carriers to offer lower policy premiums.

Subrogation actions are not typical tort cases. Because the action may be brought in the name of the policyholder, it may not always be evident that a particular suit is a subrogation action. Accordingly, attorneys defending property damage cases should issue discovery requests early in the litigation to shed light on this issue.

Subrogation actions can present unique obstacles for both prosecuting and defending attorneys. For example, it is important to determine whether the policyholder's conduct has limited the carrier's subrogation rights in any way. In the same vein, one must know whether the policyholder retains any rights to recovery under the made whole doctrine. Most importantly, subrogation actions must be defended with an eye towards the *actual* damages suffered by the Policyholder.

ENDNOTES

[1]*Wimer v. Pennsylvania Employees Benefit Trust Fund*, 939 A,2d 843 (Pa. 2007).

[2]*Id*.

[3]*State Farm. Mut. Auto. Ins. Co. v. Ware's Van Storage*, 953 A.2d 568 (Pa.Super. 2008).

[4]*Id.*

[5]*Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc.*, 916 A.2d 686 (Pa.Super. 2007).

[6]*Wimer*, 939 A.2d at 853.

[7]*Universal Underwriters*, 916 A.2d at 693.

[8]*See e.g. Ins. Co. of N. Am. v. Carnahan*, 284 A.2d 728 (Pa. 1971).

[9]670 A.2d 614 (Pa. 1995)

[10]*See e.g. Gallop v. Rose*, 616 A.2d 1027, 1030 (Pa. Super. 1992).

[11]*Id.*

[12]16 Couch on Insurance § 223:134 (3d Ed.)

[13]*See Watson v. Allstate Ins. Co.*, 28 F.Supp.2d 942 (M.D.Pa. 1998).

[14]*See e.g. Alfano v. State Farm Fire & Cas. Co.*, 2009 U.S.Dist. LEXIS 84927 (M.D.Pa. Sept. 17, 2009).

[15]*Id*.

[16]*See Babich v. Pittsburgh & New England Trucking Co.*, 563 A.2d 168 (Pa.Super. 1989)(citing *Wade v. S.J. Groves & Sons Co.*, 424 A.2d 902 (Pa. Super. 1981)).

[17]*Id*.

[18]*Id*.

[19]*Fedas v. Ins. Co. of the State of Pa.*, 151 A. 285 (Pa. 1930).

[20]*Id*.

[21]*See Lynch v. Bridges & Co.*, 678 A,.2d 414 (Pa. Super. 1996)(citing *Lloyd v. Haugh,* 72 A. 516 (Pa. 1909)).

[22]*See Mass. Bonding & Ins. Co. v. Johnsont & Harder, Inc.*, 22 A.2d 709 (Pa. 1941).

[23]*Id*.

[24]*Bolus v. United Penn Bank*, 525 A.2d 1215 (Pa. Super. 1987)

[25]*See Eastern Associated Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068 (3d Cir. 1980).

Bill Of Costs: Who Gets Paid When No One Wins?

By Joel H. Feigenbaum, Esquire, Goldberg Miller & Rubin, P.C., Philadelphia, PA

Once the dust settles after a trial victory, practitioners routinely file bill of costs in an effort to recoup litigation expenditures, such as filing and service of process fees.[1] For personal injury attorneys representing plaintiffs, this is one last opportunity to capitalize on a successful claim usually taken on a contingency basis and net additional hundreds or sometimes thousands of dollars depending on the circumstances of the case. For defense attorneys representing an insured or policyholder, this will mark the first and last time in a litigation continuum that may have lasted years to recoup a small percentage of the costs associated with defending a claim that ultimately proved to be meritless. From the moment the jury foreperson returns to the courtroom with a verdict, counsel typically learn the winner, the loser, and in turn which party will have the opportunity to seek reimbursement of such costs provided by the local rules of civil procedure.[2] But, what happens when both parties leave the courtroom believing they were the victor? What happens when defense counsel leaves the courtroom after no damages were awarded in a motor vehicle accident case and notifies their carrier of a trial win, only to learn days later that plaintiff's counsel is petitioning the court to alter the jury verdict to reflect a plaintiff victory?

In a case of first impression that was appealed from the Court of Common Pleas of Philadelphia County, the Superior Court addressed that very issue. In *Oliver v. Irvello*, 2017 PA Super 184, No. 3036 EDA 2016 (June 13, 2017), a three (3) member appellate court heard the appeal of a plaintiff who had elected a limited tort option on his motor vehicle insurance policy and then filed a personal injury action against a defendant after a May 26, 2011 auto accident. Following trial, the jury found that: (1) defendant was negligent; (2) defendant's negligence was a factual cause of plaintiff's harm; and (3) plaintiff did not sustain a serious impairment of a body function as a result of the accident.[3] The trial court subsequently entered a verdict in favor of the defendant. Plaintiff filed a motion to correct the docket to reflect that he was the winner, asserting that the *error* on the docket precluded him from recovering costs. The defendant in turn filed a bill of costs. After his motion to correct the record and ensuing motion for reconsideration were denied, plaintiff appealed arguing that the trial court committed an error of law in denying his motion to correct the record to reflect that he was the verdict winner. Plaintiff argued that he was the "prevailing party" because the jury found the defendant liable even though he could not recover non-economic damages.[4]

While several cases in the Commonwealth address the issue of the "prevailing party" to which costs may be awarded, none address this issue in the context of a limited tort case. The

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Bill Of Costs

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appellate court found that in order to recover on his claim for non-economic damages in a limited tort case, the plaintiff was required to prove serious injury. As he was unable to do so, his claim is meritless.[5] *Oliver*, 2017 PA Super at *8-9. The court reasoned that the defendant was the "prevailing party" in this limited tort case because:

> [a]s a limited tort elector, Plaintiff chose not to limit his damages, but to restrict his ability to *maintain an action* for noneconomic damages. This is not a matter of the 'amount of damages awarded,' even if zero or nominal; Plaintiff did not prevail because the action could not proceed.[6]

Oliver, 2017 PA Super at *9 (emphasis in original).

Although not explicitly stated, the *Oliver* decision provides defense counsel firm support in seeking costs in limited tort matters where their clients are found negligent and a factual cause of plaintiff's injuries, but no damages are awarded. As the "prevailing party" in such a circumstance, insurers and their attorneys may now be armed with a new weapon with which to negotiate a favorable settlement or the outright withdrawal of a claim. While many plaintiffs' lawyers may have believed they had nothing to lose by bringing a limited tort case with little chance of piercing the tort threshold, they now risk increased financial exposure in the form of defendant's bill of costs. *Oliver* may give plaintiff's counsel pause before accepting a limited tort case initially and committing their financial resources and manpower to filing suit. *Oliver* is no small victory in legal precedent that further distinguishes the viability of suits brought by limited tort motorists compared to full tort. Lawyers accepting limited tort cases of questionable merits due to prior injury history, scant objective evidence of injury, negligible treatment, or any number of other factors should judiciously consider the financial ramifications of taking on such a case in light of *Oliver*.

ENDNOTES

[1]"It is a general rule in our judicial system… that costs inherent in a law suit (sic) are awarded to and should be recoverable by the prevailing party." *De Fulvio v. Holst*, 362 A.2d 1098, 1099 (Pa. Super. 1976).

[2]Philadelphia Court of Common Pleas Local Rule 227.5 provides:

(B) Parties Entitl*ed*. Costs shall be allowed to a prevailing party except as otherwise provided by law or unless waived by a party who would otherwise be entitled thereto. A prevailing party shall include: (1) A party in whose favor a final judgment is entered. (2) A party in favor of whom a non pros is entered. (3) Defendants for whom judgment is entered, or who are dismissed from the action, even though the plaintiff ultimately prevails over the remaining defendants.

(C) Contents. A bill of costs shall itemize those costs claimed to be due. The costs claimed may include: (1) Record Costs. All costs of record appearing on the docket including but not limited to the Office of Judicial Records fees and costs, the Sheriff's fees and costs, and the jury fee. (2) Non-record Costs. Costs not appearing of record, including but not limited to: (a) Statutory witness fees. The bill shall set forth the names of witnesses, the dates of their attendance, the number of miles actually travelled by them, and the place from which mileage is claimed; (b) Costs of subpoenas for appearance in Court, including costs of service thereof; (c) Costs of maps in eminent domain actions; (d) Fees of appraisers, auditors and/or examiners where necessary to the action; (e) Notary fees; (f) Attorneys' fees if expressly authorized by statute or stipulation; and (g) Filing fee for the bill of costs. (3) Such other costs as are allowable by law.

[3]The Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") provides that a driver who purchases limited tort coverage "may seek recovery for all medical and other out-of-pocket expenses, but not for pain and suffering or other nonmonetary damages unless the injuries suffered fall within the definition of 'serious injury' as set forth in the policy." 75 Pa. Cons. Stat. Ann. § 1705(a)(1)(A).

[4]"A 'prevailing party' is commonly defined as 'a party in whose favor a judgment is rendered, regardless of the amount of damages awarded.'" *Profit Wize Mktg. v. Wiest*, 812 A.2d 1270, 1275-76 (Pa. Super. 2002). *See also* 25A Standard Pennsylvania Practice 2d § 127:8 (defining "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.").

[5]In reaching its decision, the court did not consider the unpublished appellate decision in *Bailey v. Pham*, No. 2526 EDA 2015, 2016 WL 4639941, at *1 (Pa. Super. June 29, 2016), cited by plaintiff, wherein a verdict was entered for the defendant after a Philadelphia jury found the defendant in that case negligent, a factual cause of the plaintiff's harm, and awarded zero dollars in damages to the plaintiff in a 2012 motor vehicle accident case. On appeal, the court declared the plaintiff the verdict winner and that the defendant was "erroneously" recorded as the prevailing party in a "clerical error." *Bailey,* 2016 WL 4639941 at *2. The plaintiff in *Bailey* was not a limited tort motorist.

Superior Court Internal Operating Procedure § 65.37(A) provides: "An unpublished memorandum decision shall not be relied upon or cited by a Court or party in any other action or proceeding…"

[6] The MVFRL clearly sets forth, "unless the injury sustained is a serious injury, each person who is bound by the limited tort election shall be *precluded from maintaining an action for any noneconomic loss.*" 75 Pa. Cons. Stat. Ann. § 1705(d) (emphasis added).

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A Legislative Response to the *Protz* Decision? Let's Not Forget the Court's Judicial Interpretation of How the AMA Disability Guides Should be Used in the IRE Process

*By Thomas R. Bond, Esquire**

On June 20, 2017, the Supreme Court of Pennsylvania in the landmark case of *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017) ruled that Section 306 (a.2) of the Pennsylvania Workers' Compensation Act, 77 P.S. §511(2) providing for Impairment Rating Evaluations of injured employees is unconstitutional.

In brief, this statutory provision mandated that physicians performing the impairment-rating evaluation (IRE) were obligated to determine the degree of impairment due to the employee/claimant's compensable injury utilizing the methodology set forth in the "most recent edition" of the American Medical Association (AMA) Guides to Physical Impairment ("Guides"). At the time the IRE provision was enacted the 4th Edition of the Guides was in place. That Edition was replaced by the 5th Edition which was later replaced by the 6th Edition. The Court held that the IRE provision constituted an unconstitutional delegation of lawmaking power possessed by the General Assembly to the AMA.

There are some who would like to see a legislative response to this ruling that would enable members of the business and insurance communities to continue to enjoy the benefits of limiting the extent of their liabilities under the Act through continued use of the IRE in conjunction with the AMA Disability Guides.

I believe it to be of critical importance for entities and business groups contemplating this to take into account the decision in another IRE case, that of *Duffey v. Workers' Compensation Appeal Board (Trola-Dyne, Inc.)*, 152 A.3d 984 (Pa. 2017) decided by the Pennsylvania Supreme Court several months prior to Protz.

The holding reached in this very important case should serve to give some significant degree of pause to those who would like to see continued use of the AMA Guides in efforts to contain their liability under the Act.

While, arguably, the result reached in *Duffey* no longer applies with Section 306(a.2) held to be unconstitutional, the judicial interpretation and analysis of how the AMA Guides should be utilized by the IRE physician remains very relevant serving to underscore the fact that renewed application of the Guides would carry the risk of an expansion of the scope liability beyond the injuries accepted as compensable and reflected in the Notice of Compensation Payable. Prior to the expressed judicial thought and analysis we will see in examining this case, practitioners in the practice area of Pennsylvania Worker's Compensation law operated under certain understandings based on longstanding existing statutory and case law, which included:

The understanding that the scope of the IRE was to be limited to a determination of the degree of impairment due to the compensable injury or injuries set forth in the Notice of Compensation Payable.

That in order to add any injuries to the Notice of Compensation Payable, thereby expanding the scope of the impairment rating process, there would have to be an agreement between the parties, or an adjudication expanding the scope of injury.

That only a Workers' Compensation Judge could make causation determinations regarding alleged injuries falling outside the scope of the Notice of Compensation Payable.

That to add a psychological or psychiatric component to a compensable injury, a claimant would have to present substantial and persuasive medical evidence before a Workers' Compensation Judge.

That the IRE should be focused on the injury sustained by Claimant, as opposed to the "event" surrounding the injury.

That it was not necessary for the IRE physician to arrive at a diagnosis in that the injury had been established in the Notice of Compensation Payable and that injury alone was to be evaluated from an impairment rating perspective.

As noted in the following discussion, these understandings have been upended to a significant degree, with probable heightened confusion and increased litigation in this area of the law.

The Fact Pattern of the Case:

Claimant sustained injuries to his hands when he picked up electrified wires while repairing a machine for Employer. A Notice of Compensation Payable ("NCP") was issued indicating that, "while stripping electrical wires, Claimant sustained electrical burn injuries to both of his hands."

Employer commenced to make temporary total disability benefits to Claimant, and after 104 weeks of such benefits had been paid, arranged to have Claimant undergo an IRE which established a 6% permanent impairment rating. Employer had described the underlying compensable injury to be evaluated as "bilateral hands-nerve and joint pain."

On this basis, Claimant's disability status was changed from total to partial, thereby limiting his continued receipt of compensation benefits, still at the temporary total rate, to 500 weeks.

Claimant then proceeded to file a review petition challenging the validity of the IRE, asserting that the Physician-Evaluator ("Evaluator") had failed to rate the full range of his work-related injuries in that he had not factored into his evaluation his work-related psychiatric conditions, which were complained about by Claimant at the time of his evaluation, but were not added to the NCP by a WCJ until six months after the IRE.

The Evaluator testified that the 6% impairment rating he attached to Claimant's acknowledged work-related injury was based on Claimant's physical condition and "work-related chronic neuropathic pain syndrome."

He further testified that his rating did not account for Claimant's work-adjustment disorder, or post-traumatic stress syndrome, despite the fact that the Claimant advised him of his psychological condition at the time of the evaluation. In this regard, the Evaluator offered the following explanation:

I am not a psychiatrist and I don't have appropriate skills, if you will, to do that type of assessment. And I was specifically asked to assess his electrical burn injuries and I did that.

Adjudicatory Rulings Leading Up to the Granting of the Petition to Appeal by the Pennsylvania Supreme Court:

The Workers' Compensation Judge ("WCJ") determined that the IRE was invalid in that the Evaluator had not addressed Claimant's additional psychiatric conditions. Accordingly, the WCJ found that there was insufficient evidentiary support for modification of Claimant's disability status from total to partial under Section 306(a) (1) of the Act.

Both the Workers' Compensation Appeal Board (WCAB) and the Pennsylvania Commonwealth Court, however, reversed the WCJ's holding that the IRE was valid in that IRE Evaluator had determined the degree of impairment due to the compensable injury as set forth in the NCP at the time the impairment evaluation was performed.

The Commonwealth Court urged claimants to be proactive in updating notices of compensation payable so that their constellation of injuries could be considered in impairment rating situations. To hold otherwise, noted the Court, would be to encourage claimants to wait to add additional diagnoses to their work-related injuries until after the IRE is performed as a way to automatically render the IRE invalid.

The Court opined that such an outcome would be contrary to the underlying intent of the Legislature in establishing the IRE procedure – to reduce rising Workers' Compensation costs and restore efficiency to the Workers' Compensation system. The Court also opined that Claimant's position would effectively strip the employer of its only opportunity to obtain a self-executing change in disability status by adding injuries to the NCP after the IRE is performed and having the IRE declared invalid. The Court stated that the cost of obtaining the IRE under such circumstances would be wasted.

Statements made by the Supreme Court of Pennsylvania Underscoring the Need for IREs:

Under traditional legal analysis of Pennsylvania workers' compensation issues and rulings, the treatment of this case by the WCAB and the Commonwealth Court appeared to be well founded. However, whereas, with few exceptions, liability under the Act is arrived at by earning power determinations, the IRE process brings with it functional impairment determinations. These determinations carry with them the potential to limit the duration of entitlement of benefits even if the worker cannot return to his pre-injury job, or any other work. As more formally stated by the Court in its Opinion:

"…benefits ultimately cease as a result of an unfavorable rating evaluation, although a claimant may remain, in conventional terms, totally disabled and unable to provide for his or her own well-being. *See generally*, *IA Const. Corp. v. W.C.A.B. (Rhodes)*, -- Pa. ---, 139 A.3d at 155" (discussing the distinction between impairment and disability in terms of the focus of the latter term on loss of earning capacity).

The Court also approached this case with knowledge that "injuries often are depicted briefly, and even cryptically, on notices of compensation payable." *Id.* at __, 139 A.3d at 990-1

As an aside, one of your author's can recall an experienced practitioner teaching an advanced worker' compensation course underscoring the fact that in this area of law we are dealing with the "bread and milk money," of critical importance to the claimant and any of his dependents. A judicial ruling ending these benefits should, understandably, rest on a strong evidentiary foundation.

The Court's Analysis:

The Court commenced its analysis of this case by stating that the issue to be addressed "…is ultimately whether a Notice of Compensation Payable closely circumscribes the range of health-related conditions to be considered in impairment rating evaluations." *Id.* at __, 139 A.3d at 985

While the Court agreed with the Commonwealth Court that an NCP should define the compensable injury it stated that such recognition does not determine the range of impairments which may be "due to" such injury. Further, as reflected in a several footnotes, the Court stated that IRE evaluators do not specifically rate "injuries." Rather, it is the obligation of the evaluators to determine the "degree of impairment due to the compensable injury."

Moreover, the Court stressed that the IRE mandates that there be a determination of "the percentage of permanent impairment of the whole body resulting from the compensable injury."

Using Section 306 (a.2) (1) of the Act as an underpinning, the Court opined that the evaluator must exercise professional judgment to render appropriate decisions concerning both causality and apportionment of impairment ratings.

The Court noted the Guides and Section 306(a.2) require IRE evaluators to use their clinical knowledge, skills, and abilities to arrive at a specific diagnosis; define the pathology; and impairment ratings based on the Guides' criteria.

The Court stressed that causation, for purposes of the Guides, calls for a reference to an "event" rather than an "injury."

Accordingly, the Court reasoned that there may be some basis in the Guides to permit an evaluator to attribute a claimant's psychological disorders to the event in which claimant was injured rather than the compensable injury itself.

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A Legislative Response

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The Court then proceeded to ascertain the adequacy of the impairment assessment of the evaluator and concluded that the physician's evaluation was invalid in that he had not applied the requisite evaluative professional judgment to assess (or, per the applicable regulations, arrange for the assessment of) the psychological conditions identified by Claimant during the IRE.

The Court also discussed the fact that the evaluator had also not determined whether Claimant's diagnosed psychological conditions were fairly attributable to Claimant's compensable injury.

Rather, the Court found that the Evaluator had limited his evaluation to the instructions received from Employer regarding the electrical burn injuries sustained by Claimant, and, by so doing, simply ignored a range of potential diagnoses and impairments.

The Court also stressed that benefits ultimately cease as a result of an unfavorable rating evaluation, although a claimant may remain, in conventional terms, totally disabled and unable to provide for his or her own well-being.

Justice Baer filed a Dissenting Opinion stating that the Court's holding will undermine the IRE process in general, and permit claimants to easily invalidate otherwise fair IRE proceedings by simply expressing new physical and/or psychological conditions unknown to the employer, even ones that clearly were not derived from the injury set forth in the Notice Compensation Payable. This jurist points out that the claimant's mere expression of injuries outside the scope of the NCP will trigger an obligation on the part of the physician to evaluate these conditions, regardless of the injuries accepted as compensable, or risk having the IRE declared a nullity. Such an obligation would certainly inject uncertainty and inefficiency into the IRE process, which is contrary to the goals of the Legislature in enacting the legislation.

