"TINCHER '2' PROVIDES CLARITY FOR YOU"

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THE CONTEXT OF THE *TINCHER II* DECISION

On February 16, 2018, a unanimous 3-judge panel of the Pennsylvania Superior Court in *Tincher v. Omega Flex, Inc.*, ___ A.3d ___, No. 1285 EDA 2016 (Pa. Super. Feb. 16, 2018) ("*Tincher II*") held, following the Pennsylvania Supreme Court's prior landmark ruling in the same case, *Tincher v. Omega Flex, Inc*., 104 A.3d 328 (Pa. 2014) ("*Tincher I*"), that in a strict product liability case it is "fundamental error" to use an *"Azzarello"* jury charge employing the now-overruled "any element" defect test and informing the jury that the defendant manufacturer was the "guarantor" of product safety.

As we all know too well, in *Azzarello v. Black Bros. Co*., 391 A.2d 1020 (Pa. 1978), the Pennsylvania Supreme Court held that: (1) it was improper to introduce negligence concepts into a strict liability case; (2) it was for the Court, not the jury, to determine whether a product was "unreasonably dangerous" under the Second Restatement – thereby ushering in the anomalous era of the trial judge as social policy "engineer"; (3) the seller is "the guarantor" of the product's safety; and (4) a jury may find a defect "where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for its intended use." *Azzarello*, 391 A.2d at 1025-27. *Azzarello* eliminated the core "unreasonably dangerous" element of §402A from the jury's consideration because "that language rings of negligence," 391 A.2d at 1025.

For thirty-six years following *Azzarello*, the devolution of coherent products liability jurisprudence continued. *Azzarello* was interpreted to prohibit *any* use of negligence-based language or theories in a product liability trial in Pennsylvania. *See, e.g., Lewis v. Coffing Hoist Div. Duff-Norton Co.,* 528 A.2d 590, 593 (Pa. 1987) ("besides holding that a product is defective when it leaves the supplier's control lacking any element necessary to make it safe for its intended use, we also concluded [in *Azzarello],* if not expressly then certainly by clear implication, that negligence concepts have no place in a case based on strict liability").

The Pennsylvania Supreme Court's 2014 decision in *Tincher 1* expressly overruled *Azzarello*, 104 A.3d at 335, and revived Pennsylvania as a Restatement of Torts (Second), §402A jurisdiction.

Tincher I emphasized that the "defects" and "unreasonably dangerous" aspects of products liability cannot and should never have been "*divorced*" from each other. 104 A.3d at 380. "The notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause

of action." *Id.* at 400. Thus, *Tincher I* returned a threshold "unreasonably dangerous" product defect determination to the jury. *Id.* at 406-08.

The procedural history that led to the *Tincher II* decision is illuminating. In a nutshell, Omega Flex appealed from the judgment entered in favor of the Tinchers following a jury trial, and the denial of its post-trial motions. Prior to the original trial, Omega Flex filed a motion to have the Trial Court give jury instructions based on Sections 1 and 2 of the Third Restatement of Torts: Products Liability (1998), rather than on the *Azzarello*-based "Lite" version of the Restatement (Second) of Torts. With *Azzarello* still the law, hat request was denied. The jury then found in the Tinchers' favor, and the appellate path ultimately led to the Pennsylvania Supreme Court and the consequent 2014 "*Tincher* paradigm."

In this most recent appeal, following the Pennsylvania Supreme Court's 2014 remand order, Omega Flex claimed it was entitled to a new trial because *Tincher I* held that the trial court's jury instruction contained a fundamental misstatement of the governing law. Plaintiffs countered that the voluminous evidence adduced at trial would have led a jury to the same conclusion of defect, regardless of the Court's charge on the law. The trial court bought it, hook, line and sinker.

Unlike the trial court, the Superior Court did not agree with the plaintiffs, and instead vacated the judgment, reversed the order of the Trial Court denying post-trial relief, and remanded the case for a new trial. "[T]he trial court had no authority to deny a new trial on the basis of its own speculation about what the jury would do under the Supreme Court's new formulation of the law." *Slip op.* at 27.

According to the unanimous *Tincher II* panel, "there is no question" that the *Azzarello* charge given during the trial was "incorrect:"

> The charge [that was given] contained all of the product liability law under *Azzarello* that the Supreme Court has now disapproved, including a definition equating a defective product with one that "leaves the suppliers' control lacking any element necessary to make it safe for its intended use," and a declaration that a manufacturer "is really a guarantor of [a product's] safety . . . "

Id. at 18. "There is no question that the error was fundamental to the case. It dealt with the principal issue disputed by the parties − whether there was a defect." *Id.* at 25. Indeed, the decision below was the "paradigm" of reversible error:

> ***A*n *Azzarello* "any element / guarantor" charge "fail[s] to conform to the applicable law, as stated in *Tincher," Id.* at 20. "The trial court gave a charge under law that the Supreme Court has explicitly overruled in this very case. Such a charge would appear to be a paradigm example of fundamental error."**

Id. **at 23 (**emphasis added**).**

In addition, the Pennsylvania Superior Court's *Tincher II* opinion states:

> • "If an incorrect definition of 'defect' under *Azzarello* calls for a new trial, an incorrect definition of 'defect' under *Tincher* should call for the same result." *Tincher II*, *slip op*. at 22-23.
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> • "The trial court's declaration that the new legal reformulation resulting from the Supreme Court's thorough and extensive decision . . . can cause no change to the verdict undervalues the importance of the Supreme Court's decision." *Id*. at 27 (emphasis added).
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> • "The Supreme Court said nothing in *Tincher I* to suggest that mere proof of a 'defect' under post-*Azzarello* strict liability law would be sufficient to prove an "unreasonably dangerous defective condition" under *Tincher I's* new formulation." *Id*. at 28.
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> • "The Supreme Court's statement that the 'question of whether a party has met its burden of proof' may properly be removed from a jury's consideration" . . . was referring only to a trial court's ability to decide 'a dispositive motion.'" *Id.* at 29.
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> • That the jury may have heard evidence about risk and utility during the trial does not mean that it rendered a verdict based on the risk/utility standard adopted by the Supreme Court as one way to find a product defective. ***In fact, the verdict could not mean that, because the jury was never instructed to make findings under such a standard. Rather than being asked to balance risks and utilities, the jury was told only to find whether [product] "lacked any element necessary to make it safe" − regardless of whatever reasonable risk/utility considerations might have gone into the decision to market [product] without such an element."*** *Id*. at.26 (emphasis added).

The Pennsylvania Superior Court's *Tincher II* opinion concludes with the following critical statement:

> In effect, the trial court seemed to conclude that because it believes there is sufficient evidence in the record to support a verdict for plaintiffs under the new *Tincher* standards, a new trial is not required. But, as the Supreme Court specifically instructed in *Tincher* itself, that is not a proper basis for decision. The Tinchers asked the Supreme Court to forgo resolving the issues presented to it because, they said, there was so much evidence supporting liability that any change in the law would not change the outcome. The Supreme Court rejected that

> suggestion, explaining that a verdict has meaning only considering the charge under which it was delivered: *"a trial court's charge defines the legal universe in which a jury operates for purposes of the verdict." Tincher, 104 A.3d at 347 . . . The bare litmus of sufficiency review cannot correct the fundamental error in the instructions to lay jurors concerning just what it is they are deciding. Id. The trial charge based on law overruled in this case was fundamental error. Omega Flex therefore is entitled to a new trial.*

Id. at 29-30 (emphasis added).

In sum, in a precedential opinion, *Tincher II* has unequivocally resolved the following:

- *Tincher I* overruled *Azzarello,* and after thirty-six years returned Pennsylvania to a Restatement of Torts (Second), §402A jurisdiction;

- if properly preserved, *Tincher I* is retroactively applied to cases previously filed and tried;

- in a post-*Tincher* product liability trial, it is fundamental and reversible error for a trial court to give an Azzarello "any element / guarantor" jury charge, and doing so in and of itself requires a new trial; and

- proof of "defect" under Restatement of Torts (Second), §402A requires that the product be "unreasonably dangerous" and the jury must be instructed accordingly.

THE RAMIFICATIONS OF *TINCHER II* FOR THE "DEBATE" REGARDING SUGGESTED JURY INSTRUCTIONS

In June 2016 - for reasons known only to the drafters, since nobody else was consulted - the Pennsylvania Bar Institute published a series of new, post-*Tincher I* Suggested Standard Jury Instructions that retained most of the *Azzarello* language. For that and other important reasons, the Pennsylvania Defense Institute (using a panel of some of the most experienced and knowledgeable product liability practitioners in the state) prepared and published *alternative* Suggested Jury Instructions for use in Product Liability cases in September 2017 that faithfully follow *Tincher I*. Of critical importance, The PDI *Tincher I*-based alternative Suggested Jury Instructions were expressly approved by the Philadelphia Association of Defense Counsel and were recently given to a jury by a Philadelphia trial judge.

Tincher II settled any debate over which competing set of suggested instructions was correct. The PBI Suggested Standard Jury Instructions are now expressly disapproved in *Tincher II,* on the critical definition of "defect." *Tincher II* is controlling precedent that the PDI / PADC view is correct, and that using the PBI definition of defect is "fundamental" – and thus reversible – error.

THE RAMIFICATIONS OF TINCHER II FOR THE "FRUITS OF THE POISONOUS *AZZARELLO* TREE"

By reiterating the prescripts of the *Tincher I* construct ***in the same case,*** *Tincher II* paves the way, legally and logically, for allowing jurors in a Pennsylvania products liability trial to hear and evaluate evidence that had for three decades been excluded from their consideration by Pennsylvania Supreme Court decisions expressly grounded in the now-repudiated *Azzarello* quarantine of anything that hinted at "negligence." *See, e.g., Lewis v. Coffing Hoist Div., Duff-Norton Co*., 528 A.2d 590, 593 (Pa. 1987).

There can thus be no ***doctrinal*** justification for per-se exclusion of *any* of the following categories of evidence, assuming relevance to the issues in a particular case:

- a product's compliance with government standards and regulations;
- a product's compliance with industry standards and regulations;
- a product's compliance with design and performance standard independent professional organizations;
- industry customs and practice;
- state-of-the-art at the time the product was sold;
- causative conduct on the part of the plaintiff and others; and
- the plaintiff's contributory negligence.

This type of evidence obviously informs the jury's evaluation of the design choices made by the manufacturer and the consequent integrity of the product.

CLARITY!

All products liability practitioners in the Commonwealth of Pennsylvania owe a debt of gratitude to the Pennsylvania Superior Court for shining the light of clarity on the ***Tincher I*** construct. The message – going forward, let the jurors decide.