Pennsylvania Supreme Court Overrules *Azzarello*, Only To Have PBI Suggested Jury Instructions Continue To Seek *Azzarello*'s Reinstatement (Volume 3 – Updates and Addenda to Proper Suggested Standard Jury Instructions)

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Introduction

The First Installment of this series, titled, "**Pennsylvania Supreme Court Overrules *Azzarello*, Only To Have PBI Suggested Jury Instructions Seek *Azzarello*'s Reinstatement (Vol. 1)," was** published in the February 2017 edition of **COUNTERPOINT**. That article discussed the key holdings of the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014)[1]: (1) Pennsylvania's strict liability design defect law remains grounded in the Restatement (2d) of Torts §402A (1965); (2) the 1978 decision in *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), improperly attempted to exclude negligence concepts from strict liability design defect jurisprudence, in a vain attempt at "social engineering" through product liability; (3) *Azzarello* is overruled; and (4) the key inquiry in strict liability design defect cases under *Tincher* is 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" indicated, the Bar Institute SSJI are only suggested and are not submitted to the Pennsylvania Supreme Court for approval.[2]

More specifically, the First Installment identified the numerous and systematic problems with the Bar Institute SSJI, including: (1) they ignore the overruling of *Azzarello* by retaining core jury instruction language drawn directly from *Azzarello*, and repudiated by *Tincher*; (2) they ignore *Tincher*'s holding that a concept of a "defective condition unreasonably dangerous" to the user is the "normative principle" in a strict liability trial in Pennsylvania, and that the jury must be so instructed; (3) they contain numerous unfounded assertions of law on corollary issues the *Tincher* Court expressly declined to address, and left to future courts to address incrementally; and (4) every one of the Bar Institute's departures from *Tincher* construed Pennsylvania law in a one-sided fashion beneficial only to plaintiffs.

Finally, the First Installment described the June, 2016 attempt by more than 50 legal organizations, business and insurance organizations, firms and experienced products liability lawyers to open a

[1] The Supreme Court's decision is referred to herein as "*Tincher*" or "*Tincher I*," for reasons that will become apparent.

[2] Note to the User, Bar Institute SSJI 2017 ed.

dialogue with the subcommittee responsible for the Bar Institute SSJI. That *ad hoc* group sought to discuss how to make the Bar Institute SSJI reflect the actual holdings and rationales of *Tincher*, to reflect accurately the law as it is, and to eliminate the slanted advocacy embedded in the Bar Institute SSJI. The subcommittee acknowledged receipt of the letter – but then ignored the outreach completely. The stonewalling continues to this day, leaving no doubt that the subcommittee departed from its own stated goal of "ensuring the proposed instructions reflect the current law and case law"[3] and leaving no doubt that the subcommittee has intentionally published incorrect, improper and biased "suggested standard" instructions.

In the face of the Subcommittee's intransigence and unwillingness even to discuss the pervasive inaccuracies in the Bar Institute SSJI, a group of experienced practitioners took action. Together, this "*Tincher* Group" totals more than 200 years of experience in litigating products liability cases at the trial and appellate court levels.

Under the umbrella of the Pennsylvania Defense Institute ("PDI"), the *Tincher* Group decided collectively that the undeserved gloss of validity created by the PBI's publishing of clearly improper suggested jury instructions could not go unanswered. To respond, the *Tincher* Group drafted and proposed suggested jury instructions that accurately reflect the dictates of the Pennsylvania Supreme Court in *Tincher*, its progeny, and those prior cases that were unaffected by the overruling of *Azzarello*.

The results of more than one year's worth of deliberation, drafting and redrafting were published in September 2017 and attached to the Second Installment of this series, entitled "**Pennsylvania Supreme Court Overrules *Azzarello*, Only to Have PBI Suggested Jury Instructions Seek *Azzarello*'s Reinstatement (Volume 2 – Proper Suggested Standard Jury Instructions),** published in the October 2017 edition of **COUNTERPOINT.**

Products Liability Suggested Standard Jury Instructions Pursuant to *Tincher v. Omega-Flex, Inc.*, 104 A.3d 328 (Pa. 2014) September 2017 Edition.

These suggested jury instructions, endorsed by PDI in 2017 ("PDI SSJI"), were prepared as accurate recitations of the law as it is, based on decisions of courts that have actually applied *Tincher* as the basis of Pennsylvania's products liability law. These instructions also recognized that, by directly overruling *Azzarello*, the Supreme Court sent a message that decisions on corollary issues must stand on sound rationale independent of the social engineering embodied in the now-overruled *Azzarello* and its progeny.