Further, Justice Baer observed that Claimant's position throughout all of the prior proceedings had been that his psychiatric disorders were independent injuries that, like his hand injury, derived directly from being electrocuted at work. Justice Baer underscored the fact that the Majority of the Court ignored the statutory causation requirement that the impairment to be evaluated by the IRE physician be "due to" the compensable injury. Justice Baer pointed out that there was no allegation that the psychiatric conditions were "due to" the compensable hand injury. Rather, Claimant alleged that the psychological impairment he suffered was due to the work incident.

Justice Wecht also filed a Dissenting Opinion, expressing his view that the holding reached by the Majority produces a result where IRE Evaluators are compelled to assess all of Claimant's injuries, including those that claimant's employer never accepted as compensable. By so holding, claimants are relieved of their burden of proving a causal relationship between the accepted work-related injury and any subsequently arising psychological injuries.

Justice Wecht cited case law under which it is clear that, when an employer accepts liability for purely physical injury, the claimant bears the burden of proving a causal relationship between that injury and an alleged psychological disability.

Justice Wecht opined that an IRE physician who proceeds according to his or her own assessment is not a substitute for a WCJ who first evaluates conflicting expert testimony, and then proceeds to reach a reasoned decision. He stressed that the issue of causation should be with the WCJ to decide, not the physician.

Justice Wecht also expressed his opinion that the Majority's interpretation of Section 306 (a.2) will fundamentally alter the IRE process by relieving claimants of the burden to prove compensable injuries, thereby turning impairment-rating physicians into "junior varsity WCJs." He predicts that the likely result will be heightened confusion and increased litigation.

CONCLUSION

The holding reached in this case and the its underlying rationale, should give pause to members of the business and insurance communities who are contemplating bringing about a restoration of Section 306 (a.2) through elimination of the element of unconstitutionality found to be present by the Pennsylvania Supreme Court. They should do so only after the implications of *Duffey,* truly a case of first impression, have been fully considered. It would seem clear that any legislative attempt to reduce the workers' compensation liability of employers through impairment rating evaluations alone will always be subject to a high level of scrutiny by the Pennsylvania Supreme Court for the reasons set forth in the *Duffey* case.

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AUTOMOBILE CASE LAW UPDATE – JUNE, 2017

By Summers, McDonnell, Hudock & Guthrie, P.C.

PENNSYLVANIA SUPERIOR COURT ORDERS NEW TRIAL WHERE TRIAL COURT ADMITTED EVIDENCE OF PLAINTIFF'S ALCOHOL CONSUMPTION WITHOUT SUPPORTING EVIDENCE OF UNFITNESS TO OPERATE VEHICLE

ROHE v. VINSON, 158 A.3d. 88 (Pa. Super. 2016)

Mr. Rohe ("plaintiff") suffered a right, above the knee amputation as a result of a motorcycle/truck accident which occurred along Route 220 in Bradford County, Pennsylvania.

Immediately prior to the accident, the plaintiff was behind a tractor trailer and a tri-axle dump truck operated by defendant Vinson. Plaintiff attempted to pass both the tractor trailer and the tri-axle in a legal passing zone. He successfully passed the tractor trailer. As he was attempting to pass the tri-axle truck, he noticed that its left turn signal was on and it was attempting to make a left into a gas station. Plaintiff's motorcycle struck the bumper of the tri-axle truck and he was ejected.

Plaintiff brought an action against Mr. Vinson and his employer ("defendants") alleging that Vinson failed to activate his turn signal early enough and failed to yield the right of way to the plaintiff. Discovery revealed that plaintiff had consumed between six (6) and eight (8) 12 ounce beers prior to the accident.

Plaintiff filed a motion in limine to preclude evidence of his alcohol consumption as his BAC post-accident was below the legal limit. Further, there was no indication from other witnesses, etc. that the plaintiff was unfit to operate the motorcycle at the time of the loss. In opposing the motion, the defendant put forth the toxicology report of Gary Lage, Ph.D., who opined that the plaintiff would have been impaired at the time of the accident and the impairment would have been a significant cause of the accident. Based upon this, the trial court allowed the case to proceed to trial with the evidence of plaintiff's alcohol consumption.

The jury returned a verdict in favor of the defendants finding that defendant Vinson was "not negligent". Post-trial motions were filed and denied. Plaintiff then filed an appeal to the Superior Court contending that the trial court erred in admitting the evidence of alcohol consumption without more.

The Superior Court agreed with plaintiff and ordered a new trial as the verdict may have been based upon improperly admitted evidence. The Superior Court affirmed the long line of cases which hold that there must be "other evidence of intoxication" when a person's BAC is below the legal limit. The Superior Court indicated that it was "skeptical" of the toxicologist's testimony which "related back" a BAC to the time of the incident. Also, the Superior Court held that there was no evidence of the plaintiff's unfitness to operate the motorcycle and that the toxicology report was alone insufficient.

PENNSYLVANIA SUPERIOR COURT HOLDS THAT DEAD MAN'S STATUTE NOT WAIVED BY DEFENDANT'S LIMITED PARTICIPATION IN DISCOVERY

DAVIS v. WRIGHT ex rel. WRIGHT, 156 A.3d 1261 (Pa.Super. 2017).

Plaintiffs, Davis and Gibson, alleged personal injuries as a result of a motor vehicle accident which occurred while Gibson was a guest passenger in Davis' vehicle. The plaintiffs alleged that the injuries were the result of the negligence of Bryon Wright, Jr. ("decedent"), who passed away subsequent to the accident. The decedent's personal representative ("defendant") filed an Answer alleging that the decedent was not negligent in any fashion. The representative also filed a counterclaim against Davis alleging that the accident was solely his fault. Approximately nine (9) months after the complaint was filed, the personal representative filed a motion for summary judgment alleging, in part, that the plaintiffs were precluded from testifying against the decedent by virtue of the Dead Man's Statute, 42. Pa. C.S.A. §5930. The plaintiffs were, therefore, unable to prove a case of negligence on the part of the decedent.

The plaintiffs responded that the Dead Man's Statute was inapplicable as it had not been raised as an affirmative defense. Also, such a defense was waived as the defendant had participated in discovery. The plaintiffs further argued that there was evidence outside of their own testimony to prove a case of negligence against the decedent.

Despite these arguments, the trial court granted the defendant's motion for summary judgment. The trial court also later dismissed the counterclaim. The plaintiffs appealed to the Superior Court alleging error on the part of the trial court and its interpretation of the Dead Man's Statute.

On appeal, the Superior Court initially held that the Dead Man's Statute was not waived as it is not an affirmative defense required to be pled in a responsive pleading. Further, it was not waived by the defendant's limited participation in discovery. The plaintiffs were not served any discovery by the defendant nor did the personal representative testify as to facts occurring after the decedent's passing. Therefore, plaintiffs were not competent to testify at trial regarding the accident.

As to the next issue, the trial court below it found that there was insufficient evidence of record for plaintiffs to prove their case through competent independent sources. The Superior Court concurred with this finding.

PENNSYLVANIA SUPERIOR COURT HOLDS THAT SLEEP DISTURBANCE IS NOT A SERIOUS INJURY; TRIAL COURT PROPERLY RULED THAT OTHER PLAINTIFF'S DUI WAS ADMISSIBLE BUT ERRED IN ALLOWING EVIDENCE OF CHARGES FOR DRIVING UNDER SUSPENDED LICENSE AND HARASSMENT

VETTER v. MILLER, 157 A.3d 943 (Pa. Super. 2017).

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Automobile Case Law Update *continued from page 11*

The plaintiffs, John Vetter and Ashley Jones, were leaving a wedding reception where they had been drinking when they alleged that the defendant began to tailgate them. When they stopped at a red light, Vetter, the driver, got out of his vehicle to confront the defendant. The defendant tried to get away from Vetter and struck him with his vehicle dragging him 100 feet. Vetter's BAC at the time was .09. Plaintiff Jones alleged that she suffered negligent infliction of emotional distress in witnessing Vetter, her husband, be injured.

Jones had selected limited tort on her policy and the defendant filed a motion for summary judgment on the basis that Jones' only injury was sleep disturbance. Jones also alleged that she had post-traumatic stress disorder; but, the court granted the motion noting that there was no evidence that her injury caused a serious impairment of a body function and she had been working full-time while pursuing a nursing degree and taking care of her 4-1/2-year-old son.

The case proceeded to trial on Vetter's claim and the jury found that he was 74% negligent and that defendant was 26% negligent. On appeal to the Superior Court, Vetter argued that the trial court erred in admitting his guilty plea to driving with a suspended license and in allowing evidence that he had been arrested for harassment. The Superior Court found that the admission of the DUI conviction was proper, however, allowing evidence of a suspended license and harassment arrest was reversible error; and, a new trial was ordered.

IN LATEST PRONOUNCEMENT ON SACKETT ISSUES, PENNSYLVANIA SUPERIOR COURT HOLDS THAT "AFTER ACQUIRED VEHICLE" CLAUSE INAPPLICABLE WHERE VEHICLE ADDED TO POLICY BEFORE PURCHASE COMPLETED

PERGOLESE v. STANDARD FIRE INS. CO., 2017 Pa.Super.LEXIS 243 (Pa. Super. Apr. 11, 2017).

Pergolese ("the insured") insured four (4) vehicles under one policy with Standard Fire Insurance Company ("insurer") and a fifth vehicle under a separate policy with that insurer. Upon policy inception the appropriate §1738 stacking waivers were executed. Over the years, the insured had replaced numerous vehicles. As such, new stacking waivers were arguably not required.

However, Pergolese dropped one of the vehicles from the policy that insured four (4) vehicles leaving three (3) vehicles insured. There was no replacement vehicle at that time. Forty-four (44) days later the insured contacted his agent to add a fourth vehicle to his policy prior to taking possession of the same. No new stacking waiver was requested by the insurer at that time.

The insured was severely injured in a motor vehicle accident in July of 2001 and demanded $500,000 in stacked UIM coverage. This request was denied as the insurer was of the position that the after acquired vehicle provision did not require a new stacking waiver when the subject vehicle was added to the policy.

A declaratory judgment action was filed. The record demonstrated that the latest vehicle added to the policy was not "a replacement vehicle". Cross-motions for summary judgment were filed; and, the trial court granted the insured's motion for summary judgment finding that §1738 required that the insurer obtain a new waiver of stacking under this specific factual scenario. An appeal was filed to the Pennsylvania Superior Court.

Citing its prior decision in Bumbarger v. Peerless Ins. Co., (93 A.2d 872 (Pa. Super. 2014), the Superior Court held that the insured had requested proof of coverage prior to completing the purchase. As such, the vehicle was not added to the policy by way of the after-acquired vehicle clause; and, as the addition of the additional vehicle constituted the "purchase of UM/UIM coverage", a new stacking waiver was required.

Since no waiver was obtained, the insured was entitled to $500,000 in stacked UIM coverage. Of note, the opinion did not explain why the insured was entitled to stacking under the companion single vehicle policy.

FEDERAL COURT FOR MIDDLE DISTRICT OF PENNSYLVANIA DISMISSES BAD FAITH CLAIM WHICH IS UNSUPPORTED BY SPECIFIC FACTS

MEYERS v. PROTECTIVE INS. CO., No. 3:16-cv-01821, 2017 U.S.Dist. LEXIS 11338 (M.D.Pa. Jan. 27, 2017).

Plaintiff was working as a delivery driver when he was struck and injured by a hit-and-run vehicle. He made an uninsured motorists claim to Protective Insurance Company and claimed that he provided Protective with all the information necessary to pay the $1,000,000 policy limits. The parties were unable to resolve the claim; and, plaintiff filed a complaint for breach of contract and bad faith. The complaint contained a "laundry list" of 36 general allegations describing ways in which an insurance company could act in bad faith.

Protective filed a motion to dismiss the bad faith claim arguing that it was not supported by well-pleaded allegations. The court specifically found that a 3-1/2 month delay between the demand and initial offer was not unreasonable. There was also no evidence that the initial offer of $225,000 was unreasonable since it exceeded the special damages by nearly $100,000.

Protective was also accused of bad faith for having requested four IMEs. However, the court noted that plaintiff himself admitted he had a significant medical history, there was a delay in reporting the accident, and only minor property damage. The court ultimately concluded that plaintiff's allegations were conclusory and they were stricken, but the court gave plaintiff leave to file an amended complaint if plaintiff was able to plead more specific facts.

LACKAWANNA COUNTY TRIAL COURT HOLDS THAT A PARTY MAY NOT SUBSTITUTE ANOTHER PARTY IN A REISSUED WRIT OF SUMMONS WITHOUT THE CONSENT OF ALL OTHER PARTIES OR LEAVE OF COURT

MARSH v. LIZZA, No. 16CV2812

(C.C.P. Lackawanna Co., Mar. 1, 2017).

Plaintiff filed a wrongful death and survival action against his sister alleging that his sister's negligent conduct led to their mother's death. Plaintiff filed a writ of summons identifying his mother's estate as the named plaintiff. The writ was subsequently reissued three times. Without securing his sister's consent or seeking leave of court, plaintiff changed the name of the named plaintiff on the fourth reissued writ by substituting himself for his mother's estate. The sister filed preliminary objections asserting that, under Pa.R.C.P. 1033, a plaintiff can only be substituted with consent of all parties or leave of court. The court, therefore, found that the amended writ of summons and complaint were both nullities and granted defendant's preliminary objections.

LACKAWANNA COUNTY TRIAL COURT ADDRESSES ENFORCEABILITY OF WRITTEN WAIVER OF RIGHT TO SEEK RULE 229.1 DAMAGES IN CONTEXT OF A SATISFIED MEDICARE LIEN

MARKIEWICZ v. CVS CAREMARK, CORP., No. 14 CV 4043 (C.C.P. Lackawanna Co, Mar. 10, 2017).

The parties resolved plaintiff's claim for $10,000. A settlement agreement was reached whereby the plaintiff was ultimately responsible for satisfying any medical liens, including any Medicare or Medicaid liens. The agreement also specifically set forth that plaintiff was waiving any potential damages under Pa. R.C.P. 229.1. The defendant tendered a settlement draft after deducting the amount of the Medicare lien and paying that amount directly to CMS. As such, plaintiff filed a motion for sanctions alleging that defendant violated Rule 229.1 by directly satisfying the lien, thus, depriving the plaintiff of the ability to negotiate the lien. Defendant responded that there was no right to recover any damages pursuant to Rule 229.1 as the settlement draft was delivered within the time set forth in the agreement and that any such damages were waived.

The trial court held that the plaintiff was not entitled to interest or attorney's fees under rule 229.1 as such damages were specifically waived by the express terms of the settlement agreement. However, the court held that if defendant was going to pay CMS directly, it must be reflected in the settlement agreement. As such, defendant's actions violated the settlement agreement. The court gave plaintiff leave of court to bring a petition for breach of the settlement agreement separate from the Rule 229.1 motion.

LUZERNE COUNTY TRIAL COURT DISMISSES ALLEGATIONS OF "RECKLESSNESS" AND PUNITIVE DAMAGE CLAIM WHERE PLAINTIFF PLEADS NO FACTS IN SUPPORT

WALKER v. HELSEL, No. 2016-09969 (C.C.P. Luzerne Co., Feb. 22, 2017).

Plaintiff and defendant were involved in a motor vehicle accident, and plaintiff filed a complaint alleging "recklessness" and "reckless indifference" on the part of the defendant and sought punitive damages. Defendant filed preliminary objections to these allegations and also objected to those portions of the plaintiff's complaint which referenced the police report, evidence of defendant's guilty plea and insurance information. After reviewing the complaint, the court agreed with defendant that there were no facts that supported allegations of recklessness. The court, therefore, granted the preliminary objections but gave plaintiff leave to re-assert those allegations if supported by evidence obtained in discovery. The court found that statements from the police report, evidence of a guilty plea and liability insurance information did not constitute scandalous or impertinent matter, and therefore, overruled defendant's preliminary objections in this regard.

NORTHAMPTON COUNTY TRIAL COURT DISMISSES ALLEGATIONS OF RECKLESSNESS AND PUNITIVE DAMAGES FROM REAR-END ACCIDENT CASE

WASILOW v. ALLEN, No. C-48-CV-2006-00633 (C.C.P. Northampton Co., Sept. 27, 2016).

The parties were involved in a motor vehicle accident in Montgomery County. The plaintiff alleged that defendant "violently struck" plaintiff's vehicle from behind while plaintiff was stopped. Plaintiff filed a complaint including allegations of "recklessness" and "reckless behavior". Defendant filed preliminary objections. On these facts, the court found that, even if the allegations against the defendant were true and constituted negligence, there was nothing alleged against defendant which could be considered outrageous or willful, wanton or reckless conduct. Accordingly, the court granted defendant's preliminary objections.

PUNITIVE DAMAGE CLAIM ALLOWED TO PROCEED WHERE FEDEX DRIVER WAS LOOKING AT TRACKING DEVICE AT TIME OF ACCIDENT

RAMOS v. FRASCA, No. C-48-CV-2016-1166 (C.C.P. Northampton Co., Aug. 5, 2016).

Plaintiff brought an action for personal injuries allegedly sustained when her vehicle was rear-ended by a FedEx truck operated by defendant Frasca. According to the plaintiff, Frasca was either using his cell phone or some other electronic tracking device at the time of the accident. As such, her complaint contained a claim for punitive damages.

Defendants filed preliminary objections to the punitive damages claim contending that there was no "reckless conduct". Defendant also requested that the court strike any reference to operation of the vehicle in a "careless manner".

In overruling the preliminary objections, the court held that it was too early to determine if the defendant's conduct met the requisite "reckless conduct" as the complaint contained allegations that the defendant was actually looking at and utilizing a tracking device at impact, as distinguished from a situation where the allegation was merely one of cell phone use (however, analogous to texting on a cell phone). The court also overruled the demurrer to the "careless driving" language.

Pennsylvania Employment Law Update Significant Case Summaries

By Lee C. Durivage, Esquire, Marshall Dennehey Warner Coleman & Goggin, Philadelphia, PA*

U.S. Supreme Court holds that exhaustion of remedies pursuant to Individuals with Disabilities Education Act not necessary when gravamen of lawsuit fails to seek relief for alleged denial of "free appropriate public education."

Fry v. Napoleon Cmty. Schools, 2017 U.S. LEXIS 1427 (Feb. 22, 2017)

In Fry, The United States Supreme Court vacated and remanded a decision that found the plaintiff failed to exhaust the Individuals with Disabilities Educational Act's (IDEA) procedures prior to filing a lawsuit alleging violations of the Rehabilitation Act and the Americans with Disabilities Act. In short, the Court held, "Exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—what the Act calls a 'free appropriate public education.'"

The minor student suffered from severe cerebral palsy. As a result, her parents obtained a trained service dog, Wonder, to assist her with daily activities. However, when her parents requested permission for Wonder to join the student in kindergarten, the school declined the request. Instead, the school noted that the student's existing IEP required the use of a human aide, which they believed rendered Wonder superfluous. As a result, a complaint was filed with the Department of Education's Office for Civil Rights, which determined that, even if the school provided the student with a free appropriate public education, the decision to forbid Wonder from assisting the student violated Title II of the Americans with Disabilities Act and the Rehabilitation Act. As a result of this finding, the school permitted Wonder to attend school with the student. However, the student's parents declined the request and removed the student from the school altogether.

Thereafter, a lawsuit was initiated against the school, asserting that it violated the ADA and Rehabilitation Act by refusing to accommodate the student's need for a service animal. In response, the school argued that the student failed to exhaust remedies available pursuant to the IDEA. The lower courts agreed with the school and dismissed the lawsuit. In vacating the dismissal of the lawsuit, the Supreme Court determined that the exhaustion requirement is only required when the "relief" sought in the complaint is for a denial of a "free appropriate public education," reasoning, "[t]hat is the only 'relief' the IDEA makes 'available.'" In determining what "relief" is being sought, the Supreme Court noted that a "court should look to the substance, or gravamen, of the plaintiff's complaint." Significantly, the Court outlined a pair of hypothetical questions as a means in determining "[w]hether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination."

First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

In remanding the case for further proceedings, the Supreme Court noted that nothing in the plaintiffs' complaint suggests any implicit focus on the adequacy of the student's education. In particular, the Court noted that the plaintiffs could have filed the same lawsuit against a public library or theater that refused admittance to Wonder and an adult at the school could have asserted the same claims if they were denied an ability to enter with a service dog. The Court did note, however, that it was unclear from the record whether an attempt was made to exhaust remedies pursuant to the IDEA and, if an attempt was made, "[t]he court should decide whether their actions reveal that the gravamen of their complaint is indeed the denial of a FAPE, thus necessitating further exhaustion."

