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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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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 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

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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

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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