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"Pennsylvania Supreme Court Overrules *Azzarello* in Landmark *Tincher* Decision, Only To Have Suggested Jury Instructions Seek Azzarello's Reinstatement" {Volume 1}

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The Pennsylvania Supreme Court's decision in *Azzarello v. Black Brothers Co.,* 391 A.2d 1020 (Pa. 1978) and its logically strained progeny created real problems from the day *Azzarello* was decided until its demise in late 2014. The *Azzarello* model was a vain attempt at "social engineering" that ultimately collapsed. The Court's decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014) revived Pennsylvania's self-description as a Restatement of Torts (Second), §402A jurisdiction.

Azzarello deleted the "unreasonably dangerous" element of §402A because that language "rings of negligence," 391 A.2d at 1025. *Azzarello* was understood to prohibit any use of negligence-like language or theories in a product liability trial in Pennsylvania: "besides holding that a product is defective when it leaves the supplier's control lacking any element necessary to make it safe for its intended use, we also concluded [in *Azzarello*], if not expressly then certainly by clear implication, that negligence concepts have no place in a case based on strict liability." *Lewis v. Coffing Hoist Div., Duff-Norton Co*., 528 A.2d 590, 593 (Pa. 1987).

The core ruling in *Azzarello,* now inoperative, was that the trial court had erred by using the phrase "unreasonably dangerous" in the jury charge. *Azzarello,* 391 A.2d at 1022. However, the Supreme Court came to realize that *Azzarello's* "no-negligence-in-strict-liability rubric resulted in material ambiguities and inconsistencies in Pennsylvania's procedure.' *Schmidt v. Boardman Co.*, 11 A.3d 924, 940 (Pa. 2011). *Tincher expressly* "overruled" *Azzarello. See Tincher,* 104 A.3d at 335. *Tincher* held that the "unsupported assumptions and conclusory statements upon which *Azzarello*'s directives are built are problematic on their face . . . :

> In a jurisdiction following the 2nd Restatement formulation of strict liability in Tort, the critical inquiry in affixing liability is whether the product is 'defective;' in the context of a [product liability claim], whether a product is defective depends upon whether that product was unreasonably dangerous [when sold as a new product].

104 A.3d at 380 (emphasis added). The Court emphasized that the "defect" and "unreasonably dangerous" aspects of products liability cannot and should never have been *"divorced*" from each other. *Id*. (emphasis added). "[T]he notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." *Id* at 400. The *Tincher* Court clearly returned the threshold "unreasonable dangerous" product defect determination to the jury. *Id* at 406-08.[1]

Of equal importance, *Tincher* labeled the *Azzarello* "any element" standard for the jury's determination of defect as "impractical," opting instead for a "composite" standard where defect may be proven under either "risk-utility" or "consumer expectation" approaches, depending on the particulars of a given case and product. 104 A.3d at 384. A product may be proven defective by showing either that (1) "the danger is unknowable and unacceptable to the average or ordinary consumer," or that (2) "a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. *Id.* at 387, 389.[2] However, to maintain integrity and fairness, each part of the standard of proof remains subject to limitations that must be observed as appropriate to the facts of a particular dispute. *Tincher,* 104 A.3d at 401.

Consequently, *Tincher* teaches that both "tests" may not be suitable for all cases involving product design. *Tincher,* 104 A.3d. at 388, 407 & n.29 (discussing *Soule v Gen. Motors Corp.,* 882 P.2d 298 (Cal. 1994)); *see also Pruitt v. GM Corp.,* 72 Cal. App. 4th 1480 (1999) (consumer expectations inappropriate in motor vehicle design case).[3]

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While *Tincher* underscored that the core of the Restatement (2nd) of Torts §402A is the foundation of Pennsylvania products liability jurisprudence, at the same time the Court expressly approved certain principles of the 3rd Restatement. 104 A.3d at 397 (the "typical" design defect case involves foreseeable risks, akin to negligence, and thus approximates the "alternative design" approach of the Third Restatement).[4]

Of note, the *Tincher* decision deliberately left a number of related questions unanswered, since they were not specifically before the Court at the time. The Court then adopted an "incrementalist" approach, insisting that principles of "judicial modesty counsel . . . that we be content to permit the common law to develop incrementally." 104 A.3d at 406.