Third Circuit holds that an employer's honest belief that its employee was misusing FMLA leave mandates dismissal of his FMLA retaliation claim.

Capps v. Mondelez Global, LLC, 2017 U.S. App. LEXIS 1593 (Jan. 30, 2017)

The Third Circuit upheld the dismissal of the plaintiff's FMLA retaliation claim, finding that the plaintiff could not demonstrate that his termination was pretextual in light of the employer's honest belief that the plaintiff misused his FMLA. The plaintiff applied for FMLA leave, necessitated due to a hip replacement surgery, and then took intermittent leave for pain in his hips. The plaintiff utilized this FMLA leave for approximately 10 years without incident. On February 14, 2013, following a traffic stop where the plaintiff's blood alcohol level was more than four times the legal limit, the plaintiff was arrested and charged with driving under the influence. The plaintiff, who had used FMLA leave that day (and then the following day), returned to work the next week, but he never advised his employer of his arrest or subsequent conviction. Several months later, the employer received an anonymous tip regarding the plaintiff's arrest. Upon investigation, the employer believed that the plaintiff had used FMLA leave for absences related to his DUI charges and subsequent court

dates. Based upon this information, the plaintiff was suspended and ultimately terminated from his employment. On appeal, the plaintiff argued that the employer was mistaken in its belief that he plaintiff misused his FMLA based upon its review of the criminal docket. The Third Circuit, however, noted that, regardless of whether the employer was mistaken, "[t]here is a lack of evidence indicating that [the employer] did not honestly hold that belief [that plaintiff misused his FMLA leave]."

Third Circuit finds that plaintiffs are not required to plead and prove they are objectively qualified for a position in order to sustain failure to promote claim pursuant to Uniformed Services Employment and Reemployment Act.

Carroll v. Del. River Port Auth., 843 F.3d 129 (3d. Cir. Dec. 12, 2016)

The Third Circuit was tasked to decide a certified question from the district court, namely, "must a plaintiff plead and prove that he or she was objectively qualified for the position sought" in a failure-to-promote discrimination suit under the USERRA? The plaintiff was hired as a police officer for the port authority in 1989 and obtained the rank of corporal in 2004. During this time period, the plaintiff was a member of the uniformed services in various capacities. In early 2009, the plaintiff sustained injuries while deployed in Iraq and was in rehabilitation until 2013. However, the plaintiff has not returned to work with the port authority. His lawsuit, though, alleged that while he was in rehabilitation, he applied for a promotion to sergeant with the port authority. While he was interviewed for the position, other individuals were ultimately hired for that rank. As a result, he alleged a violation of the USERRA. In opposing the claim, the port authority asserted that the plaintiff failed to plead or prove an essential element of the claim, namely, that he was objectively qualified for the position. In particular, it was asserted that the plaintiff was not objectively qualified for the position because he was physically incapable of performing the job duties based upon his injuries. The Third Circuit, however, determined that plaintiffs do not need to establish an initial burden of proving objective qualifications in order to establish a USERRA claim. Rather, a plaintiff asserting the claim of discrimination "[b]ears the initial burden of showing by a preponderance of the evidence that the employee's military service was 'a substantial or motivating factor' in the adverse employment action." If a plaintiff can establish this initial burden, "[t]he employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason." In so holding, the Third Circuit rejected the traditional burden shifting method propounded for other employment discrimination statutes, noting that the framework identified above has been consistently applied to analyze USERRA claims throughout other Courts of Appeals. The Third Circuit did note, however, "it is incumbent on employers to raise a plaintiff's lack of qualifications at the second step of [the] USERRA framework."

Third Circuit determines plaintiff's failure to articulate that her cancer substantially limited a major life activity required dismissal of her lawsuit.

Alston v. Park Pleasant, Inc., 2017 U.S. App. LEXIS 2668 (3d. Cir. Feb. 15, 2017)

The Third Circuit affirmed the dismissal of the plaintiff's disability discrimination claim, finding that the district court correctly determined that the plaintiff failed to satisfy her burden of establishing that she was disabled pursuant to the Americans with Disabilities Act. Specifically, the plaintiff filed a lawsuit in which she alleged that her employment was terminated within a few weeks after informing her supervisors that she had been diagnosed with breast cancer. Following the completion of discovery, the employer moved for summary judgment, arguing that the plaintiff failed to establish that she was "disabled" pursuant to the ADA and that she was terminated for a legitimate, nondiscriminatory business reason. In upholding the dismissal of the lawsuit, the Third Circuit solely addressed the issue of disability. Although the Third Circuit noted that the amendments to the ADA "[b]roadened the scope of ADA coverage by expanding the definition of disability" and "[t]hat cancer can—and generally will—be a qualifying disability under the ADA," it also determined that the "[d]etermination of whether an impairment substantially limits a major life activity requires an individualized assessment." In fact, while the court stated that the individualized assessment is "[p]articularly simple and straightforward for diseases like cancer," the plaintiff's claim failed because she "[h]as never claimed at any stage of this litigation that her [cancer] limited any substantial life activity" and her attorney admitted during argument that the plaintiff "[h]as not claimed that she had any limitations in her activities."

The Eastern District of Pennsylvania grants motion to dismiss, finding that a sexual orientation discrimination claim is not actionable under Title VII.

Coleman v. AmeriHealth Caritas, 2017 U.S. Dist. LEXIS 85319 (E.D. Pa. Jun. 2, 2017)

The district court in the Eastern District of Pennsylvania was tasked to determine whether the plaintiff, who alleged that he was subjected to gay slurs and physically assaulted at the workplace, could sustain a Title VII claim premised upon sexual orientation discrimination. In determining that the plaintiff's claim failed as a matter of law, the court noted that the "[u]se of gay slurs indicates that a 'claim is based upon discrimination that is motivated by perceived sexual orientation.'" While the court observed that the comments cited by the plaintiff would be unacceptable in the workplace and that the Seventh Circuit Court of Appeals recently "[r]eexamined its interpretation of Title VII and determined that discrimination on the basis of sexual orientation is a form of sex discrimination," it ultimately determined that the Third Circuit precedent did not recognize a claim for sexual orientation discrimination pursuant to Title VII and that it was bound to follow the precedent

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within the Third Circuit. In noting that the court would dismiss the "[c]laim for sexual orientation discrimination under Title VII with prejudice, it [did] so with the recognition that 'the nature of injustice is that we may not always see it in our times.'"

Court finds that plaintiff's stomach, problem which caused him to miss two weeks of work, was not a disability pursuant to the Americans with Disabilities Act.

Kurylo v. Parkhouse Nursing & Rehab. Ctr., L.P., 2017 U.S. Dist. LEXIS 50188 (Apr. 3, 2017)

The court granted the employer's motion to dismiss the plaintiff's disability discrimination claim pursuant to the Americans with Disabilities Act, finding that the impairment pled—a stomach problem—did not constitute a disability pursuant to the ADA. The plaintiff asserted that he was required to miss work between March 12, 2015, and March 23, 2015, due to "a stomach problem." The plaintiff then obtained a doctor's note, requested to use his accrued sick leave for his time out of the office and attempted to return to work. The employer, however, never put the plaintiff back on the schedule because he failed to submit FMLA paperwork from his physician, which he did not believe was necessary because he was not eligible for FMLA at the time (as he had been working for the company for less than one year). Following his separation, he filed a lawsuit alleging that, among other things, the company engaged in disability discrimination for terminating his employment and retaliated against him for attempting to take medical leave, which he asserted was a reasonable accommodation pursuant to the ADA. Ultimately, the court determined that the plaintiff's "stomach problem" was not a disability pursuant to the ADA, noting that there was nothing in the complaint suggesting that "[t]he 'stomach problem' was anything other than a one-time occurrence with a limited recovery period," or that any limitations he had lasted beyond the two-week period he was out of work. As a result, the court concluded that the "[p]laintiff's stomach problem is the very definition of a temporary, non-chronic impairment of short duration" and, therefore, could not support a disability under the ADA. However, the court denied the employer's motion to dismiss as to the plaintiff's ADA retaliation claim, noting that, "[u]nlike a claim for discrimination under the ADA, an ADA retaliation claim based upon an employee having requested an accommodation does not require that a plaintiff show that he or she is 'disabled' within the meaning of the ADA and, [r]ather, a plaintiff need only show that she had a 'reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested.'"

Pennsylvania Superior Court affirms decision declining to award attorneys' fees following jury's finding that employer violated the Pennsylvania Human Relations Act.

Huyett v. Doug's Family Pharm., 2017 Pa. Super. 115 (Pa. Super. Ct. Apr. 20, 2017)

A jury awarded the plaintiff more than $20,000 in damages in connection with her claim that her former employer terminated her from a pharmacy technician position after it learned that she had been diagnosed with cancer, in violation of the Pennsylvania Human Relations Act. Following trial, plaintiff's counsel filed a fee petition, requesting more than $106,000 in attorneys' fees and costs. The trial court, however, denied the petition, concluding that the evidence presented by the plaintiff at trial was "['w]eak' and did not support a finding of a violation [of the PHRA]." On appeal, the plaintiff argued that "[t]he trial court was bound by the fact finder's finding of discrimination, and that it lacked discretion to weigh the evidence and make its own independent determination of whether the PHRA was violated," essentially asserting that "[a]ttorney fees are mandated or presumptively warranted when the plaintiff prevails." The Superior Court, however, expressly disagreed with this assertion, noting that the language from the PHRA states, "The trial court may award attorney fees: where the plaintiff prevails and the **trial court** determines there has been a violation [of the statute]" (emphasis in original). In so finding, the court expressly noted that the issue was not whether the evidence was sufficient to sustain a jury verdict, "[b]ut whether the trial court, after engaging in its own, permissible weighing of the evidence, concluded the defendant engaged in a discriminatory practice in violation of the PHRA for purposes of awarding attorney fees."

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PROPERTY AND CASUALTY CASE LAW UPDATE APRIL 2017

By Summers, McDonnell, Hudock & Guthrie, P.C

PENNSYLVANIA SUPERIOR COURT AFFIRMS TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF INSURER OVER INTERPRETATION OF "ASSAULT AND BATTERY" POLICY EXCLUSION

QBE INSURANCE CO. v. WALTERS and OK CAFÉ, INC. et al., 148 A.3d. 785 (Pa. Super. 2016).

Jalil Walters and three friends became involved in a confrontation with Eric Chambers after having been at the OK Café. Chambers subsequently drew a weapon and shot Walters in the stomach and arm.

The injured patron filed suit against the OK Café alleging that the establishment was aware that patrons brought firearms into the establishment and that the surrounding area was a high crime neighborhood. There was also an allegation that OK Café failed to properly employ, train and supervise its employees regarding the safety of its patrons or take sufficient precautions to protect patrons like Walters.

OK Café requested that QBE defend and indemnify it in the lawsuit. QBE refused citing the "assault and battery" exclusion in the policy and instituted this declaratory judgment action.

The assault and battery exclusion at issue precluded coverage not just for the actual act of assault and/or battery but for any claims arising out of an alleged failure of the insured or its officers or employees to properly supervise the premises or any claims for improper training resulting to an assault. The exclusion was fairly detailed and appeared to cover the claims at issue.

The parties eventually filed cross-motions for summary judgment. The Dauphin County Court entered judgment in favor of QBE Insurance holding that the exclusion clearly precluded coverage in actions such as this.

On appeal the Superior Court agreed and distinguished a prior Superior Court decision finding coverage in a similar situation involving QBE Insurance. That case was distinguishable as the previous exclusion was not nearly as broad as the exclusion in the instant case. As the QBE policy clearly excluded coverage for not only assault and battery claims but for negligent hiring and training leading to such claims, the trial court's entry of summary judgment was affirmed.

PENNSYLVANIA SUPERIOR COURT AWARDS NEW TRIAL LIMITED TO DAMAGES IN CONVENIENCE STORE SHOOTING CASE

STAPAS v. GIANT EAGLE, INC., et al., 153 A.3d. 353 (Pa. Super. 2016)

In July of 2007 John Stapas, the plaintiff was a regular customer at a GetGo convenience store on Pittsburgh's Southside. On the evening of July 18, 2007 Stappas went into the store and was speaking with one of the clerks when another patron entered who had been barred from the store. An argument ensued and the barred patron and the plaintiff went outside into the parking lot. A verbal and physical altercation occurred culminating in Stappas being shot and seriously injured.

Plaintiff filed suit against Giant Eagle, the grocery store chain that owned the convenience store. He alleged that the defendants were negligent in not having proper security and allowing dangerous people on the premises. At trial he sought damages for past and future pain and suffering and potential impairment of earning capacity. There was also a claim for past and future medical expenses. Of note, the plaintiff returned to work approximately six (6) weeks post-incident thus there was no claim for "future wage loss."

The jury found in plaintiff's favor and awarded $2,086,000. This was reduced to $1,522,780 to reflect 27% comparative negligence apportioned to the plaintiff. The verdict was then increased by $280,000 to reflect Rule 238 delay damages. $1,300,000 of the original verdict was for future wage loss which was not part of the case.

Giant Eagle filed an appeal to the Superior Court contending that the jury violated its oath in awarding future wage loss when the court did not charge on that as an element of damages and plaintiff himself admitted, through his counsel, that there was no future wage loss claim. Giant Eagle also contended that the trial court erred in determining that the plaintiff was a business invitee as opposed to a mere licensee. The other grounds for appeal were that the jury heard improper evidence concerning Giant Eagle's subsequent remedial measures as well as the plaintiff's alleged lack of health insurance. Giant Eagle also contended that the trial court erred in not granting judgment notwithstanding the verdict on the issue of the plaintiff's assumption of the risk.

The plaintiff had initially contended at the post-trial motion stage that Giant Eagle had waived the right to object to the alleged inconsistent verdict as no objection was raised prior to the jury's dismissal. The Superior Court disagreed as this was not the type of verdict that required immediate correction. The verdict was clearly contrary to the law and the evidence presented. As such, a new trial was awarded as to damages only.

With respect to the remaining issues, the Superior Court found that the trial court had sufficient evidence to charge the jury that the plaintiff was a business invitee as opposed to a licensee. Also, the court held that the testimony concerning remedial measures and the lack of health insurance was improper but did not affect the verdict. Finally, the motion for judgment notwithstanding the verdict was properly denied as the trial court was within its discretion not to charge on the issue of assumption of the risk.

PENNSYLVANIA SUPERIOR COURT ALLOWS WRONGFUL DEATH CLAIM TO PROCEED UNDER COMMON LAW THEORY OF NEGLIGENCE WHERE RENTED PROPERTY DID NOT HAVE SMOKE DETECTORS

ECHEVERRIA v. HOLLEY v. MEARKLE, 142 A.3d. 29 (Pa. Super. 2016).

Donna Day was killed in a fire which occurred in a residential property that she had rented in Bedford County. The property had originally been owned by the additional defendant and had been sold to the original defendant approximately three (3) months prior to the fire. The original defendant had performed no modifications or repair work subsequent to the purchase. There is no issue that the property did not contain working smoke detectors at the time of the loss.

The trial court sustained Holley's preliminary objections to the common law negligence claim concerning the smoke detectors as a landlord's general duty to protect tenants did not include the installation of smoke detectors absent regulatory authority.

Plaintiff later attempted to amend the complaint citing the Pennsylvania Uniform Construction Code to add a negligence per se claim contending that the applicable building codes compelled defendants to install smoke detectors. The court refused to allow this as it would add a new cause of action outside of the limitations period.

Holley eventually moved for summary judgment alleging, among other things, that the state failed to support its claim that the fire was caused by faulty wiring. The trial court granted the motion as the Estate could not establish the cause of the fire.

On appeal to the Superior Court the Estate raised the issue of the dismissal of any common law negligence claims as well as the court's refusal to allow an amendment to set forth a claim of negligence per se.

The Superior Court held that the trial court was premature in dismissing the common law negligence claim at the preliminary objection stage. The court also held that the trial court did not abuse its discretion in not allowing the amendment to pursue a "negligence per se" claim under the UCC's requirement of smoke detectors as it would be introducing a new cause of action outside of the two year statute of limitations period.

IN MEMORANDUM OPINION PENNSYLVANIA SUPERIOR COURT AFFIRMS TRIAL COURT'S GRANT OF NON-SUIT IN FAVOR OF SUPERMARKET

HONIS v. GIANT FOOD STORES, INC., 1245 MDA 2015 (Pa. Super. – Memorandum Opinion, 2016).

Veronica Honis was injured in June of 2010 while attempting to enter the checkout line at the Giant Supermarket in Hazelton, Pennsylvania. Apparently as she was approaching the checkout station she stepped on a small botte of Red Bull that had fallen from somewhere into her path of travel. The evidence was clear that neither her husband nor she had seen the bottle in the aisle before the incident.

At trial a representative of Giant Food Stores, called by Plaintiff as a witness, testified that there had been a "front end inspection" of the area in question within a short time prior to the Plaintiff's fall. At the close of Plaintiff's case the Defendant moved for a non-suit which was granted.

The trial court found that Plaintiff failed to meet her burden as she could not prove that the Defendant deviated from its duty of reasonable care as set forth in the Restatement (2nd) of Torts. As there was no evidence of any breach of any duty of reasonable care under the evidence presented, a non-suit was proper.

On appeal the Superior Court affirmed the trial court's decision using the same rationale. As this was a Memorandum Opinion it has no precedential value.

LACKAWANNA COUNTY TRIAL COURT DENIES ADDITIONAL DEFENDANT'S MOTION FOR SUMMARYJUDGMENT UNDER THE "NO DUTY" RULE

BARRETT v. CHERVANKA v. VALLEY LANES, No. 14 CV 5175 (C.C.P. Lackawanna Co., December 8, 2016)

John Barrett, a minor, was injured as a result of an incident which occurred at a bowling alley owned and operated by the additional defendant, Valley Lanes. Apparently, the original defendant, Emily Chervanka, a minor, was bowling with friends. This group of individuals was launching bowling balls from approximately ten (10) feet behind the "foul line." At the same time the minor plaintiff was releasing a ball at the foul line of the same lane. Unfortunately Chervanka released the bowling ball from behind him striking him and causing a significant hand injury.

The evidence showed that such activity was prohibited and, if it had been known by the proprietor, Chervanka would have been cautioned.

In her joinder of the proprietor of the bowling alley the original defendant alleged that the additional defendant was negligent in allowing such activity to take place. The bowling alley responded that it had no duty to protect a business invitee against risks inherent with amusement activities, such as bowling. The additional defendant then moved for summary judgment contending that this "no duty" rule barred any claims against the bowling alley.

In denying additional defendant's motion the court set forth a lengthy analysis of when the "no duty" rule would apply to situations involving inherent risks associated with amusement activities. The court found that there were factual issues as to whether the "no duty" rule would apply in this situation as it was questionable whether or not the risks associated with plaintiff's injury were those commonly encountered in bowling. The court felt that a jury could find that the original defendant's horse play which led to this incident would not constitute the "common, frequent and expected" risks inherent in bowling. In other words, the actions of the minor

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parties would have superseded any inherent risk that one would encounter in the sport of bowling. The matter was then set to proceed to trial.

LEHIGH COUNTY TRIAL COURT GRANTS PROPERTY OWNERS MOTION FOR SUMMARY JUDGMENT HOLDING THAT LANDLORD OUT OF POSSESSION HAD NO DUTY TO PLAINTIFF AS IT RESERVED NO CONTROL OVER AREA OF BUILDING WHERE INCIDENT OCCURRED

VASILIK v. VOIPOCH, LLC, No. 2015-C-904 (Lehigh Co., 2016).

Plaintiff filed suit against the defendant and Macungie Township for injuries sustained when plaintiff fell in a stairway without a handrail while providing maintenance services. Macungie Township was dismissed early in the action.

Plaintiff's theory of liability against the defendant was that the tenant had only rented the first two floors of the building and not the third floor where the incident occurred. As such, the landlord/property owner had retained "constructive control" over the area which is an exception to the general principles of liability involving landlords out of possession.

At the close of discovery the defendant landlord filed a motion for summary judgment on the basis that an out of possession landlord owed no duty to the plaintiff for a condition which existed when the lessee took possession. Defendant also contended that the condition was clear to the lessee at the time of execution of the lease. The trial court agreed holding that the general rule is that a landlord out of possession owes no duty to an invitee except in certain circumstances.

In this instance the "retention of control" exception to the general rule did not apply as there is no such thing as "constructive control." The record demonstrated that the defendant reserved no control over any part of the building. Further, there is no obligation for the landlord to make the repairs in this instance as the lessee was aware of the lack of a handrail at the time that he took possession.

PHILADLEPHIA TRIAL COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF PROPERTY OWNER AND SNOW REMOVAL CONTRACTOR AS THERE WERE NO ISSUES OF FACT CONCERNING THE DEFENDANTS' DUTY TO REMOVE SNOW AND ICE ON DATE IN QUESTION

CREORUSKA v. BURGER KING CORP., et al., No. 150102948 (C.C.P. Philadelphia Co., 2016)

Plaintiff was injured when she slipped on snow and ice while exiting a Burger King where she had eaten lunch. The record indicated that plaintiff had gone to the Burger King after church and had remained there for approximately thirty (30) minutes. During this entire time it had snowed covering the sidewalk and parking lot. The plaintiff conceded that the area of ingress and egress was not snow covered when she entered the restaurant.

The record demonstrated that the Philadelphia area had received three (3) to four (4) inches of snow between noon and 5:00 p.m. on the date in question. The property owner had contacted a snow removal company with whom a contract existed for snow and ice removal. The snow and ice had been removed at approximately 5:00 p.m. This was after the fall occurred.

In granting summary judgment in favor of the defendants, the court held that the plaintiff could not sustain her burden of proof that liability could be imposed upon the defendants under the "hills and ridges doctrine" as there was no evidence that the defendants had delayed in removing the snow after actual and/or constructive notice. Also, there was no evidence that the accumulation of snow unreasonably constituted a danger to pedestrians.

The court found that there is no evidence that any "dangerous condition" caused the plaintiff to fall. The court also found that the defendants did not fail to remove the snow within a reasonable time after notice of the weather conditions. Also, the snow removal contract entered into between the defendants did not provide a basis for imposing liability on the defendants.

The granting of summary judgment was appealed to the Pennsylvania Superior Court.

PHILADELPHIA TRIAL COURT PRECLUDES SURVEYOR FROM TESTIFYING AS TO LOCATION OF SLIP AND FALL WHERE OPINION BASED UPON HEARSAY STATEMENTS

WHITE v. SEHERLIS, August Term, 2014, No. 2511 (C.C.P. Philadelphia Co., 2016)

Plaintiff was injured in a slip and fall allegedly due to a snow covered sidewalk adjacent to an abandoned property. As a result of the fall she sustained foot and right ankle fractures necessitating surgery and a four (4) day hospital stay. Plaintiff then brought suit against the defendant alleging that they owned the property where she fell.

At trial the plaintiff attempted to present testimony from a surveyor as to ownership of the property where the fall occurred. The basis of the surveyor's opinion was a hearsay statement made by the plaintiff. In her testimony, plaintiff was equivocal as to where exactly the incident occurred. As the surveyor testified that he typically did not rely on hearsay statements in his work as a surveyor, the trial court precluded his testimony. Also, the trial court precluded plaintiff's counsel from recalling the plaintiff in her case-in-chief to provide information as the issue had already been sufficiently covered.

The jury returned a verdict in the defendant's favor. In her post-trial motion the plaintiff requested a new trial contending that the court erred in precluding the testimony of the surveyor as well as prohibiting the plaintiff to be recalled in her case-in-chief. The plaintiff also requested a new trial arguing that the verdict was against the weight of the evidence.

In addressing the post-trial motion the court first found that there was no reason to reverse any credibility decisions of the jury. The trial court also held that it did not abuse its discretion by precluding the testimony of the surveyor who based his opinion on the location of the accident on pre-trial hearsay statements. As the surveyor testified that he typically did not rely on such statements in forming his opinion, said opinion should not be heard by the jury. Also, the trial court upheld its decision to prohibit the plaintiff from being recalled to clarify the issue of the location of the fall as this issue had already been covered in her original testimony.

The case was then appealed to the Pennsylvania Superior Court.

Pennsylvania Workers' Compensation Updates

By Francis X. Wickersham, Esquire, Marshall Dennehey Warner Coleman & Goggin, King of Prussia, PA*

A claimant working in a modified-duty position at her regular wages with her pre-injury employer, who later voluntarily accepts a lower paying job created for her by her pre-injury employer, suffers a loss of earning power caused by the work injury.

Holy Redeemer Health Systems v. WCAB (Lux); No. 768 C.D. 2016; Filed Jun. 6, 2017; Judge Brobson

The claimant worked for the employer as a Telemetry RN. She sustained an injury to her low back on October 11, 2011, and the employer filed a Medical-only Notice of Compensation Payable. The claimant later filed a claim petition, alleging partial disability from the work injury. The employer in turn filed a termination petition, alleging the claimant had fully recovered from her work injury.

The evidence showed that after the work injury, the claimant was released to work light duty. She did not experience any time off from work following the injury, and she returned to a modified-duty position with the employer in the pre-injury Telemetry Unit with no loss of wages. In February 2013, while the claimant was working the modified-duty Telemetry RN job, in addition to a job in the employer's nursing office, the employer created a permanent, available position in their Care Management Department and offered it to the claimant. The claimant was not forced to leave her modified-duty job, nor was she required to stop working that job by her treating physician. She accepted the job voluntarily. The job, though, paid less than her pre-injury average weekly wage, and her attempts to return to her pre-injury Telemetry RN position were unsuccessful. Therefore, the Worker's Compensation Judge granted the claim petition and denied the termination petition.

The employer appealed to the Worker's Compensation Appeal Board, which affirmed. The employer then appealed to the Commonwealth Court, arguing that the testimony of the claimant's medical expert confirmed that the claimant was capable of performing the light-duty position made available to her by the employer and that she never testified that her restrictions due to the work injury forced her to switch to the permanent position in the Care Management Department. The court considered the issue of the effect of the claimant's voluntary acceptance of the permanent Care Management position and whether that resulted in a loss of earning power attributable to the her work injury. The court concluded that it did and dismissed the employer's appeal.

The court pointed out that the claimant did not seek out and apply for the position and noted that the employer specifically created the job and offered it to the claimant. The court said that they could not ignore the fact that the employer, on its own, created and offered the claimant a permanent light-duty position within her restrictions at a loss of earnings, for which it claimed no liability. The court viewed the employer's actions as an attempt to evade the payment of benefits by creating and offering a permanent, lower-paying position that was within the restrictions of the claimant's work injuries.

An uninsured employer that fails to commence payments following a decision awarding benefits is not relieved of its payment obligations by its financial inability to do so. The Uninsured Employer's Guaranty Fund does not shield an employer from its obligations under the Act.

CMR Construction of Texas v. WCAB (Begly); No. 693 C.D. 2016; Filed Jun. 26, 2017; Judge McCullough

The claimant worked as a sales representative for the employer, soliciting contracts to perform home repairs. In January 2012, in the course and scope of his employment, the claimant fell from a roof and sustained multiple injuries. He filed a claim petition, which the employer denied on the basis that the claimant was an independent contractor, not an employee. The employer did not have worker's compensation insurance coverage. Therefore, the claimant filed a notice of claim against the Uninsured Employer's Guaranty Fund and, subsequently, a claim petition against the Fund.

The Workers' Compensation Judge granted the claim petition and awarded the claimant temporary total disability benefits as well as partial benefits. The judge also found that the claimant was an employee, not an independent contractor, and directed the Fund to pay the award should the uninsured employer fail, or be unable, to pay.

The employer appealed to the Appeal Board, but its request for supersedeas was denied. In August 2014, the claimant filed a penalty petition alleging that the employer violated the judge's decision and order.

At a hearing on the penalty petition, the employer stipulated that it had not

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made any payments to the claimant. It pointed out that the Fund began making payments to the claimant as of September 1, 2014. The employer's vice president testified that the employer could not afford to comply with the order due to its poor financial condition. He also said that the employer's financial condition had improved and that they were able to enter into an agreement with the Fund to make monthly payments to them in the amount of $1,000. The witness admitted, though, that the employer made no disability payments to the claimant or paid any of claimant's medical bills, as directed by the Workers' Compensation Judge's April 2014 order.

The Workers' Compensation Judge granted the claimant's penalty petition. The employer appealed to the Appeal Board, which affirmed. On appeal to the Commonwealth Court, the employer argued that the Board ignored the legislative intent behind the creation of the Fund and its demonstrated financial ability to comply with the judge's award. The court pointed out that the employer failed to offer any authority to support an argument that an inability to pay forecloses the imposition of penalties. Additionally, the court rejected the employer's argument on the legislative intent of the Fund. The court said that the Fund was created to protect an injured worker and his right to be compensated for work injuries, not to protect an uninsured employer from its obligations under the Act.

Although the claimant's injuries stemmed from his misguided decision to jump from a roof, that act was not so deliberate and intentional that it placed the claimant outside the course and scope of his employment.

Wilgro Services, Inc. v. WCAB (Mentusky); No. 1932 C.D. 2016; Filed Jun. 28, 2017; Judge McCullough

While working at a job site, the claimant jumped off a two-story roof and injured his feet and back. The employer issued a notice of denial, contending that the injuries were not work-related and that the claimant's jump from the roof was a deliberate and intentional act. The claimant later filed a claim petition, in response to which the employer maintained that the claimant was beyond the scope of employment and, thus, benefits were not payable.

The claimant testified that he was working as a mechanic for the employer and was assigned to work on a unit located on the roof of a building. He previously accessed the roof by using a ladder that had been placed by roofers, who were also working on the building. He also used the ladder to get down from the roof on his lunch break. On the date of injury, after finishing his job, he gathered his tools and supplies. He looked around and noticed that no one else was on the roof and the ladder was gone. He attempted to try a roof hatch, but it was locked. He did not attempt to call the building owner, because whenever he did, he could never get through to a live person. He also did not call the owner's maintenance man, since he saw him at lunch and was told by him that he was leaving at 1:00. The claimant never considered calling 911 or an emergency number. Rather, he waited for 30 minutes near the employer's entrance, waiting to see if someone entered or exited the building. He saw no one and, therefore, opted to jump from 16 to 20 feet into an area covered with mulch. He felt immediate pain in both feet and was taken by ambulance to a local hospital.

The Workers' Compensation Judge granted the claim petition, finding that the claimant was a traveling employee and furthering the employer's business. The judge further found that the claimant did not intentionally or deliberately attempt to injure himself, was not involved in horseplay when he jumped, did not violate any positive work order, and had not considered jumping from the roof as an appropriate means of getting down at the end of his work day.

The employer appealed to the Appeal Board, which affirmed. On appeal to the Commonwealth Court, the employer argued that the intentional, pre-meditated, deliberate, extreme and high-risk nature of the claimant's conduct precluded benefits under the Act. The court rejected this argument, agreeing with the Workers' Compensation Judge and the Board that the claimant was a traveling employee. The court pointed out that, while jumping off a roof was not one of the claimant's job duties, exiting a worksite was a necessary component of any job and advanced the employer's business and affairs. While the decision to jump was not advisable, it did not rise to the level of job abandonment, and, therefore, the claim was compensable.

For purposes of an offset under Section 204(a) of the Act, claimant's joint and survivor annuity constitutes the benefit to which an employer is entitled to offset.

David C. Harrison v. WCAB (Commonwealth of Pennsylvania); No. 658 C.D. 2016; Filed Jun. 28, 2017; Judge Simpson

The claimant sustained a work injury in June 2010, which was acknowledged by the employer. The claimant's average weekly wage was $1,273.59, and his compensation rate was $845 per week. In February 2012, the employer issued a notice of worker's compensation benefit offset based on information it received from the Pennsylvania State Employees' Retirement System (PSERS). That information stated that the employer was entitled to a pro rata pension offset for benefits the claimant received in the amount of $1,885.03 per month. The employer calculated the weekly offset to be $434.34, thus reducing the claimant's compensation rate to $410.66 per week. The claimant filed a petition challenging the offset, as well as penalty and a reinstatement petitions.

In connection with these petitions, the employer presented testimony from a claims representative for the third party administrator, the PSERS' director of benefit administration and an actuary employed by PSERS. The benefits director testified there were various payment options the claimant could select from, some of which provided a greater monthly payout than others. However, PSERS does not take into consideration the selected option in calculating the offset. Rather, the offset is always based on the participant's maximum single life annuity (MSLA).

The actuary testified that a calculation is made to determine the extent to which the Commonwealth funds an employee's pension by determining how much money will be needed to fund the pension for the rest of his life. Once that determination is made, a calculation as to the amount the employee contributes over the course of his life can be made. When the employee's contribution is deducted from the total amount of funding needed, the amount the Commonwealth contributes to the pension can be determined.

The Workers' Compensation Judge dismissed the claimant's petitions, concluding he failed to meet his burden of proof. The judge found the calculations for the pension offset to be sound and the methodology accurate in calculating the employer-funded portion of the defined benefit plan. The Appeal Board affirmed on appeal, pointing out that, even though the claimant took a lower paying option, that decision did not impact the amount of money required to fund the claimant's pension for the remainder of his life, as well as his wife's life.

The claimant appealed to the Commonwealth Court, which affirmed the Board. The claimant argued that the actuary erred in taking an offset in the amount of $1,885.03 per month since he opted for a lower monthly payout, which also provided for pension payments to his spouse should he predecease her. Thus, the claimant actually received approximately $700 less per month than if he opted for the standard option (MSLA). The court disagreed, holding that the claimant's pension benefit under the choice he selected remained the actuarial equivalent to the standard option. Although the claimant was receiving a reduced payment under the option he selected, the employer was not receiving a corresponding reduction in the amount it must fund the claimant's pension benefits. The court held that under Section 204(a) of the Act, the employer is entitled to a workers' compensation offset for pension benefits an employee receives to the extent funded by the employer.

Refusal to pay work-related medical treatment because a different entity was actual provider of billed services subjects employer to penalties.

Derry Township Supervisors and Selective Insurance Company of America v. WCAB (Reed), No. 751 C.D. 2016; Filed Jan. 30, 2017; Senior Judge Pellegrini

The claimant's bills for physical therapy treatment were being submitted to the worker's compensation carrier by pt Group, but the actual services were performed by The Physical Therapy Institute (PTI). According to an exception to Section 306(3)(iii) of the Act—billing based on the Medicare Fee Schedule—providers in existence on or before January 1, 1995, when the cost containment provisions were enacted, are grandfathered and can avoid billing in accordance with the Medicare Fee Schedule. The pt Group was not in existence in 1995. It owned the facility where physical therapy treatment was received and leased it and physical therapists to PTI for the purpose of treating workers' compensation clients. PTI was in existence in 1995 and was the entity that submitted the bills to the workers' compensation carrier. The carrier denied the bills because it believed pt Group performed the claimant's physical therapy, not PTI. On appeal to the Commonwealth Court, the court considered the issue of whether the Workers' Compensation Judge correctly found that the joint venture between PTI and pt Group was lawful, thereby enabling PTI to bill for the services rendered. The employer argued that, because pt Group was the actual provider, the services should be billed at the Medicare Part B fee reduction rate and that the insurance carrier did not violate the Act by not paying the bills. The Commonwealth Court disagreed and dismissed the employer's appeal. According to the court, the Workers'' Compensation Judge did not abuse his discretion in imposing a 50% penalty, nor did he err in awarding unreasonable contest counsel fees, given the employer's failure to provide any evidence establishing the alleged illegality of the joint venture.

Benefits properly denied when claimant is an independent contractor, not employee, and the judge is not required to hold claimant as employee because of late answer to claim petition.

Justin Hawbaker v. WCAB (Kriner's Quality Roofing Services and Uninsured Employers Guaranty Fund); No. 224 C.D. 2016; Filed Feb. 13, 2017; By President Judge Leavitt

The Commonwealth Court affirmed the decisions of the Workers' Compensation Judge and the Appeal Board in which they dismissed the claim petition and applied the 2010 Construction Workplace Misclassification Act in finding the claimant to be an independent contractor. The court pointed out that the January 2012 Independent Contractor Agreement signed by the claimant never terminated, and the defendant company did not direct the manner in which the claimant did work, a critical feature of the master servant relationship. The claimant performed the same or similar services for two other roofing companies. His Facebook page stated he was an "independent roofing contractor," and the claimant's insurance application identified his business and himself as the owner. Finally, the court rejected the claimant's argument that the defendant's untimely answer to the claim petition required the Workers' Compensation Judge to conclude that he was an employee. According to the court, the claimant still has the burden of proving all elements to support an award of compensation. Conclusions of law are not deemed admitted by a late answer to a claim petition, and the existence of an employer/employee relationship is a question of law based on the facts presented in each case.

Claimant hired for harvest season is itinerant agricultural laborer, not seasonal employee, and entitled to higher average weekly wage and compensation rate.

Toigo Orchards, LLC and Nationwide Insurance Company v. WCAB (Gaffney), No. 722 C.D. 2016; Filed Mar. 13, 2017; Judge Cohn-Jubelirer

The Commonwealth Court agreed that the claimant was not a seasonal employee. They concurred with the

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Appeal Board that the claimant was an itinerant farm laborer, who could travel from state to state to harvest crops or engage in other related work. The court also pointed out that the claimant did not have a contract prohibiting him from finding work as a laborer somewhere else. Additionally, the court agreed with the Board's average weekly wage calculation given that it fairly addressed the claimant's earnings when he was actually working and advanced the humanitarian purpose of the Act, as well as the purpose of Section 309, by accurately capturing the claimant's economic reality. In the court's view, Section 309(d.1) of the Act did not apply, since that section was intended to govern long-term employment relationships, and Section 309(d.2) did not reflect the claimant's economic reality. Finally, the court did reverse the Board's award of a healing period to the claimant because the employer presented evidence that the claimant was retired, and collecting Social Security Retirement Benefits both prior to and after his work with the employer, and had no intention of returning to work after his injury. For this reason, the claimant did not require a period for healing.

Car accident on the way to work is in course and scope of employment because claimant was sick and had intended to stay home but went to work at employer's special request.

Lutheran Senior Services Management Company v. WCAB (Miller); No. 1074 C.D. 2016; filed Feb. 15, 2017; Judge McCullough

The Commonwealth Court agreed with the Workers' Compensation Judge and the Appeal Board, finding the claim compensable. The court pointed out that the claimant was considered an "on-call" employee; one who is paid from door-to-door when responding to on-call assignments or emergencies. According to the court, the claimant was ill and had intended to take a sick day and would not have been expected to report to work. But, the employer made a special request of the claimant to come to work in order to get their security cameras up and running. While en route, the claimant began feeling nauseous, which caused him to veer off the road and hit a telephone pole. Therefore, the court found that the claimant was "on the clock" from the time he picked up the employer's phone call at home and fielded a specific request to report to work and fix the security cameras.

Deviation from work to obtain feminine hygiene products a temporary departure. Injuries are compensable.

Starr Aviation v. WCAB (Colquitt); No. 659 C.D. 2016; filed Mar. 7, 2017; Judge McCullough

Approximately six hours into her shift, and with her supervisor's persmission, the claimant drove a tug from the terminal where she was located to another terminal in order to meet her mother. The claimant's mother brought her feminine hygiene products, money and other items she had requested just after she reported for work. While the claimant was driving the tug, it flipped and trapped her left leg, which had to be amputated below the knee. The Commonwealth Court agreed with the Workers' Compensation Judge and the Appeal Board that the claimant was in the course and scope of her employment at the time she suffered her injury. According to the court, the claimant's conduct fit within the Personal Comfort Doctrine, which holds that an employee does not fall outside the course of employment for a momentary departure from active work in order to attend to "personal comfort," such as using the restroom, changing contact lenses, etc.

Heart and Lung Act benefits not subject to subrogation under Act even when claimant agreed to employer's lien recovery in stipulation.

Pennsylvania State Police v. WCAB (Bushta); 2426 C.D. 2015; filed Oct. 26, 2016; Judge Covey

The Commonwealth Court found that the claimant signed the stipulation that was submitted to the Workers' Compensation Judge after they issued their opinion in *Stermel v. WCAB (City of Philadelphia*, 103 A.3d, 876 (Pa. Cmwlth. 2014), wherein the court held that Heart and Lung benefits were not subject to § 319 of the Pennsylvania Workers' Compensation Act. The employer argued that, despite *Stermel*, the claimant signed the stipulation after it was decided and, therefore, the claimant was bound by the stipulation, notwithstanding the claimant's lack of knowledge of the *Stermel* opinion. The Commonwealth Court rejected this argument, pointing out that *Stermel* was decided before the Workers' Compensation Judge issued his decision and before the matter was appealed to the Appeal Board. The court also rejected the employer's argument that the Workers' Compensation Judge's decision was not contrary to *Stermel*, making it abundantly clear that the Heart and Lung benefits paid by the employer were not subject to subrogation.