THE REVISED "SUGGESTED STANDARD JURY INSTRUCTIONS"

In June 2016 the Pennsylvania Bar Institute published a "Revision" to the "Suggested Pa. Standard Jury Instructions" for Product's Liability (Chapter 16). These revisions were drafted by the Civil Instructions Subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions (hereafter the "subcommittee"). This Subcommittee's work product is neither adopted nor approved by the Supreme Court. Of significance, there was apparently no advance notice of these "revisions" prior to their publication – they were not circulated for comment or publicized in advance to anyone outside the Subcommittee. Apparently, none its members has been actively involved in the defense of strict liability cases. The "Note to the User" indicates that "these instructions are only suggested." This is confirmed by controlling precedent.[5]

The problems with the Suggested Standard Jury instructions ("SSJI") are numerous and wide-ranging, but can be summarized as follows:

a) they ignore the essence of *Tincher,* namely that the distinction between strict liability and negligence does not create a "bright line rule that any negligence rhetoric carries an undue risk of misleading lay juries in strict liability cases," and that the "notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action;

b) they make highly questionable predictions and assumptions relating to issues *Tincher* deliberately declined to decide, then ignore *Tincher's* directive to permit the common law to develop incrementally in these specific areas. In doing so, they ignore the *Tincher* Court's express commitment to "judicial modesty;" and attempt to influence the development of the law by suggested one-sider answers to open questions.

c) they ignore the reasons why - *and essentially ignore the fact that* - *Tincher* expressly overruled *Azzarello.* Most tellingly, the SSJI track *Azzarello* by completely omitting mention of the 402A requirement that, to support strict liability, a product must be unreasonably dangerous, and by retaining the "any element" test for defect;

d) they include negligence concepts and terminology only when doing so leads to a potential expansion of liability (such as bystander liability and limiting use-based defenses);

e) they support exclusion of evidence relating to a plaintiff's conduct;

f) they support exclusion of compliance with industry standards, industry custom and usage – issues deliberately left open by *Tincher* but exclusions clearly based on *Azzarello's* now rejected norm;

g) they create a "presumed knowledge" standard for warnings liability, and assume that *Tincher* has no impact on warnings claims; and

h) they omit any instruction on the long-established criteria for liability in "crashworthiness" cases

The most glaring problem with the Suggested Standard Jury Instructions is evident in the critical **Section 16.10, "GENERAL RULE OF STRICT LIABILITY."** First, there is no instruction*, indeed no mention at all*, of section 402A's requirement – clearly affirmed by *Tincher* as a "jury question" - that in order to support a finding of product defect, the plaintiff must prove and the jury must conclude that the product was "unreasonably dangerous" at the time of its original sale. Such a charge was standard before *Azzarello*.[6] Astoundingly, **Section 16.10** retains the "any element" language that was the unique and never imitated benchmark of the *Azzarello* charge,[7] and was essentially repudiated by *Tincher*.[8] Thus, the most important Suggested Instruction cannot withstand appellate scrutiny if *Tincher* means anything at all.

On the other hand, the Subcommittee embraces the negligence concepts of "reasonableness" and "foreseeability" when doing so *expands* potential liability. For example, **Sections 16.10(1)**

(GENERAL RULE OF STRICT LIABILITY) and **16.20 (DETERMINATION OF DESIGN DEFECT / CONSUMER EXPECTATION TEST)** allow the jury to impose liability if a product is being used in an "unintended but reasonably foreseeable way." **Section 16.100 (STRICT LIABILITY RESPONSIBILITY NON-DELEGABLE)** provides for the imposition of liability "despite the foreseeable conduct, negligent or otherwise, of others." **Section 16.120 (AFFIRMATIVE DEFENSE / SUBSTANTIAL CHANGE)** brings this affirmative defense into play only if the defendant establishes that the alteration "was so extraordinary that it was not reasonably foreseeable." Finally, **Section 16.121 (AFFIRMATIVE DEFENSE / USE OF PRODUCT IN UNINTENDED WAY)** allows this affirmative defense only if the defendant establishes that the use "was so extraordinary that it was not reasonably foreseeable." Such instructions, particularly in the *absence* of the core "unreasonably dangerous" charge (and *inclusion* of the *Azzarello* "any element" charge), will likely give the plaintiff the advantage in most cases. The Pennsylvania Supreme Court had rejected this kind of one-way use of negligence concepts solely to increase liability even before *Tincher*.[9]