A claimant injured while walking along a U.S. naval ship that is on the water is not entitled to workers' compensation benefits, the Longshore and Harbor Workers' Compensation Act has exclusive jurisdiction.

Christopher Savoy v. WCAB (Global Associates); 2613 C.D. 2015; filed Aug. 25, 2016; by President Judge Leavitt

Before the Workers' Compensation Judge, the parties litigated the issue of whether there was concurrent compensation under the Pennsylvania Workers' Compensation Act (Act) or whether the Longshore and Harbor Workers' Compensation Act (Longshore Act) was exclusive. The claimant testified that, at the time of the injury, the ship was located inside the basin of the Navy Yard, on the water. Consequently, the judge concluded that the Longshore Act had exclusive jurisdiction. The Workers' Compensation Appeal Board affirmed. On appeal to the Commonwealth Court, the claimant argued there was insufficient evidence to establish that the ship was on the navigable waters of the United States when he was injured. However, the only evidence presented on this issue was the claimant's own testimony, and he unequivocally said that the ship was "on the water." The court held that the Workers' Compensation Judge correctly determined that the Longshore

Act provided the claimant's exclusive remedy. The claimant was injured while performing the traditional maritime function of ship repair while the vessel was on the water. The claimant did not fit within any landward extension of the Longshore Act since he presented no evidence to suggest that the ship was working on a graven dry-dock at the time of his injury.

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WHAT NOW? A *PROTZ* PRIMER

By Audrey L. Copeland, Esq. and Francis X. Wickersham, Esq.

"What now?" That was the most frequently asked question by workers' compensation lawyers and judges in hearing offices across the state the day after the Supreme Court of Pennsylvania dropped its landmark decision in *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 2017 Pa. LEXIS 1401 (Pa. June 20, 2017). There were no hard answers—mostly conjecture, speculation and predictions. For the uninitiated, in *Protz*, the Pennsylvania Supreme Court found the IRE provisions of Section 306(a.2) of the Pennsylvania Workers' Compensation Act to be unconstitutional for improperly delegating legislative authority to the American Medical Association (AMA) and severed it from the Act in its entirety.

"What now?" is not the only question being asked in Workers' Compensation Land. The question that quickly follows is whether *Protz* is retroactive. After all, the Pennsylvania Supreme Court's opinion was silent on the issue. So, does *Protz* retroactively invalidate all IREs dating back to the time when Section 306(a.2) was passed? It can be said with confidence that this is the position the claimant's bar will be pushing, since the court struck Section 306(a.2) from the Act. But there's no need to roll over. A valid argument can be made that *Protz* does not have that level of retroactivity, and it is an argument that has some juice.

In *Blackwell v. Commonwealth State Ethics Commission,* 567 A.2d 630 (Pa. 1989)(Blackwell II), the Pennsylvania Supreme Court struck down a statute as an unconstitutional delegation of legislative power. The court then granted reargument limited to the question of the retrospective application of its decision. *Blackwell v. Commonwealth of Pennsylvania State Ethics Commission*, 573 A.2d 536 (Pa. 1990). On reargument, the court held that the decision applied retroactively because the legal principle on which the decision was based, that legislators may not delegate their power, was a settled principle and not a new rule of law. But the court explained that retroactive application meant that the new decision applied only to cases still pending at any stage of the proceedings **and** in which the issue was preserved. *Blackwell v. Commonwealth of Pennsylvania, States Ethics Commission, 589* A.2d 1094 (Pa. 1991)(Blackwell III). Reargument was not requested in *Protz,* so there may be no quick resolution of the retroactivity issue.

The *Protz* opinion should give employers some hope to fight attempts made to reinstate benefits in cases where the period of partial disability based on an IRE of less than 50% has lapsed. Employers can also argue against retroactive application of *Protz* in cases where there was an adjustment to partial disability status based on a Notice of Change in Status that was never challenged within 60 days as required by the Act. Additionally, employers can argue *res judicata* against attempts to reinstate benefits in cases where there was a judicial determination that a claimant was partially disabled due to an impairment rating of less than 50% and no appeal was ever filed.

As for current cases, it is unlikely that an argument that *Protz* does not have retroactive effect because the issue was never preserved will fly with Workers' Compensation Judges or the Workers' Compensation Appeal Board. The Commonwealth Court has taken the position that in matters commenced before its decision in *Protz*, where the claimant raised the issue at the first opportunity to do so, a *Protz* challenge can be raised for the first time on appeal because the appeal involves the validity of a statute. *See Beasley v. Workers' Comp. Appeal Bd. (Peco Energy Co.)*, 152 A.3d 391, 399 (Pa. Cmwlth. 2016) ("Under both Section 703 of the Administrative Agency Law and Pa. R.A.P. 1551(a),
claimant was allowed to raise the issue of the improper use of the Sixth Guide on appeal."). If a claimant did not raise a *Protz* challenge in a pending IRE Modification Petition prior to the Supreme Court's opinion, they most certainly will now. Modification Petitions based on an IRE that are in litigation before a Workers' Compensation Judge or the Appeal Board should be withdrawn. Failure to do so would be folly and potentially subject employers to sanctions in the form of penalties and counsel fees.

So, for now, the best answer to "What now?" is to develop a sensible and pragmatic game plan for the coming challenges to past IREs. Depending on the particular IRE situation you are faced with, it might be best to fight, or it might be best to retreat. The Supreme Court of Pennsylvania will likely have to wrestle with *Protz* again and decide the retroactivity issue, and the future of IREs in Pennsylvania will be in the hands of the legislature. In the meantime, pick your battles wisely.

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Products Liability

Suggested Standard Jury Instructions

Pursuant to

Tincher v. Omega Flex, Inc.,

104 A.3d 328 (Pa. 2014)

September 2017

16.10 GENERAL RULE OF STRICT LIABILITY

[Name of plaintiff] claims that [he/she] was harmed by [insert type of product], which was [distributed] [manufactured] [sold] by [name of defendant].

To recover for this harm, the plaintiff must prove by a fair preponderance of the evidence each of the following elements:

(1) [Name of defendant] is in the business of [distributing] [manufacturing] [selling] such a product;

(2) The product in question had a defect that made it unreasonably dangerous;

(3) The product's unreasonably dangerous condition existed at the time the product left the defendant's control;

(4) The product was expected to and did in fact reach the plaintiff, and was thereafter used at the time of the [accident][exposure], without substantial change in its condition; and

(5) The unreasonably dangerous condition of the product was a substantial factor in causing harm to the plaintiff.

RATIONALE

The RESTATEMENT (SECOND) OF TORTS § 402A, is the basis for strict product liability in Pennsylvania. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014) ("Pennsylvania remains a Second Restatement jurisdiction.").

The elements listed in this instruction are drawn from Section 402A, which provides:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> RESTATEMENT (SECOND) OF TORTS § 402A(1).

The jury should be given additional instructions, as appropriate, to elaborate on each of the elements of this cause of action.

The contrary SSJI (Civ.) § 16.10 retains the *Azzarello*-era instruction that a product is defective if it "lacked any element necessary to make it safe for its intended use." *See Azzarello v. Black Bros. Co.*, 391 A.2d 1010 (Pa. 1978) (endorsing a jury charge instructing that a product must be "provided with every element necessary to make it safe for its intended use.").

That charge should not be given, since the Supreme Court overruled *Azzarello* in *Tincher*, specifically rejecting the jury charge that *Azzarello* had endorsed. *See Tincher*, 104 A.3d at 335 (declaring *Azzarello* to be overruled); 378-79 (criticizing *Azzarello* standard as "impractical"" and noting that the "every element" language had been taken out of context). Even before *Tincher*, the "every element" jury instruction had long been the subject of criticism, with the Superior Court remarking three decades ago, "[t]his instruction calls forth fantastic cartoon images of products, both simple and complex, laden with fail-safe mechanism upon fail-safe mechanism." *McKay v. Sandmold Systems, Inc.*, 482 A.2d 260, 263 (Pa. Super. 1984) (quoting Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 637-39 (1980)). Given the longstanding problems with this instruction, as well as its express rejection in *Tincher*, the "every/any element" language has no place in a modern Pennsylvania jury charge.

The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

More recent precedent uses the concept of the defendant's "control" in articulating the defect-at-sale element of §402A. *See Barnish v. KWI Building Co.*, 980 A.2d 535, 547 (Pa. 2009). Older cases express the same concept as leaving the defendant's "hands." *See Duchess v. Langston Corp.*, 769 A.2d 1131, 1140 (Pa. 2001). These instructions use the term "control" as a more precise description.

"The seller is not liable if a safe product is made unsafe by subsequent changes." *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997). Whether a post-manufacture change to a product is "substantial" so as to preclude strict liability depends on "whether the manufacturer could have reasonably expected or foreseen such an alteration of its product." *Id.* (citing *Eck v. Powermatic Houdaille, Div.*, 527 A.2d 1012, 1018-19 (Pa. Super. 1987)). This standard accords with *Tincher*'s recognition of negligence concepts in strict liability. *See Nelson v. Airco Welders Supply*, 107 A.3d 146, 159 n.17 (Pa. Super. 2014) (en banc) (post-*Tincher*); *Roudabush v. Rondo, Inc.*, 2017 WL 3912370, at *3 (W.D. Pa. Sept. 5, 2017) (same); *Sikkelee v. AVCO Corp.*, ___ F. Supp.3d ___, 2017 WL 3317545, at *37-39 (M.D. Pa. Aug. 3, 2017) (same), *reconsideration granted on other grounds*,2017 WL 3310953 (M.D. Pa. Aug. 3, 2017).

"[R]equirements of proving substantial-factor causation remain the same" for both negligence and strict liability." *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1165 (Pa. 2010). The Pennsylvania Supreme Court has repeatedly specified "substantial factor" as the causation standard in product liability cases. *E.g. Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016) (post-*Tincher*); *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1091 (Pa. 2012); *Harsh v. Petroll*, 887 A.2d 209, 213-14 & n.9 (Pa. 2005).

16.20(1) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

Finding of Defect Requires "Unreasonably Dangerous" Condition

The Plaintiff claims that the [identify the product] was defective and that the defect caused [him/her] harm. The plaintiff must prove that the product contained a defect that made the product unreasonably dangerous.

The plaintiff's evidence must convince you both that the product was defective and that the defect made the product unreasonably dangerous.

In considering whether a product is unreasonably dangerous, you must consider the overall safety of the product for all [intended] [reasonably foreseeable] uses. You may not conclude that the product is unreasonably dangerous only because a different design might have reduced or prevented the harm suffered by the plaintiff in this particular incident. Rather, you must consider whether any alternative proposed by the plaintiff would have introduced into the product other dangers or disadvantages of equal or greater magnitude.

RATIONALE

The RESTATEMENT (SECOND) OF TORTS § 402A, is the basis for strict product liability in Pennsylvania. Section 402A limits liability to products "in a defective condition *unreasonably dangerous* to the user or consumer." Restatement (Second) of Torts § 402A (emphasis added). "Pennsylvania remains a Second Restatement jurisdiction." *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 399 (Pa. 2014). Thus,

> in a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is "defective"; in the context of a strict liability claim, whether a product is defective depends upon whether that product is "unreasonably dangerous."

Tincher, 104 A.3d at 380, 399. "[T]he notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." *Id.* at 400.

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in product liability cases from using the term "unreasonably dangerous." Instead of juries making this decision, trial courts were required to make "threshold" determinations" whether a "plaintiff's allegations" supported a finding that the product at issue was "unreasonably dangerous," justifying submission of the case to the jury. *Id.* at 1026; *Dambacher v. Mallis*, 485 A.2d 408, 423 (Pa. Super. 1984) (en banc).

Tincher expressly overruled *Azzarello*, finding *Azzarello*'s division of labor between judge and jury "undesirable" because it "encourage[d] trial courts to make either uninformed or unfounded decisions of social policy." *Tincher*, 104 A.3d at 381. "[T]rial courts simply do not have 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." *Id.* at 380.

Tincher found "undesirable" *Azzarello*'s "strict" separation of negligence and strict liability concepts. "[E]levat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative" was not "consistent with reason," and "validate[d] the suggestion that the cause of action, so shaped, was not viable." *Id.* at 380-81. Far from separating strict liability and negligence, *Tincher* emphasized their overlap. *Id.* at 371 (describing "negligence-derived risk-utility balancing in design defect litigation"); *id.* ("in design cases the character of the product and the conduct of the manufacturer are largely inseparable"); *id.* at 401 ("the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty") (internal citations omitted).

In *Tincher,* the court rejected the prevailing standard that a defective product is one that lacks every "element" necessary to make it safe for use. 104 A.3d at 379. In its place, the *Tincher* court instituted a "composite" standard for proving when a design defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01. These tests are discussed in §§16.20(2-3), *infra*.

Before *Azzarello*, proof that "the defective condition was unreasonably dangerous" was an accepted element of strict liability, along with the defect itself, existence of the defect at the time of sale, and causation. *E.g.*, *Bialek v. Pittsburgh Brewing Co.*, 242 A.2d 231, 235-36 (Pa. 1968); *Forry v. Gulf Oil Corp.*, 237 A.2d 593, 597 (Pa. 1967). Given the Supreme Court's rejection of *Azzarello* and its rationale, post-*Tincher* cases have returned to that pre-*Azzarello* formulation, and hold that juries must be asked whether the product at issue is "unreasonably dangerous." *See*, *e.g., High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017) ("the *Tincher* Court concluded that the question of whether a product is in a defective condition unreasonably dangerous to the consumer is a question of fact that should generally be reserved for the factfinder, whether it be the trial court or a jury"); *Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015) ("in *Tincher*, the Court returned to the finder of fact the question of whether a product is 'unreasonably dangerous,' as that determination is part and parcel of whether the product is, in fact, defective"), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Hatcher v. SCM Group, Inc.*, 167 F. Supp.3d 719, 727 (E.D. Pa. 2016) ("a product is only defective . . . if it is 'unreasonably dangerous'"); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *2 (W.D. Pa. July 14, 2016) ("the *Tincher* Court also made clear that it is now up to the jury not the judge to determine whether a product is in a 'defective condition unreasonably dangerous' to the consumer"); *Nathan v. Techtronic Industries North America., Inc.*, 92 F. Supp.3d 264, 270-71 (M.D. Pa. 2015) (court no longer to make threshold "unreasonably dangerous" determination; issues of defect are questions of fact for the jury).

Charging the jury to decide whether defects render products "unreasonably dangerous" is consistent with the vast majority of states that follow §402A (or §402A-based statutes). *See* Arizona – RAJI (Civil) PLI 4; Arkansas – AMJI Civ. 1017; Colorado – CJI Civ. 14:3; Florida – FSJI (Civ.) 403.7(b); Illinois – IPJI-Civ. 400.06; Indiana – IN-JICIV 2117; Kansas – KS-PIKCIV 128.17; Louisiana – La. CJI §11:2; Maryland – MPJI-Cv 26:12; Massachusetts – CIVJI MA 11.3.1; Minnesota – 4A MPJI-Civ. 75.20; Mississippi – MMJI Civ. §16.2.7; Missouri – MAJI (Civ.) 25.04; Nebraska – NJI2d Civ. 11.24; Oklahoma – OUJI-CIV 12.3; Oregon – UCJI No. 48.07; South Carolina – SCRC – Civ. §32-45 (2009); Tennessee – TPI-Civ. 10.01; Virginia – VPJI §39:15 (implied warranty). *Compare*: Georgia – GSPJI 62.640 ("reasonable care"); New Mexico – NMRA, Civ. UJI 13-1407 ("unreasonable risk"); New Jersey – NJ-JICIV 5.40D-2 ("reasonably safe"); New York – NYPJI 2:120 ("not reasonably safe").

Tincher left open the extent to which the "intended use"/"intended user" doctrine that developed under *Azzarello* remains viable, or conversely, whether it has been displaced by negligence concepts of reasonableness and foreseeability. 104 A.3d at 410; *see*, *e.g.*, *Pennsylvania Dep't of Gen. Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (strict liability exists "only for harm that occurs in connection with a product's intended use by an intended user"). This instruction takes no position on that issue, offering alternative "intended" and "reasonably foreseeable" language.

The contrary SSJI (Civ.) §16.20(1) omits the §402A phrase "unreasonably dangerous," thereby ignoring *Tincher*'s return of this "normative principle" of strict liability to the jury. *See Tincher*, 104 A.3d at 400. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

The second paragraph of the charge, regarding the scope of the unreasonably dangerous determination, follows the pre-*Tincher* §402A decision, *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823 (Pa. 2012), which "decline[d] to limit [unreasonably dangerous analysis – then "relegated" to the trial court by *Azzarello*] to a particular intended use." *Id.* at 836. "[A] product's utility obviously may be enhanced by multi-functionality." *Id.* Therefore, "alternative designs must be safer to the relevant set of users overall, not just the plaintiff." *Id.* at 838. *Accord*, *e.g.*, *Tincher*, 104 A.3d at 390 n.16 (characterizing *Beard* as holding that the defect determination is "not restricted to considering single use of multi-use product in design defect" case); *Phatak v. United Chair Co.*, 756 A.2d 690, 693

(Pa. Super. 2000) (allowing evidence that "incorporating the design [plaintiffs] proffered would have created a substantial hazard to other workers"); *Kordek v. Becton, Dickinson & Co.*, 921 F. Supp.2d 422, 431 (E.D. Pa. 2013) (the "determination of whether a product is a reasonable alternative design must be conducted comprehensively").

16.20(2) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

Consumer Expectations

The plaintiff claims that [he/she] was harmed by a product that was defective in that it was unreasonably dangerous under the consumer expectations test.

Under the consumer expectations test, a product is unreasonably dangerous if you find that the product is dangerous to an extent beyond what would be contemplated by the ordinary consumer who purchases the product, taking into account that ordinary consumer's knowledge of the product and its characteristics.

Under this consumer expectations test, a product is unreasonably dangerous only if the plaintiff proves first, that the risk that the plaintiff claims caused harm was unknowable; and, second, that the risk that the plaintiff claims caused harm was unacceptable to the average or ordinary consumer.

In making this determination, you should consider factors such as the nature of the product and its intended use; the product's intended user; whether any warnings or instructions that accompanied the product addressed the risk involved; and the level of knowledge in the general community about the product and its risks.

RATIONALE

This instruction should only be given after the court has made a threshold finding that the consumer expectations test is appropriate, under the facts of a given case, as outlined below.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the prevailing standard that a defective product is one that lacks every element necessary to make it safe for use. *Id.* at 379. In its place, the *Tincher* court instituted a "composite" standard for proving when a defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01.

Both tests have their own "theoretical and practical limitations," and are not both appropriate in every product liability case. *See id.* at 388-89 (limitations of consumer expectations test), 390 (limitations of risk-utility test). Although the plaintiff may choose to pursue one or both theories of defect, that choice does not bind the defense. Rather, the defendant may call on the trial court to act as a "gate-keeper" and to submit to the jury only the test that the evidence warrants. *Id.* at 407 ("A defendant may also seek to have dismissed any overreaching by the plaintiff via appropriate motion and objection"). Judicial gate-keeping to ensure that each test is only employed in appropriate cases "maintain[s] the integrity and fairness of the strict products liability cause of action." *Id.* at 401. As discussed below, post-*Tincher* "gate-keeping has been repeatedly invoked against the consumer expectations test.

Under the consumer expectations test, a product is unreasonably dangerous by reason of a "defective condition" that makes that product "upon normal use, dangerous beyond the reasonable consumer's contemplations." *Tincher*, 104 A.3d at 387 (citations omitted). This test reflects the "surprise element of danger," and asks whether the danger posed by the product is "unknowable and unacceptable to the average or ordinary consumer." *See id.*; *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 348 (Pa. Super. 2017).

The consumer expectations test is "'reserved for cases in which the everyday experience of the product users permits a conclusion that the product design violated minimum safety

assumptions.'" *Tincher*, 104 A.3d at 392 (quoting *Soule v. General Motors Corp.*, 882 P.2d 298, 308-09 (Cal. 1994)). The consumer expectations test does not apply where an "ordinary consumer would reasonably anticipate and appreciate the dangerous condition." *High*, 154 A.3d at 350 (quoting *Tincher*, 104 A.3d at 387).

As noted above, the Supreme Court recognized several "theoretical and practical limitations" of the consumer expectations test. Because this test only finds a defect where the dangerous condition is unknowable, a product "whose danger is obvious or within the ordinary consumer's contemplation" would not fall within the consumer expectations test. *Id.* at 388. *See High*, 154 A.3d at 350-51 (obviousness of risk created jury question under *Tincher* factors for consumer expectations test).

On the other end of the spectrum, the consumer expectations test will ordinarily not apply to products of complex design or that present esoteric risks, because an ordinary consumer simply does not have reasonable safety expectations about those products or those risks. *Tincher*, 104 A.3d at 388. As the *Tincher* court explained:

> [A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.

Id. (quoting *Soule* 882 P.2d at 308).

Accordingly, post-*Tincher* cases decline to allow the consumer expectations standard in cases involving complicated machinery. *See*, *e.g.*, *Yazdani v. BMW of North America, LLC*, 188 F. Supp.3d 468, 493 (E.D. Pa. 2016) (air-cooled motorcycle engine); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439, 452-53 (E.D. Pa. 2016) ("rip fence" on table saw); *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *8-9 (E.D. Pa. Sept. 8, 2016) (industrial lift table).

These holdings are consistent with those in other jurisdictions applying a similar consumer expectations test. *See*, *e.g.*, *Brown v. Raymond Corp.*, 432 F.3d 640 (6th Cir. 2005) (ordinary consumer has no expectation regarding safety of forklift design) (applying Tennessee law); *Fremaint v. Ford Motor Co.*, 258 F. Supp.2d 24, 29-30 (D.P.R. 2003) (consumer expectations test "cannot be the basis of liability in a case involving complex technical matters," such as automotive design); *Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1295-96 (10th Cir. 2010) ("complex product liability claims involving primarily technical and scientific information *require* use of a risk-benefit test *rather than* a consumer expectations test") (emphasis in original) (applying Colorado law).

The contrary SSJI (Civ.) §16.20(1) does not use *Tincher*'s formulation of the consumer expectations test, but rather the test enunciated in *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). While *Tincher* at times looked to California law, including *Barker*, in discussing the consumer expectations test, the Pennsylvania Supreme Court chose not to follow *Barker*. Instead, the Court chose the language appearing in the above instruction as the governing test. *See Tincher*, 104 A.3d at 335 (holding that consumer expectations test requires proof that "the danger is unknowable and unacceptable to the average or ordinary consumer"), 387 (a "product is defective [under the consumer expectations test] if the danger is unknowable and unacceptable to the average or ordinary consumer").

The contrary SSJI's omission of *Tincher*'s controlling language – "unknowable and unacceptable" – is incorrect. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

16.20(3) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

Risk-Utility

The plaintiff claims that [he/she] was harmed by a product that was defective in that it was unreasonably dangerous under the risk-utility test.

The risk-utility test requires the plaintiff to prove how a reasonable manufacturer should weigh the benefits and risks involved with a particular product, and whether the omission of any feasible alternative design proposed by the plaintiff rendered the product unreasonably dangerous.

In determining whether the product was defectively designed under the risk-utility test, and whether its risks outweighed the benefits, or utility, of the product, you may consider the following factors:

[Not all factors apply to every case; charge only on those reasonably raised by the evidence]

(1) The usefulness, desirability and benefits of the product to all ordinary consumers – the plaintiff, other users of the product, and the public in general – as compared to that product's dangers, drawbacks, and risks of harm;

(2) The likelihood of foreseeable risks of harm and the seriousness of such harm to foreseeable users of the product;

(3) The availability of a substitute product which would meet the same need and involve less risk, considering the effects that the substitute product would have on the plaintiff, other users of the product, and the public in general;

(4) The relative advantages and disadvantages of the design at issue and the plaintiff's proposed feasible alternative, including the effects of the alternative design on product costs and usefulness, such as, longevity, maintenance, repair, and desirability;

(5) The adverse consequences of, including safety hazards created by, a different design to the plaintiff, other users of the product, and the public in general;

(6) The ability of product users to avoid the danger by the exercise of care in their use of the product; and

(7) The awareness that ordinary consumers would have of dangers associated with their use of the product, and their likely knowledge of such dangers because of general public knowledge, obviousness, warnings, or availability of training concerning those dangers.

RATIONALE

This instruction should only be given after the court has made a threshold finding that the risk-utility test is appropriate, under the facts of a given case, as outlined below.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the prevailing standard that a defective product is one that lacks every element necessary to make it safe for use. *Id.* at 379. In its place, the *Tincher* court instituted a "composite" standard for proving when defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01.

Both tests have their own "theoretical and practical limitations," and are not both appropriate in every product liability case. *See id.* at 388-89 (limitations of consumer expectations test), 390 (limitations of risk-utility test). Although the plaintiff may choose to pursue one or both theories of defect, that choice does not bind the defense. Rather, the defendant may call on the trial court to act as a "gate-keeper" and to submit to the jury only the test that the evidence warrants. *See id.* at 407("A defendant may also seek to have dismissed any overreaching by the plaintiff via appropriate motion and objection"). Judicial gate-keeping to ensure that each test is only employed in appropriate cases "maintain[s] the integrity and fairness of the strict products liability cause of action." *Id.* at 401.

Under the risk-utility test, 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 389 (citations omitted). A product is not defective if the seller's precautions anticipate and reflect the type and magnitude of the risk posed by the use of the product. *See id.* The risk-utility test asks courts to "analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable." *Id.* This standard is a "negligence-derived risk-utility alternative formulation" that "reflects the negligence roots of strict liability." *Id.* at 389, 403.

In defining this "cost-benefit analysis," many jurisdictions rely on the seven risk-utility factors identified by John Wade, a leading authority on tort law. *See id.* at 389-90 (quoting John W. Wade, ON THE NATURE OF STRICT TORT LIABILITY FOR PRODUCTS, 44 Miss. L.J. 825, 837-38 (1973)). The Pennsylvania Supreme Court did not fully endorse these so-called "Wade factors," as not all would necessarily apply, depending on the "allegations relating to a particular design feature"" *See id.* at 390. Given their longevity and widespread approval, six of the seven concepts addressed by the Wade factors are incorporated into the above instruction, to be selected and charged in particular cases as the evidence warrants. *See generally Phatak v. United Chair Co.*, 756 A.2d 690, 695 (Pa. Super. 2000) (applying several Wade factors; "the safeness of [plaintiffs'] proposed design feature was a factor that was relevant to the determination of whether the chair was 'defectively designed'"). The above instruction omits the final Wade factor, which concerns the availability of insurance to the defendant. This consideration is inappropriate for a jury charge in Pennsylvania. *See*, *e.g.*, *Deeds v. University of Pennsylvania Medical Center*, 110 A.3d 1009, 1013-14 (Pa. Super. 2015) (discussion of insurance violated collateral source rule). It has been replaced with a factor examining various avenues of available public knowledge about relevant product risks. Other factors, not listed here, may be appropriate for jury consideration in particular cases. *See Tincher*, 104 A.3d at 408 ("the test we articulate today is not intended as a rigid formula to be offered to the jury in all situations").

Like the consumer expectations test, the risk-utility test has "theoretical and practical limitations." *See Tincher*, 104 A.3d at 390. The goal of the risk-utility test is to "achieve efficiency" by weighing costs and benefits, but such an economic calculation can, in some respects, "conflict[] with bedrock moral intuitions regarding justice in determining proper compensation for injury" in particular cases. *Id.* Additionally, the holistic perspective to product design suggested by the risk-utility test "may not be immediately responsive" in a case focused on a particular design feature. *Id.* Thus, although no decision has yet occurred, there may be cases where the risk-utility test is inappropriate.

The contrary SSJI (Civ.) §16.20(1) truncates the factors to be considered in the risk-utility analysis. It paraphrases only two of the Wade factors, drawing not from *Tincher*, but from the California decision, *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). While *Tincher* at times looked to California law, including *Barker*, in describing the risk-utility test, the Pennsylvania Supreme Court chose not to follow *Barker*, and instead cited the Wade factors in preference to the test enunciated in *Barker*. *Tincher*'s broader sweep indicates that it would be error to foreclose potentially relevant factors *a priori*. *See Tincher*, 104 A.3d at 408 ("In charging the jury, the trial court's objective is 'to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict.' Where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted.") (internal citation omitted). The Wade-factor-based approach here, rather than SSJI §16.20(1), best reflects Pennsylvania law, and offers a wide-ranging list of factors in the proposed jury instruction, with the intent that

the court and the parties in each particular case will identify those factors reasonably raised by the evidence for inclusion in the ultimate jury charge. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

* * *

The contrary SSJI (Civ.) §16.20(1) also includes an "alternative" jury instruction that would shift the burden of proof in the risk-utility test to the defendant. Such an instruction is premature and speculative. It should not be included in any standard charge. As noted, the *Tincher* court drew on certain principles of California law, while rejecting others. *See Tincher*, 104 A.3d at 408 (adopting *Barker* "composite" defect analysis); *id.* at 377-78 (rejecting *Cronin* "rings of negligence" approach). *Tincher*'s discussion of *Barker* and the burden of production and persuasion was pure *dictum*, and recognized as such. The parties had not briefed the issue, and the Court expressly declined to decide it. *See id.* at 409 ("[W]e need not decide it [*i.e.*, the question of burden-shifting] to resolve this appeal"). Rather, the Supreme Court also discussed the "countervailing considerations may also be relevant," including, *inter alia*, the principle that Pennsylvania tort law assigns the burden of proof to the plaintiff. *Id.*

In Pennsylvania, the burden of proving product defect has always belonged to the plaintiff. *See Tincher*, 104 A.3d at 378 (discussing "plaintiff's burden of proof" under *Azzarello*). *Accord*, *e.g.*, *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1003 (Pa. 2003); *Schroeder v. Pa. Dep't of Transportation*, 710 A.2d 23, 27 (Pa. 1998); *Spino v. John S. Tilley Ladder Co.,* 696 A.2d 1169, 1172 (Pa. 1997); *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995); *Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992); *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 754 (Pa. 1989). Shifting the burden of proof would be a drastic step and a change to a foundational principle of tort law. To take that step would run counter to the *Tincher* Court's repeated respect for "judicial modesty." *See Tincher*, 104 A.3d at 354 n.6, 377-78, 397-98, 406. Indeed, the *Tincher* Court explained that resolution of the burden-shifting question, like other subsidiary issues, would require targeted briefing and advocacy in a factually apposite case. *See id.* at 409-10. Accordingly, the expressly undecided question of burden-shifting is inappropriate for inclusion in a standard jury charge.

16.30 STRICT LIABILITY – DUTY TO WARN/WARNING DEFECT

Even a perfectly made and designed product may be defective if not accompanied by adequate warnings or instructions. Thus, the defendant may be liable if you find that inadequate, or absent, warnings or instructions made its product unreasonably dangerous for [intended] [reasonably foreseeable] uses. A product is defective due to inadequate warnings when distributed without sufficient warnings to notify [intended] [reasonably foreseeable] users of non-obvious dangers inherent in the product.

Factors that you may consider in deciding if a warning is adequate are the nature of the product, the identity of the user, whether the product was being used in an [intended] [reasonably foreseeable] manner, the expected experience of its intended users, and any implied representations by the manufacturer or other seller.

RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict product liability in Pennsylvania. Section 402A limits liability to products "in a defective condition *unreasonably dangerous* to the user or consumer." Restatement (Second) of Torts §402A (emphasis added). "Pennsylvania remains a Second Restatement jurisdiction." *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 399 (Pa. 2014). Thus,

> in a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is "defective"; in the context of a strict liability claim, whether a product is defective depends upon whether that product is "unreasonably dangerous."

Tincher, 104 A.3d at 380, 399. "[T]he notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." *Id.* at 400.

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in product liability cases from using the term "unreasonably dangerous." Instead of juries making this decision, trial courts were required to make "threshold" determinations" whether a "plaintiff's allegations" supported a finding that the product at issue was "unreasonably dangerous," justifying submission of the case to the jury. *Id.* at 1026; *Dambacher v. Mallis*, 485 A.2d 408, 423 (Pa. Super. 1984) (en banc).

Tincher expressly overruled *Azzarello*, finding *Azzarello*'s division of labor between judge and jury "undesirable" because it "encourage[d] trial courts to make either uninformed or unfounded decisions of social policy." *Tincher*, 104 A.3d at 381. "[T]rial courts simply do not have 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." *Id.* at 380.

While neither *Azzarello* nor *Tincher* involved alleged inadequate product warnings or instructions, comment j to §402A recognizes that "to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning." *Tincher* acknowledged that overruling *Azzarello* "may have an impact upon . . . warning claims." 104 A.3d at 409. Before *Tincher*, the Supreme Court held that "[t]o establish that the product was defective, the plaintiff must show that a warning of a particular danger was either inadequate or altogether lacking, and that this deficiency in warning made the product 'unreasonably dangerous.'" *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995). *Tincher* restored the "unreasonably dangerous" element of strict liability to the jury as the finder of fact. 104 A.3d at 380-81.

After *Tincher*, "[a] plaintiff can show a product was defective" where a "deficiency in warning made the product unreasonably dangerous." *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 351 (Pa. Super. 2017) (quoting *Phillips*, *supra*). With design and warning defect claims routinely tried together, juries would be confused, and error invited, by using the overruled *Azzarello* instruction in warning cases. Thus, the *Tincher*/§402A "unreasonably dangerous" element should be charged

in warning cases. *See also Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015) (*Tincher* "provided something of a road map for navigating the broader world of post-Azzarello strict liability law" in warning cases), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Horst v. Union Carbide Corp.*, 2016 WL 1670272, at *15 (Pa. C.P. Lackawanna Co. April 27, 2016) (*Tincher* and "defective product unreasonably dangerous" apply to warning claims); *Igwe v. Skaggs*, ___ F. Supp.3d ___, 2017 WL 2798417, at *11 (W.D. Pa. June 28, 2017) (plaintiff "may recover only if the lack of warning rendered the product unreasonably dangerous"); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439 (E.D. Pa. 2016) ("[a] plaintiff raising a failure-to-warn claim must establish . . . the product was sold in a defective condition unreasonably dangerous to the user"); *Inman v. General Electric Co.*, 2016 WL 5106939, at *7 (W.D. Pa. Sept. 20, 2016) ("a plaintiff raising a failure to warn claim must establish . . . that the product was sold in a defective condition 'unreasonably dangerous' to the user"); *Bailey v. B.S. Quarries, Inc.*, 2016 WL 1271381, at *14-15 (M.D. Pa. March 31, 2016) (*Azzarello* . . . and its progeny are no longer good law" with respect to plaintiff's warning claim).

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook further supports applying *Tincher*'s negligence-influenced defect analysis to warning claims. Owen Handbook §9.2 at 589 ("claims for warning defects in negligence and strict liability in tort are nearly, or entirely, identical").

Another issue *Tincher* left open is the extent to which the "intended use"/"intended user" doctrine that developed under *Azzarello* remains viable, or conversely, whether it has been displaced by negligence concepts of reasonableness and foreseeability. 104 A.3d at 410; *see*, *e.g.*, *Pennsylvania Dep't of Gen. Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (strict liability exists "only for harm that occurs in connection with a product's intended use by an intended user"). This instruction takes no position on that issue, offering alternative "intended" and "reasonably foreseeable" language.

The Pa. Bar institute's SSJI (Civ.) §16.122 fails to follow *Tincher* by omitting §402A's "unreasonably dangerous" defect standard, returned to the jury by *Tincher*. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017).

Also unlike the SSJI, this instruction follows *Tincher* by including factors that a jury may consider in evaluating whether a defective warning made the product unreasonably dangerous. *See* 104 A.3d at 351 ("when a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict"). The factors are derived from *Tincher*'s list of those relevant to the "consumer expectations" design defect test. *Id.* at 387. Using these factors is appropriate since "express" representations such as warnings and instructions are a major source of consumer expectations about products. *Id.*; *High*, 154 A.3d at 348.

16.40 "HEEDING PRESUMPTION" FOR SELLER/DEFENDANT WHERE WARNINGS OR INSTRUCTIONS ARE GIVEN

Where the defendant provides adequate product warnings or instructions, it may reasonably assume that those warnings will be read and heeded. You may not find the defendant liable for harm caused by the plaintiff not reading or heeding adequate warnings or instructions provided by the defendant.

RATIONALE

"Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts §402A, comment j (1965). Comment j is the law of Pennsylvania. *E.g.*, *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Hahn v. Richter*, 673 A.2d 888, 890 (Pa. 1996) (both applying comment j). Thus, "comment j gives an evidentiary advantage to the defense" where warnings are adequate. *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd mem.*, 881 A.2d 1262 (Pa. 2005). The comment j presumption was rejected by the Restatement (Third) of Torts, Products Liability §2, comment l & Reporter's Notes (1998). In *Tincher*, however, Pennsylvania declined to "move" to the Third Restatement. *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 399 (Pa. 2014). Thus, the comment j presumption remains the law of Pennsylvania.

In *Davis* the defendant could not be liable for its product lacking an unremovable guard where it adequately warned users to use the guard and avoid the area in question while the product was operating. Because "the law presumes that warnings will be obeyed," *id.* at 190 (following comment j), it was "untenable" that defendants "must anticipate that a specific warning" would not be obeyed. *Id.* at 190-91. Disobedience of adequate warnings is unforeseeable as a matter of law. *Id. Accord Gigus v. Giles & Ransome, Inc.*, 868 A.2d 459, 462-63 (Pa. Super. 2005); *Fletcher v. Raymond Corp.*, 623 A.2d 845, 848 (Pa. Super. 1993); *Roudabush v. Rondo, Inc.*, 2017 WL 3912370, at *7 (W.D. Pa. Sept. 5, 2017) (post-*Tincher*). Thus, where plaintiffs advance design defect allegations, as in *Davis*, *Gigus*, *Fletcher*, and *Roudabush*, juries should be instructed on the legal import of relevant warnings, should they find them adequate.

The Pa. Bar Institute's SSJI 16.40 is classified as a warning instruction. That is incorrect. In warning defect cases, where the warning is "proper and adequate," *id.*, the defendant necessarily prevails on the warning's adequacy alone. *E.g.*, *Mackowick v. Westinghouse Electric Corp.*, 575 A.2d 100, 103-04 (Pa. 1990). Thus a warning causation instruction predicated on an "adequate" warning is superfluous because where a warning is found adequate, the jury will never reach causation. The effect of adequate warnings can only be a subject of jury consideration where the defect that is claimed to render the product unreasonably dangerous is not the warning itself. *See Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at *2-3 (E.D. Pa. Jan. 26, 2017) (jury to consider whether plaintiff conduct in not "heeding instructions" that "a reasonable consumer" would have followed is part of design defect analysis).

16.50 STRICT LIABILITY – DUTY TO WARN – "HEEDING PRESUMPTION" IN WORKPLACE INJURY CASES

[This instruction is only to be given in cases involving workplace injuries.]

If you find that warnings or instructions were required to make the product nondefective, and that the product was unreasonably dangerous without such warnings or instructions, then the law presumes, and you would have to presume, that, if there had been adequate warnings or instructions, the plaintiff would have followed them.

This presumption is rebuttable, and to overcome it, the defendant's evidence must establish that the plaintiff would not have heeded adequate warnings or instructions. If you find that the defendant has not rebutted this presumption, then you may not find for the defendant based on a conclusion that, even with adequate warnings or instructions, the plaintiff would not have read or heeded them.

RATIONALE

During the *Azzarello* era, some courts recognized a "logical corollary" to the comment j presumption that adequate warnings are read and heeded (*see* Rationale for SSJI 16.40, *supra*) that where a warning is inadequate, a plaintiff will be presumed to have read and heeded an adequate warning, had one been given. *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa. Super. 1999), *appeal granted*, 743 A.2d 920 (Pa. 1999); *Pavlik v. Lane Limited/Tobacco Exporters International*, 135 F.3d 876, 883 (3d Cir. 1998) (applying Pennsylvania law). However, the bankruptcy of the asbestos defendant in *Coward* foreclosed the Pennsylvania Supreme Court from ruling on the issue in *Coward* and the high court has yet to revisit it.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court declined to adopt the Third Restatement of Torts, which would have abolished the comment j presumption, and thus its "corollary." *Id.* at 399; *compare* Restatement (Third) of Torts, Products Liability §2, comment l & Reporter's Notes (1998).