Ignoring *Tincher*'s call for judicial modesty, the Subcommittee proposes critical instructions not only expressly contrary to issues that *Tincher* did decide, but also effectively decides issues that *Tincher* expressly reserved for future ruling within a fully developed factual context. **Section 16.122 (DEFENSES NOT AVAILABLE IN STRICT LIABILITY CLAIMS)** preempts the treatment of a plaintiff's fault as well as the admissibility of industry customs or standards, by commenting on the excludability of such evidence. *Tincher* did not decide, but rather specifically reserved these issues for future decision, on a case-by-case basis. 104 A.3d at 409-410. In effect, the Subcommittee attempts to throw a life-preserver to many pre-*Tincher* decisions that were expressly grounded in and predicated on the now-overruled *Azzarello* quarantine of negligence principles in product liability trials.[10] Surely each of these decisions will, at the proper time, be an appropriate target for repudiation as "fruit of the poisonous Azzarello decision."

Section 16.122 makes a mockery of *Tincher*'s "not purport[ing] to either approve or disapprove prior decisional law" on such issues. *Id.* at 409-10. Its instructions "approve" what *Tincher*" deferred. As stated previously, a fundamental premise of *Tincher* is that the character of the product and the conduct of the manufacturer are "largely inseparable," 104 A.3d at 405. By blatantly ignoring this prescript, **Section 16.122** likewise cannot withstand appellate scrutiny.

Compounding the problem, **Section 16.122 (1) (KNOWLEDGE OF DEFECT)** actually creates a "presumed knowledge" standard for liability in warnings and other claims. Such standard is nowhere to be found in any Pennsylvania case law – *Tincher* was not a warnings case – and should likewise be discarded as improper.

In the Subcommittee's notes to **Section 16.30**, it assumes that *Tincher* "does not affect the law concerning this charge." However, the Subcommittee totally ignores the Superior Court's precedential opinion in *Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015), *appeal dismissed* ____ A.3d ____ (Pa. 2016), which holds that the opposite is true, and that the question whether a product was "unreasonably dangerous" at the time of original sale is likewise vital to a warnings-based claim. *Id*.

Finally, while the Subcommittee acknowledges in its notes the requisite elements of a products liability claim based on "crashworthiness" or "enhanced injury," the Suggested Standard Jury Instructions themselves are silent on this topic. This silence is unjustifiable, as the elements and the burden of proof in crashworthiness cases have been established repeatedly in binding Pennsylvania precedent.[11]

In sum, *Tincher* abolished the prohibition of negligence principles in product liability cases and trials, holding that the "broad" reading of *Azzarello* in previous decisions, "to the point of correcting that negligence concepts have no place in Pennsylvania strict liability doctrine," was error. 104 A.3d at 376.[12] Yet, that elimination is exactly what the suggested standard jury instructions and the accompanying notes purport to do in many critical areas. The Subcommittee, through its Suggested Standard Jury Instructions, proceeds as though the *Tincher* "paradigm" never took place, except when the effect is to expand potential liability.

This past July, more than 50 members of the statewide defense community as well as a group of nationwide product manufacturers and insurers wrote a letter to the chairman of the Subcommittee that drafted these controversial Suggested Standard Jury Instructions, outlining in detail how the suggested instructions "veer sharply from the course that the Court plotted in *Tincher*." The authors of the letter urged the Subcommittee to acknowledge and address the serious concerns raised, and invited members of the Subcommittee to meet with delegates from the defense group. The Subcommittee acknowledged receipt of the letter, but ignored repeated requests for further action.

{VOLUME 2 WILL OFFER A SPECIFIC *APPROACH* TO OFFERING COUNTER-INSTRUCTIONS, ON A CASE-BY-CASE BASIS}

ENDNOTES

[1]In discussing the relative roles of the judge and jury in a product liability trial, the *Tincher* Court pointed out that "severing findings relating to the risk-utility calculus from findings relating to the condition of the product is impractical and inconsistent with the theory of strict liability." *Id.* at 406

[2]Consumer expectations and risk-utility are not substantive theories of liability. Neither "test" has elements independent of those that define the tort of strict liability. Both are more precisely understood as rubrics for methods of proof that a product was designed or manufactured in a defective condition rendering it unreasonably dangerous – i.e., proof of breach of the duty owed under Section 402A. *Tincher*, 104 A.3d at 362, 384 (discussing malfunction evidence and res ipsa loquitur); *Breidor v. Sears Roebuck and Co*., 722 F.2d 1134, 1140 fn. 14 (3d Cir 1983) (malfunction test is not a legal theory); *1836 Callowhill St. v Johnson Controls, Inc*., 819 F.Supp. 460, 463 (E.D. Pa. 1993) ("mal-

function rule" and "res ispa loquitur" are rules of evidence and not distinct theories of liability); *see also Mikolajczyk v. Ford Motor Co*., 901 N.E.2d 329, 349 (Ill. 2008) (consumer expectations and risk utility are methods of proving defect in a strict liability case, not legal theories).