In Pennsylvania, the heeding presumption has been limited to product liability cases involving workplace injuries such as *Coward*. "[W]here the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful." *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005) (per curiam); *accord Moroney v. General Motors Corp.*, 850 A.2d 629, 634 & n.3 (Pa. Super. 2004) (heeding presumption "authorized only in cases of workplace exposure," not automobiles); *Goldstein v. Phillip Morris*, 854 A.2d 585, 587 (Pa. Super. 2004) (same as *Viguers*); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at *1 (Pa. C.P. Clarion Co. Oct. 19, 2015). *See Demmler v. SmithKline Beecham Corp.*, 671 A.2d 1151, 1155 (Pa. Super. 1996) ("proximate cause is not presumed" in prescription medical product cases).

The heeding presumption is "rebuttable upon evidence that the plaintiff would have disregarded a warning even had one been given, *Coward*, 729 A.3d at 620, with the burden of production of such evidence initially on the defendant. *Coward*, 720 A.2d at 622. Once the defendant has produced rebuttal evidence, the burden "shifts back to the plaintiff to produce evidence that he would have acted to avoid the underlying hazard had the defendant provided an adequate warning." *Id.* Examples of proper rebuttal evidence are: (1) that the plaintiff already knew of the risk, or (2) in fact failed to read the warnings (if any) that were given. *Id.* at 620-21 (discussing *Sherk v. Daisy-Heddon*, 450 A.2d 615, 621 (Pa. 1982), and *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995)); *see*, *e.g.*, *Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp.2d 530, 543-44 (E.D. Pa. 2005). Rebutting the heeding presumption requires only evidence "sufficient to support a finding contrary to the presumed fact." *Coward*, 729 A.2d at 621.

16.60 STRICT LIABILITY – DUTY TO WARN – CAUSATION, WHEN "HEEDING PRESUMPTION" FOR PLAINTIFF IS REBUTTED

[No instruction should be given.]

RATIONALE

Once the heeding presumption has been rebutted, it "is of no further effect and drops from the case." *Coward*, 729 A.2d at 621; *accord*, *e.g.*, *Overpeck v. Chicago Pneumatic Tool Co.*, 823 F.2d 751, 756 (3d Cir. 1987) (applying Pennsylvania law). Thus, there is no need for a separate standard instruction, concerning how the jury should proceed once the presumption has been rebutted. *Cf.* PBI SSJI (Civ) 16.60 ("Duty to Warn – Causation, When 'Heeding Presumption' for Plaintiff Is Rebutted"). Where the jury is to decide whether the heeding presumption is rebutted, the only additional instruction appropriate in the event that the jury finds in favor of rebuttal is the generally applicable causation instruction. Thus, there is no need for a separate SSJI 16.60.

16.90 STRICT LIABILITY – MANUFACTURING DEFECT – MALFUNCTION THEORY

The plaintiff may prove a manufacturing defect indirectly by showing the occurrence of a malfunction of a product during normal use, without having to prove the existence of a specific defect in the product that caused the malfunction. The plaintiff must prove three facts: that the product malfunctioned, that it was given only normal or reasonably foreseeable use prior to the accident, and that no reasonable secondary causes were responsible for the product malfunction.

RATIONALE

The so-called "malfunction theory" is a method of circumstantial proof of defect available "[i]n certain cases of alleged manufacturing defects." *Long v. Yingling*, 700 A.2d 508, 514 (Pa. Super. 1997). To establish a basis for liability under the malfunction theory, a plaintiff must prove three things: a product malfunction, only normal product use, and absence of "reasonable secondary causes" for the malfunction:

> First, the "occurrence of a malfunction" is merely circumstantial evidence that the product had a defect, even though the defect cannot be identified. The second element in the proof of a malfunction theory case, which is evidence eliminating abnormal use or reasonable, secondary causes, also helps to establish the first element of a standard strict liability case, the existence of a defect. By demonstrating the absence of other potential causes for the malfunction, the plaintiff allows the jury to infer the existence of defect from the fact of a malfunction.

Barnish v. KWI Building Co., 980 A.2d 535, 541 (Pa. 2009). Without this proof, "[t]he mere fact that an accident happens . . . does not take the injured plaintiff to the jury." *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d 489, 496 (Pa. Super. 1997).

This instruction follows the post-*Barnish* charge approved in *Wiggins v. Synthes*, 29 A.3d 9, 18-19 (Pa. Super. 2011), as modified by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), to include "reasonably foreseeable" as the standard for abnormal use. Prior to *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), the standard for abnormal use in a malfunction theory case "depend[ed] on whether the use was reasonably foreseeable by the seller." *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 921 n.13 (Pa. 1974) (plurality opinion). *Tincher* overruled *Azzarello*'s bar to strict liability jury instructions mentioning reasonableness and foreseeability, 104 A.3d at 389, and cited *Kuisis* favorably. *Id.* at 363-64. Since plaintiffs must prove lack of abnormal use as an element of their *prima facie* circumstantial defect case, a second, separate jury instruction on abnormal use is unnecessary. *Wiggins*, 29 A.3d at 18-19.

The malfunction theory is proper only in manufacturing defect cases. *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 755 (Pa. 1989) (accepting malfunction theory "as appropriate in ascertaining the existence of a defect in the manufacturing process"); *Dansak*, 703 A.2d at 495 ("in cases of a manufacturing defect, a plaintiff could prove a defect through a malfunction theory"); *accord Ducko v. Chrysler Motors Corp.*, 639 A.2d 1204, 1205 (Pa. Super. 1994); *Smith v. Howmedica Osteonics Corp.*, ___ F. Supp.3d ___, 2017 WL 1508992, at *5 (E.D. Pa. April 27, 2017); *Varner v. MHS, Ltd.*, 2 F. Supp.3d 584, 592 (M.D. Pa. 2014).

In design defect cases, *Tincher* adopted a "composite" approach to liability that "requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." 104 A.3d at 401. Although *Tincher* considered the malfunction theory, *id.* at 362-63, it did not identify product malfunction as a relevant factor for either method of proving design defect. *Id.* at 387 (consumer expectations), 389-90 (risk-utility). Thus, under *Tincher*, the malfunction theory cannot be a method of proving design defect. *See also Dansak*, 703 A.2d at 495 n.8 ("to prove that an entire line of products was designed improperly, the plaintiff need not resort to the malfunction theory").

A warned-of malfunction would not be unexplained. Thus, no precedent supports use of the malfunction theory in warning cases. *See Dolby v. Ziegler Tire & Supply Co.*, 2017 WL 781650, at *6, 161 A.3d 393 (Table) (Pa. Super. 2017) (plaintiffs "only pursued a strict liability failure to warn case, the malfunction theory is not applicable") (unpublished); *cf. Barnish*, 980 A.2d at 542 ("facts indicating that the plaintiff was using the product in violation of the product directions and/or warnings" defeats malfunction theory as a matter of law).

The malfunction theory is limited to new, or nearly new products, as the longer a product is used, the more likely reasonable secondary causes, such as improper maintenance or ordinary wear and tear, become. "[P]rior successful use" of a product "undermines the inference that the product was defective when it left the manufacturer's control." *Barnish*, 980 A.2d at 547 (2009); *accord Kuisis*, 319 A.2d at 922-23 ("normal wear-and-tear" over 20 years precluded malfunction theory); *Nobles v. Staples, Inc.*, 2016 WL 6496590, at *6 (Pa. C.P. Phila. Co.) (three years of successful use precludes malfunction theory), *aff'd*, 150 A.3d 110 (Pa. Super. 2016); *Wilson v. Saint-Gobain Universal Abrasives, Inc.*, 2015 WL 1499477, at *15 (W.D. Pa. Apr. 1, 2015) (malfunction theory allowed where new product "failed as soon as [plaintiff] touched it"); *Banks v. Coloplast Corp.*, 2012 WL 651867, at *3 (E.D. Pa. Feb. 28, 2012) (malfunction on "first use" allows malfunction theory); *Hamilton v. Emerson Electric Co.*, 133 F. Supp.2d 360, 378 (M.D. Pa. 2001) ("one to two years" of successful use precludes malfunction theory).

The malfunction theory only applies "where the allegedly defective product has been destroyed or is otherwise unavailable." *Barnish*, 980 A.2d at 535; *accord Wiggins*, 29 A.3d at 14; *Wilson*, 2015 WL 1499477, at *12-13; *Houtz v. Encore Medical Corp.*, 2014 WL 6982767, at *7 (M.D. Pa. Dec. 10, 2014); *Ellis v. Beemiller, Inc.*, 910 F. Supp.2d 768, 775 (W.D. Pa. 2012).

A plaintiff has the burden of producing "evidence eliminating abnormal use or reasonable, secondary causes." *Barnish*, *supra* (quoting *Rogers*, 656 A.2d at 754); *accord Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 830 n.10 (2012) (noting "plaintiff's burden, under malfunction theory, of addressing alternative causes"). Thus, "a plaintiff does not sustain its burden of proof in a malfunction theory case when the defendant furnishes an alternative explanation for the accident." *Raskin v. Ford Motor Co.*, 837 A.2d 518, 522 (Pa. Super. 2003); *accord Thompson v. Anthony Crane Rental, Inc.*, 473 A.2d 120, 125 (Pa. Super. 1984) (jury finding product operator negligent established "secondary cause" precluding malfunction theory). A plaintiff must also "present[] a case-in-chief free of secondary causes." *Rogers*, 565 A.2d at 755; *accord Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 72 (Pa. Super. 2005) (malfunction theory precluded where "record also establishes" use of product in excess of what "it was either designed or manufactured to withstand"). "Defendant's only burden is to identify other possible non-defect oriented explanations." *Long*, 700 A.2d at 515.

This instruction differs from the Pa. Bar Institute's SSJI (Civ.) §16.90 in: (1) explicitly limiting the instruction to manufacturing defect, and (2) using "reasonable foreseeability" language. The SSJI fails to follow *Tincher*. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). The SSJI notes are also obsolete, citing no precedent less than 20 years old, and in particular omitting *Barnish*.

16.122(1) STRICT LIABILITY – STATE OF THE ART EVIDENCE

Unknowability of Claimed Defective Condition

You have been instructed about applicable test[s] for unreasonably dangerous product defect. Under the risk/utility test, you must consider known or knowable product risks and benefits. Under the consumer expectations test, the plaintiff must prove that the risk[s] [was/were] unknowable when the product was sold.

[Omit consumer expectations or risk/utility language if that test is not at issue]

Thus, [under either test,] you may only find the defendant liable where the plaintiff proves that the [plans or designs] for the product [or the methods and techniques for the manufacture, inspection, testing and labeling of the product] were state of the art at the time the product left the defendant's control.

"State of the art" means that the technical, mechanical, scientific, [and/or] safety knowledge were known or knowable at the time the product left the defendant's control. Thus, you may not consider technical, mechanical, scientific [and/or] safety knowledge that became available only by the time of trial or at any time after the product left the defendant's control

RATIONALE

This instruction is to be given where the jury must resolve a dispute over whether the product risk that the plaintiff claims has caused injury was knowable, given the technological state of the art when the product was manufactured or supplied.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania product liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (1978). *Tincher* replaced *Azzarello*-era defect standards with a "composite" test utilizing both "risk/utility" and "consumer expectations" defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (1978). *See* 104 A.3d at 387-89.

The risk/utility prong of *Tincher*'s "composite" defect test provides "an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." 104 A.3d at 389. The consumer expectations prong is explicitly limited to risks that are "unknowable and unacceptable" to "average or ordinary consumer[s]." *Id.* at 335, 387. *Tincher* did "not purport to either approve or disapprove prior decisional law," on issues such as state of the art. *Id.*

Likewise, Restatement §402A, reaffirmed in *Tincher*, limits the duty to warn to information that the manufacturer or seller "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge," thus rejecting liability for unknowable product risks. Restatement (Second) of Torts §402A, comment j (1965).

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook supports admission of state of the art evidence, dismissing liability for unknowable defects as a "dwindling idea." Owen Handbook §9.2 at 587. The state of the art is relevant to consumer

expectations "to determine the expectation of the ordinary consumer," and to risk/utility, since the risk-utility test rests on the *foreseeability* of the risk and the availability of a *feasible* alternative design." *Id.* §10.4, at 715 (emphasis original). "[T]he great majority of judicial opinions" hold that "the practical availability of safety technology is relevant and admissible." *Id.* at 717. Likewise, *Barker* recognized that "the evidentiary matters" relevant to its test "are similar to those issues typically presented in a negligent design case." 573 P.2d at 326. Thus, the *Azzarello*-era rationale for exclusion no longer exists after elimination of the strict separation of negligence and strict liability.

Tincher held that, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." 104 A.3d at 401. Accordingly, *Tincher* rejected the view that "negligence concepts" in strict liability could only "confuse" juries.

> [A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

Id. "Even a cursory reading of *Tincher* belies th[e] argument" that *Tincher* "overruled *Azzarello* but did little else." *Renninger v. A&R Machine Shop*, 163 A.3d 988, 1000 (Pa. Super. 2017). Rather, in *Tincher*, "the Supreme Court rejected the '*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law." *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381).

During the now-repudiated *Azzarello* period, the Superior Court held that strict liability allowed liability for scientifically unknowable product risks, because "inviting the jury to consider the 'state of the art' . . . injects negligence principles into a products liability case." *Carrecter v. Colson Equipment Co.*, 499 A.2d 326, 329 (Pa. Super. 1985). Both pre-*Azzarello* strict liability and negligence liability, rejected liability for unknowable product risks. *See Leibowitz v. Ortho Pharmaceutical Corp.*, 307 A.2d 449, 458 (Pa. Super. 1973) ("[a] warning should not be held improper because of subsequent revelations") (opinion in support of affirmance); *Mazur v. Merck & Co.*, 964 F.2d 1348, 1366-67 (3d Cir. 1992) (defect depends on "the state of medical knowledge" at manufacture) (applying Pennsylvania law); *Frankel v. Lull Engineering Co.*, 334 F. Supp. 913, 924 (E.D. Pa. 1971) (§402A "requires only proof that the manufacturer reasonably should have known"), *aff'd*, 470 F.2d 995 (3d Cir. 1973) (*per curiam*).

Post-*Tincher*, technological infeasibility has been recognized as relevant. *Igwe v. Skaggs*, ___ F. Supp.3d ___, 2017 WL 2798417, at *10 (W.D. Pa. June 28, 2017) (risk "cannot be reasonably designed out based on the technology used at the time of production"). Pennsylvania cases also support admissibility of state of the art evidence generally. *See Renninger*, 163 A.3d at 1000 ("a large body of post-*Azzarello* and pre-*Tincher* law" is no longer binding precedent); *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 482 (Pa. Super. 2016) (the *Azzarello* "strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania"); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on "state-of-the-art" grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016). "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." *Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790, at *2 (Pa. C.P. Mifflin Co. Sept. 23, 2016), *aff'd mem.*, 2017 WL 1163056 (Pa. Super. March 28, 2017).

The contrary SSJI (Civ.) §16.122 does not rely on Pennsylvania law, but rather on the "Wade-Keeton test" that would impute all knowledge available at the time to the manufacturer/supplier. *Id.* at Subcommittee Note. However, that test has never been adopted in Pennsylvania, and was criticized by *Tincher*. 104 A.3d at 405 ("Imputing knowledge . . . was theoretically counter-intuitive and offered practical difficulties, as illustrated by the Wade-Keeton debate."). *See* Owen Handbook §10.4 at 733 ("modern

product liability law is quite surely better off without a duty to warn or otherwise protect against unknowable risks"). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017).

16.122(2) STRICT LIABILITY – STATE OF THE ART EVIDENCE

Compliance with Product Safety Statutes or Regulations

You have heard evidence that the [product] complied with the [identify applicable statute or regulation]. While compliance with that [statute or regulation] is not conclusive, it is a factor you should consider in determining whether the design of the product was defective so as to render the product unreasonably dangerous.

RATIONALE

This instruction is to be given where the jury has heard evidence that the product at issue complied with the requirements of an applicable product safety statute or governmental regulation.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania product liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (1978). *Tincher* replaced *Azzarello*-era defect standards with a "composite" test utilizing both "risk/utility" and "consumer expectations" defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (1978). *See* 104 A.3d at 387-89. *Barker* also recognized that "the evidentiary matters" relevant to its test "are similar to those issues typically presented in a negligent design case." 573 P.2d at 326.

The risk/utility prong of *Tincher*'s "composite" defect test provides "an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." 104 A.3d at 389. The consumer expectations prong is explicitly limited to risks that are "unknowable and unacceptable" to "average or ordinary consumer[s]." *Id.* at 335, 387.

Tincher did "not purport to either approve or disapprove prior decisional law," on issues such as state of the art. *Id.* at 409-10. However, the *Azzarello*-era rationale for exclusion of regulatory compliance evidence no longer exists after elimination of the strict separation of negligence and strict liability. "[S]ubsequent application" of what "bright-line" or "per se" rules against "negligence rhetoric and concepts" is neither "consistent with reason" nor "viable." *Tincher*, 104 A.3d at 380-81. Courts excluding such evidence "relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim." *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016). Thus, "a large body of post-*Azzarello* and pre-*Tincher* law" can no longer be considered binding precedent. *Renninger v. A&R Machine Shop*, 163 A.3d 988, 1000 (Pa. Super. 2017).

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook supports admission of regulatory compliance:

> The rule as to a manufacturer's compliance with a governmental safety standard set forth in a statute or regulation largely mimics the rule on violation: compliance with a regulated safety standard . . . is widely considered proper evidence of a product's nondefectiveness but is not conclusive on that issue.

Id. §6.4, at 401 (footnote omitted).

Tincher held that, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." 104 A.3d at 401. Accordingly, *Tincher* rejected the view that "negligence concepts" in strict liability could only "confuse" juries.

> [A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated

> from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

Id. Even a cursory reading of *Tincher* belies th[e] argument" that *Tincher* "overruled *Azzarello* but did little else." *Renninger*, 163 A.3d at 1000. Rather, in *Tincher*, "the Supreme Court rejected the '*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law." *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381).

During the now-repudiated *Azzarello* period, the Superior Court held that strict liability precluded evidence that the defendant's product complied with governing safety statutes or regulations because "the use of such evidence interjects negligence concepts and tends to divert the jury from their proper focus, which must remain upon whether or not the product . . . was 'lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.'" *Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 962 (Pa. Super. 2009) (en banc). *Hicks* used the now-repudiated *Azzarello* defect standard to overrule prior precedent that held regulatory compliance admissible in strict liability actions. *See Cave v. Wampler Foods, Inc.*, 961 A.2d 864, 869 (Pa. Super. 2008) (regulatory compliance "evidence is directly relevant to and probative of [plaintiff's] allegation that the product at issue was defective") (overruled in *Hicks*); *Jackson v. Spagnola*, 503 A.2d 944, 948 (Pa. Super. 1986) (regulatory compliance is "of probative value in determining whether there is a defect") (overruled in *Hicks*); *Brogley v. Chambersburg Engineering Co.*, 452 A.2d 743, 745-46 (Pa. Super. 1982) (negligence case; courts have "uniformly held admissible . . . safety codes and regulations intended to enhance safety").

Even *Hicks*, however, recognized that regulatory compliance would be relevant to a consumer expectations test for defect, because "evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect." 984 A.2d at 966. Likewise, the risk/utility test "reflects the negligence roots of strict liability" and "analyzes *post hoc* whether a manufacturer's conduct . . . was reasonable." *Tincher*, 104 A.3d at 389. Since the risk/utility inquiry involves "conduct," regulatory compliance is admissible evidence. "Pennsylvania courts permit[] defendants to adduce evidence of compliance with governmental regulation in their efforts to demonstrate due care (when conduct is in issue)." *Lance v. Wyeth*, 85 A.3d 434, 456 (Pa. 2014).

Post-*Tincher* Pennsylvania cases support admissibility of state of the art evidence generally. *See Webb*, 148 A.3d at 482 (the *Azzarello* "strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania"); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on "state-of-the-art" grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016). *See Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *3 (W.D. Pa. July 14, 2016) (the "the principles of *Tincher* counsel in favor of [the] admissibility" of compliance with "industry or government standards"); *Morello v. Kenco Toyota Lift*, 142 F. Supp.3d 378, 386 (E.D. Pa. 2015) (expert regulatory compliance testimony held relevant in strict liability).

The contrary SSJI (Civ.) §16.122 would perpetuate the *Lewis per se* exclusion of regulatory compliance evidence. *Id.* at Subcommittee Note (relying solely upon the *Lewis* line of cases). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High*, 154 A.3d at 347.

16.122(3) STRICT LIABILITY – STATE OF THE ART EVIDENCE

Compliance with Industry Standards

You have heard evidence that the [product] complied with the design and safety customs or practices in the [type of product] industry. While compliance with these industry standards is not conclusive, it is a factor you should consider in determining whether the design of the product was defective so as to render the product unreasonably dangerous.

RATIONALE

This instruction is to be given where the jury has heard evidence that the product at issue complied with industry-wide standards.

In *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania product liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (1978). *Tincher* replaced *Azzarello*-era defect standards with a "composite" test utilizing both "risk/utility" and "consumer expectations" defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (1978). *See* 104 A.3d at 387-89. *Barker* recognized that "the evidentiary matters" relevant to its test "are similar to those issues typically presented in a negligent design case." 573 P.2d at 326.

The risk/utility prong of *Tincher*'s "composite" defect test provides "an opportunity to analyze *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability." 104 A.3d at 389; *accord Renninger v. A&R Machine Shop*, 163 A.3d 988, 997 (Pa. Super. 2017) (*Tincher* risk/utility test "is derived from negligence principles"). Likewise, compliance with industry standards would be relevant to consumer expectations test for defect, because "evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect." *Estate of Hicks v. Dana Cos*., 984 A.2d 943, 966 (Pa. Super. 2009) (en banc).

Tincher did "not purport to either approve or disapprove prior decisional law," on issues such as state of the art. 104 A.3d at 409-10. However, the *Azzarello*-era rationale for exclusion of industry standards evidence no longer exists after elimination of the strict separation of negligence and strict liability. "[S]ubsequent application" of what "bright-line" or "per se" rules against "negligence rhetoric and concepts" is neither "consistent with reason" nor "viable." *Id.* at 380-81. Courts excluding such evidence "relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim." *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016). *Lewis*, which *Tincher* recognized as "in harmony with *Azzarello*," is part of "a large body of post-*Azzarello* and pre-*Tincher* law" that can no longer be considered binding precedent. *Renninger*, 163 A.3d at 1000-01.

Tincher relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook views the *Lewis* blanket inadmissibility rule is "an outmoded holdover from early, misguided efforts to distinguish strict liability from negligence," and recognizes that a "great majority of courts allow applicable evidence of industry custom." *Id.* §6.4, at 392-93 (footnote omitted). Industry standards are "some evidence" concerning defect and "does not alone conclusively establish whether a product is defective." *Id.* at 394-95 (footnote omitted).

Tincher held that, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." 104 A.3d at 401. Accordingly, *Tincher* rejected the view that "negligence concepts" in strict liability could only "confuse" juries.

> [A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative,

> whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

Id. Even a cursory reading of *Tincher* belies th[e] argument" that *Tincher* "overruled *Azzarello* but did little else." *Renninger*, 163 A.3d at 1000. Rather, in *Tincher*, "the Supreme Court rejected the '*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law." *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381).

During the now-repudiated *Azzarello* period, the Pennsylvania Supreme Court held that strict liability precluded evidence that the defendant's product complied with industry standards in *Lewis v. Coffing Hoist Div.*, 528 A.2d 590 (Pa. 1987). "'[I]ndustry standards'" go to the negligence concept of reasonable care, and . . . under our decision in *Azzarello* such a concept has no place in an action based on strict liability in tort." *Id.* at 594. *Lewis* thus used the now-repudiated *Azzarello* defect standard to depart from prior precedent that had held industry standards admissible in strict liability. *See Forry v. Gulf Oil Corp.*, 237 A.2d 593, 598 & n.10 (1968) (industry standards – "the custom and practice in the [relevant] industry" held relevant to establishing product defect under §402A).

Post-*Tincher* Pennsylvania cases support admissibility of state of the art evidence generally. *See High v. Pennsy Supply, Inc.*, 154 A.3d 341, 350 n.5 (Pa. Super. 2017) (expert industry standards compliance testimony relevant to product's "nature" in consumer expectations approach); *Webb*, 148 A.3d at 482 (the *Azzarello* "strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania"); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on "state-of-the-art" grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at *2 (E.D. Pa. Jan. 26, 2017) ("After *Tincher*, courts should not draw a bright line between negligence theories and strict liability theories regarding evidence of industry standards"); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *3 (W.D. Pa. July 14, 2016) (the "the principles of *Tincher* counsel in favor of [the] admissibility" of compliance with "industry or government standards"); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at *7 (Pa. C.P. Clarion Co. Oct. 19, 2015) (industry standards evidence admissible as "particularly relevant to factor (2)" of *Tincher*'s risk/utility approach).

The contrary SSJI (Civ.) §16.122 would perpetuate the *Lewis per se* exclusion of industry standards evidence. *Id.* at Subcommittee Note (relying solely upon the *Lewis* line of cases). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High*, 154 A.3d at 347.

16.122(4) STRICT LIABILITY – PLAINTIFF CONDUCT EVIDENCE

You have heard evidence about the manner that the plaintiff[s] used the product. You may consider this evidence as you evaluate whether the product was in a defective condition and unreasonably dangerous to the user. However, a plaintiff's failure to exercise care while using a product does not require your verdict to be for the defendant.

[If the evidence is that the plaintiff's conduct was "highly reckless" and creates a jury question whether this conduct could be "a sole or superseding cause" of the plaintiff's harm, then the jury should also be instructed on that conduct as a superseding cause.]

RATIONALE

The pre-*Tincher* decision *Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012), held that a plaintiff conduct, such as product misuse, was admissible in strict liability when "highly reckless" and tending to establish that such conduct "was the sole or superseding cause of the injuries sustained." *Id.* at 1101. Evidence that showed nothing more than "a plaintiff's comparative or contributory negligence" was not admissible. *Id.* at 1098. Under the Pennsylvania Fair Share Act, plaintiff conduct cannot be apportioned to reduce recovery in strict liability – liability is reduced only by the conduct of "joint defendants." 42 Pa. C.S. §7102(a.1).

However, *Tincher* also viewed plaintiff conduct as relevant to whether a claimed product defect creates an "unreasonably dangerous" product, particularly under the risk/utility prong of its "composite" test. *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 401-02 (Pa. 2014). The fifth risk/utility factor is, "The user's ability to avoid danger by the exercise of care in the use of the product." *Id.* at 389-90 (quoting factors). Post-*Tincher* courts applying the risk/utility prong utilize these factors to determine unreasonably dangerous defect. *Punch v. Dollar Tree Stores*, 2017 WL 752396, at *8 (Mag. W.D. Pa. Feb. 17, 2017), *adopted* 2017 WL 1159735 (W.D. Pa. March 29, 2017); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *2-3 (W.D. Pa. March 15, 2016); *Lewis v. Lycoming*, 2015 WL 3444220, at *3 (E.D. Pa. May 29, 2015); *Capece v. Hess Maschinenfabrik GmbH & Co. KG*, 2015 WL 1291798, at *3 (M.D. Pa. July 14, 2015); *Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790, at *3 (Pa. C.P. Mifflin Co. Sept. 23, 2016), *aff'd mem.*, 2017 WL 1163056 (Pa. Super. March 28, 2017); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at *4 (Pa. C.P. Clarion Co. Oct. 19, 2015).

Plaintiff conduct evidence thus has been held relevant, regardless of causation, where such evidence would make the risk/utility factor of avoidance of danger through exercise of care in using the product more or less probable. *Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at *2-3 (E.D. Pa. Jan. 26, 2017) (plaintiff conduct in not "heeding instructions" that "a reasonable consumer" would have followed is admissible); *Punch*, 2017 WL 752396, at *11 ("a jury could conclude that the Plaintiffs might have avoided the injury had they exercised reasonable care with the product"); *Sliker*, 2015 WL 6735548, at *4 (plaintiff conduct "may be relevant to the risk-utility standard articulated in *Tincher* and is therefore admissible for that purpose"). Exercise of care as risk avoidance, however, is just one factor in the risk/utility determination.

Contributory fault, in and of itself, is not a defense to strict liability. 42 Pa. C.S. §7102(a.1); *see Kimco Development Corp. v. Michael D's Carpet Outlets*, 637 A.2d 603, 606 (Pa. 1993). In cases where plaintiff conduct evidence is admitted as relevant to defect, the plaintiff would be entitled to request a cautionary instruction to prevent the jury from considering such evidence for any other purpose. *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997); *Bialek v. Pittsburgh Brewing Co.*, 242 A.2d 231, 235 (Pa. 1968).

The contrary SSJI (Civ.) §16.122 does not mention the *Tincher* risk/utility factor of avoidance of danger through exercise of care. *Id.* at Subcommittee Note (discussing

plaintiff conduct solely in the causation context). The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI, ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability," specifically *Tincher*'s recognition of a new test for product defect. *High*, 154 A.3d at 347.

16.175 CRASHWORTHINESS – GENERAL INSTRUCTIONS

The plaintiff has alleged a crashworthiness defect. By "crashworthiness" I mean the accident that happened was not caused by any defect in the [product]/[vehicle]. Instead the plaintiff alleges that a defect enhanced injuries that [he]/[she] sustained in that accident, making those injuries worse than if the alleged defect did not exist.

In a crashworthiness case, the first question is whether the [product]/[vehicle] was defective. Only if you find that the design of the [product's]/[vehicle's] [specific defect alleged] was unreasonably dangerous and defective, under the definitions I have just given you, should you proceed to examine the remaining elements of crashworthiness.

RATIONALE

"Crashworthiness," in Pennsylvania, has been considered a design defect-related "subset of a products liability action pursuant to Section 402A ." *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994); *accord Parr v. Ford Motor Co.*, 109 A.3d 682, 689 (Pa. Super. 2014) (post-*Tincher*). *Cf. Harsh v. Petroll,* 887 A.2d 209, 211 n.1 (Pa. 2005) (noting "continuing controversy" about "whether crashworthiness claims. . . are appropriately administered as a subset of strict liability and/or negligence theory"). "The effect of the crashworthiness doctrine is that a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy." *Kupetz*, 644 A.2d at 1218.

"[T]he crashworthiness doctrine is uniquely tailored to address those situations where the defective product did not cause the accident but served to increase the injury." *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 925-26 (Pa. Super. 2002). Crashworthiness thus is not merely "an additional theory of recovery that a plaintiff may elect to pursue." *Id.* at 926 ("disagree[ing]" with that proposition). Rather crashworthiness requires "particularized instructions to jurors concerning increased harm." *Pennsylvania Dep't of Gen. Servs. v. U.S. Mineral Prod. Co.*, 898 A.2d 590, 602 (Pa. 2006). These crashworthiness instructions are to be given in any case involving enhanced injuries from a design defect not alleged to cause the accident itself.

While the crashworthiness doctrine in Pennsylvania applies most commonly in the context of motor vehicles, it is not limited to that scenario. *Colville*, 809 A.2d at 923 (standup rider). The principle underlying the doctrine is compensation for injuries that result not from an initial impact, but from an unnecessary aggravation or enhancement caused by the design of the product. *Id.* For example, a claim that the structure of an automobile failed to prevent an otherwise preventable injury in a foreseeable accident would fall under the crashworthiness doctrine. *Harsh*, 887 A.2d at 211 n.1. The crashworthiness doctrine likewise applies to safety devices such as helmets that are designed to reduce or mitigate injury in foreseeable impacts. *Craigie v. General Motors,* 740 F. Supp. 353, 360 (E.D. Pa. 1990) (characterizing *Svetz*);, *Svetz v. Land Tool Co.*, 513 A.2d 403 (Pa. Super. 1986) (motorcycle helmet).

Although the crashworthiness doctrine is sometimes described in terms of "second collision," this terminology is disfavored. Crashworthiness is frequently invoked where no literal "second collision" or "enhanced injury" is present. *Colville*, 809 A.2d at 924; *Kupetz*, 644 A.2d at 1218. The doctrine applies, for instance, not only when a vehicle occupant sustains injuries within the vehicle itself, but also when an occupant is ejected or suffers injury without an actual second collision or "impact." *Colville*, 809 A.2d at 924.

Likewise, while the doctrine refers to the "enhancement" of an occupant's injuries, its application is not limited to instances of literal "enhancement" of an otherwise existing injury. Rather, the crashworthiness doctrine extends to situations of indivisible injury, such as death. *Harsh*, 887 A.2d at 219. The doctrine also "include[s] those circumstances where an individual would not have received any injuries in the absence of a defect."

Colville, 809 A.2d at 924-25; *see Kolesar v. Navistar Int'l Transp. Corp.*, 815 F. Supp. 818, 819 (M.D. Pa. 1992) (permitting plaintiff to proceed on a crashworthiness theory where the plaintiff would have walked away uninjured absent the defect), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

This instruction's "unreasonably dangerous" language recognizes that *Tincher v. Omega Flex, Inc.*, changed the defect test in all §402A strict liability actions by returning to the jury the inquiry of whether a product is "unreasonably dangerous." 104 A.3d 328, 380 389-91 (Pa. 2014). See Rationale for Suggested Instruction 16.20(1). The consumer expectations test for "unreasonably dangerous" will ordinarily not apply to products of complex design or that present esoteric risks, because an ordinary consumer does not have reasonable safety expectations about those products or those risks. *Tincher*, 104 A.3d at 388. As the *Tincher* court explained:

> [A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.

Id. (quoting *Soule* 882 P.2d at 308). The crashworthiness doctrine exists to address exactly such products and scenarios. *Cf. Harsh*, 887 A.2d at 219. Accordingly, the consumer expectations method of proof should not be permitted and the jury should not be instructed on the consumer expectations test in crashworthiness cases.

16.176 CRASHWORTHINESS - ELEMENTS

I will now instruct you on the plaintiff's burden in a crashworthiness case. In order to prove the defendant liable in a "crashworthiness" case, the plaintiff has the burden of proving:

1. That the design of the [product]/[vehicle] in question was defective, rendering the product unreasonably dangerous, and that at the time the [product]/[vehicle] left the defendant's control, an alternative, safer design, practicable under the circumstances existed;

2. What injuries, if any, the plaintiff would have sustained had the alternative, safer design been used; and

3. The extent to which the plaintiff would not have suffered these injuries if the alternative design had been used, so that those additional injuries, if any, were caused by the defendant's defective design.

If after considering all of the evidence you feel persuaded that these three propositions are more probably true than not, your verdict must be for plaintiff. Otherwise your verdict must be for the defendant.

RATIONALE

The burden of proving the elements of crashworthiness rests on the plaintiff. *Schroeder v. Com., DOT*, 710 A.2d 23, 27 n.8 (Pa. 1998); *Parr v. Ford Motor Co.*, 109 A.3d 682, 689 (Pa. Super. 2014) (post-*Tincher*); *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532, 548, 550-551 (Pa. Super. 2009); *Raskin v. Ford Motor Co.*, 837 A.2d 518, 524 (Pa. Super. 2003); *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 922-23 (Pa. Super. 2002); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994). In *Stecher v. Ford Motor Co.*, 812 A.2d 553, 558 (Pa. 2002), the Supreme Court reversed as deciding a moot issue a Superior Court ruling that purported to shifted the burden of proof in crashworthiness cases to defendants. All post-*Stecher* appellate decisions impose the burden of proof on plaintiffs.

Although some federal cases predicting Pennsylvania law listed four elements of crashworthiness (breaking element one, above, into two elements at the "and"), *see Oddi v. Ford Motor Co.*, 234 F.3d 136, 143 (3d Cir. 2000); *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 284 (3d Cir. 1994), the great majority of Pennsylvania precedent, including all recent state appellate authority, defines crashworthiness as having three elements. *See Schroeder*, 710 A.2d at 27 n.8; *Parr*, 109 A.3d at 689; *Gaudio*, 976 A.2d at 532, 550-551; *Colville*, 809 A.2d at 922-23; *Kupetz*, 644 A.2d at 1218. This instruction follows the controlling Pennsylvania cases. It is based on the crashworthiness charge approved as "correct" in *Gaudio*, 976 A.3d at 550-51, to which is added the "unreasonably dangerous" language required of all §402A instructions by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 380 399-400 (Pa. 2014). *See* Rationale for Suggested Instruction 16.20(1), *supra*.

Crashworthiness "requir[es] the fact finder to distinguish non-compensable injury (namely, that which would have occurred in a vehicular accident in the absence of any product defect) from the enhanced and compensable harm resulting from the product defect." *Pennsylvania Dep't of Gen. Servs. v. U.S. Mineral Prod. Co.*, 898 A.2d 590, 601 (Pa. 2006). Crashworthiness allows recovery of "increased or enhanced injuries over and above those which would have been sustained as a result of an initial impact, where a vehicle defect can be shown to have increased the severity of the injury." *Harsh v. Petroll*, 887 A.2d 209, 210 n.1 (Pa. 2005). These instructions direct the jury to apportion the plaintiff's injury, in order to limit recovery to compensable harm. *Kupetz*, 644 A.2d at

1218. Thus, "[t]he second of these elements required the plaintiff to demonstrate "what injuries, *if any*, the plaintiff would have received had the alternative safer design been used." *Colville*, 809 A.2d at 924 (emphasis original).

The "precept of strict liability theory that a product's safety be adjudged as of the time that it left the manufacturer's hands," *Duchess v. Langston Corp.*, 769 A.2d 1131, 1140 (Pa. 2001), is recognized throughout Pennsylvania strict liability jurisprudence, including the "subset" of crashworthiness doctrine.

16.177 CRASHWORTHINESS – SAFER ALTERNATIVE DESIGN PRACTICABLE UNDER THE CIRCUMSTANCES

In determining whether the plaintiff's proposed alternative design was safer and practicable under the circumstances at the time the [product][vehicle] left the defendant's control, the plaintiff must prove that the combined risks and benefits of the product as designed by the defendant made it unreasonably dangerous compared to the combined risks and benefits of the product incorporating the plaintiff's proposed feasible alternative design.

In determining whether the product was crashworthy under this test, you may consider the following factors:

[Instruct on the risk-utility factors from Suggested Instruction 16.20(3)]

RATIONALE

Crashworthiness involves a risk-utility test that compares the defendant's design with the plaintiff's proposed alternative. *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 548-50 (Pa. Super. 2009). While *Tincher v. Omega Flex, Inc.,* permits a plaintiff in an ordinary §402A claim to prove that a product is unreasonably dangerous and defective under either a consumer expectations test or a risk-utility test, 104 A.3d 328, 335, 388, 406-07 (Pa. 2014); *see* Suggested Instructions 16.120(2) & 16.120(3), *supra*, the comparison between the manufacturer's design, present in the challenged product, and the plaintiff's proposed alternative design, is an essential element of crashworthiness. *E.g.*, *Schroeder v. Commonwealth, DOT*, 710 A.2d 23, 28 n.8 (Pa. 1998); *Parr v. Ford Motor Co.,* 109 A.3d 682 (Pa. Super. 2014) (post-*Tincher*); *Gaudio*, 976 A.2d at 532 (Pa. Super. 2009); *Colville v. Crown Equip. Corp.,* 809 A.2d 916, 922 (Pa. Super. 2002); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994). This instruction therefore utilizes the same risk-utility factors as the risk-utility prong of the "composite" defect test from *Tincher,* 104 A.3d at 389-91.

Prior to its *Tincher* decision, the Supreme Court recognized that risk-utility analysis encompasses all intended uses of a product, not limited to the narrowly defined set of circumstances that led to the injury at issue. *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 836-37 (Pa. 2012) (scope of the risk-utility analysis in a strict-liability design defect case is not limited to a particular intended use of the product). Because the real likelihood exists that an increase in safety in one aspect of a product may result in a decrease in safety in a different aspect of the same product, Pennsylvania courts have recognized that a manufacturer's product development and design considerations are relevant, in the context of a risk-utility analysis, to assess a plaintiff's crashworthiness claim. *Gaudio,* 976 A.2d at 548 ("If, in fact, making the [product] in question 'safer' for its occupants also created an 'unbelievable hazard' to others, the risk-utility is essentially negative. The safety utility to the occupant would seemingly be outweighed by the extra risk created to others.") (quoting *Phatak v. United Chair Co.*, 756 A.2d 690, 694 (Pa. Super. 2000)). For these reasons, juries consider the same set of factors in evaluating a proposed alternative design that are used to evaluate whether the subject design is unreasonably dangerous. Just as when the jury assesses overall product design, some, or all of the factors may be particularly relevant, or somewhat less relevant, to the jury's risk-utility assessment. *See* Rationale of Suggested Instruction 16.120(3), *supra*.

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