[3]Since *Tincher*, the consumer expectation standard has been found inapplicable to the facts of several Pennsylvania cases. *See Yazdani v. BMW of North America, LLC*, ___ F. Supp.3d ___, 2016 WL 3041869, at *3 (E.D. Pa. May 26, 2016); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439, 452-53 (E.D. Pa. 2016); *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at *9 (E.D. Pa. Sept. 8, 2016); *Capece v. Hess Maschinenfabrik GmbH & Co. KG*, 2015 WL 1291798, at *3 (M.D. Pa. March 20, 2015).

[4]In fact, the primary reason for the Court's decision not to adopt the Third Restatement in toto was its unwillingness to replace one all-encompassing approach (i.e., the Azzarello approach) with another. Id. at 399 ("[O]ur reticence respecting broad approval of the Third Restatement is separately explainable by looking no further than to the aftermath of Az zarello . . .."). Pennsylvania can now be characterized as a "Restatement 2.5"state!

[5]"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.11 (Pa. 1997). "[A]s their title suggests, the instructions are guides only." *Commonwealth v.Simpson*, 66 A.3d 253, 274 n.24 (Pa. 2013). *See Carpinet v. Mitchell*, 853 A.2d 366, 374 (Pa. Super. 2004) (reversing for a new trial where trial court charged with an erroneous SSJI); *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992) ("the suggested standard jury instructions have not been adopted by our supreme court and therefore are not binding").

[6]*E.g.*, *Forry v. Gulf Oil Corp.*, 237 A.2d 593, 597 (Pa. 1968) ("unreasonably dangerous" part of plaintiff's burden of proof); *Greiner v. Volkswagenwerk Aktiengeselleschaft*, 540 F.2d 85, 94-95 (3d Cir. 1976) (applying Pennsylvania law).

[7]Suggested Standard Jury Instruction 16.1.0 states that a product is defective "if at the time the product left [name of defendant's] control, it lacked any element necessary to make it safe for [it's intended] use, [or use in an unintended but reasonably foreseeable way], or contained any condition that made it unsafe for [its intended] use [or use in an unintended but reasonably foreseeable way]."

[8]See *Tinche*r, 104 A.3d at 384. It is noteworthy that the Subcommittee Notes to §16.10, pp. 3-5, expressly embrace the *Tincher*-repudiated "bright line" quarantine of negligence concepts.

[9]*Schmidt*, 11 A.3d 924, 940 (Pa. 2011) ("comment[ing] on the fundamental imbalance, dissymmetry, and injustice of utilizing the no-negligence-in-strict-liability rubric to stifle manufacturer defenses, while at the same time relying on negligence concepts to expand the scope of manufacturer liability"); *Pa. Dep't of General Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 603 (Pa. 2006).("incongruous to constrain manufacturer resort to use-related defenses based on the logic that negligence concepts have no place in strict liability cases, while at the same time expanding the scope of manufacturer liability without fault in a generalized fashion using the negligence-based foreseeability concept").

[10]See, e.g. *Kimco Dev. Corp. v. Michael D's Carpet Outlets,* 637 A.2d 603 (Pa. 1993), *Lewis v. Coffing Hoist Div.,* 528 A.2d 590 (Pa. 1987), and *Reott v. Asia Trend, Inc.,* 55 A. 3d 1088 (Pa. 2012).

[11]*Stecher v. Ford Motor Co.*, 812 A.2d 553, 558 (Pa. 2002) (reversing Superior Court decision that would have shifted the burden of proof); *Schroeder v. Com. Dep't of Transportation*, 710 A.2d 23, 27 n.8 (Pa. 1998); *Parr v. Ford Motor Co*., 109 A.3d 682 (Pa. Super. 2014) (post-*Tincher*); *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532, 551-52 (Pa. Super. 2009); *Colville v. Crown Equipment Corp*., 809 A.2d 916, 922 (Pa. Super. 2002); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994).

[12]"[T]hose decisions essentially led to puzzling trial directors that the bench and bar understandably have had difficulty following in practice." *Id.*

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