The PDI SSJI reflect not only the considered judgment and experience of the drafters and numerous attorneys 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.

[3] Introduction to the 2016 Supplement.

The October 2017 **COUNTERPOINT** article (Vol 2 of this series) delineated and explained these "alternative" − i.e., **proper** - *Tincher*-based suggested instructions, and attached a full copy of the September 2017 published instructions for ease of reference.

For the convenience of practitioners and the Courts, these instructions were organized and numbered to follow as closely as possible the organizational scheme of the Bar Institute SSJI. Instructions offered as direct alternatives to the Bar Institute SSJI have the same corresponding numbers.

Each of the PDI SSJI was accompanied by a detailed rationale that outlines the grounds, reasoning, and authority under current Pennsylvania law on which it stands. For many of the instructions, the reasoning and rationale came directly from *Tincher* itself, as well as cases applying the *Tincher* paradigm. The remaining instructions rested on Pennsylvania precedent untainted by *Azzarello*. Not only did these rationales provide the reasoning on which the PDI SSJI were based, they explain the deficiencies in the Bar Institute SSJI. The copious citations permit any Court or practitioner to confirm their validity with minimal effort.

As noted, the PDI Suggested Instructions were not intended to take the place of considered advocacy. Nor was it intended that the Courts would employ these reflexively to every case; rather, courts were expressly encouraged to apply the same scrutiny and judgment to these suggested instructions that they would apply to the Bar Institute SSJI. The drafters of these instructions, and the PDI, welcomed that scrutiny, as these organizations believed these suggested instructions were fundamentally fair, were more faithful to the language and reasoning of *Tincher* than the Bar Institute SSJI and stood up to any scrutiny.

Since the 2017 debut of the PDI SSJI, courts have chosen to charge juries with appropriate portions of these instructions in preference to the erroneous instructions published by the PBI. Conversely, the fundamentally flawed nature of the Bar Institute SSJI has become even more apparent.

"TINCHER II" -
Tincher v. Omega Flex, Inc., 180 A.3d 386 (Pa. Super. 2018).

On February 16, 2018, a unanimous three-judge panel of the Pennsylvania Superior Court decided *Tincher v. Omega Flex, Inc.,* 180 A.3d 386 (Pa. Super. 2018) (*"Tincher II*"). The Superior Court held, following the Pennsylvania Supreme Court's landmark *Tincher I* ruling **in the same case**, that in a §402A strict product liability case, it is "fundamental error" to use an *"Azzarello"* jury charge employing the now-overruled "any element" defect test and misinforming the jury that the defendant manufacturer was the "guarantor" of product safety. 180 A.3d at 399.

In **"*Tincher '2'* Provides Clarity for You,"**[4] published in the April 2018 edition of **COUNTERPOINT,** the authors confirmed that *Tincher II* has unequivocally resolved the following:

[4] **COUNTERPOINT,** April 2018 Ed., by James M. Beck, Esquire, Reed Smith, Philadelphia, William J. Ricci, Esquire, Ricci, Tyrrell, Johnson & Grey, LLP, Philadelphia, PA, & C. Scott Toomey, Esquire, Littleton Park Joyce Ughetta & Kelly LLP, Radnor, PA.

- *Tincher I* overruled *Azzarello*, and after 36 years returned Pennsylvania as a true Restatement of Torts (Second), §402A jurisdiction, 180 A.3d at 392-93;

- if properly preserved, *Tincher I* applies retroactively to cases previously filed and tried, *id.* at 395;

- 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, *id.* at 398, 400, 402; and

- proof of "defect" under the Restatement of Torts (Second), §402A requires that the product be "unreasonably dangerous," and the jury must be instructed accordingly. *Id.* at 401-02.

The authors noted that *Tincher II* clearly confirmed that the Bar Institute SSJI are now expressly disapproved in *Tincher II*, on the critical definition of "defect," that *Tincher II* is controlling precedent, that the view stated in the PDI SSJI on that issue is correct, and that using the PBI's *Azzarello*-based definition of "defect" is "fundamental" – and thus reversible – error.

Finally, the authors outlined the clear ramifications of *Tincher II* for the "fruits of the poisonous *Azzarello* tree:"

> By reiterating the principles of the *Tincher I* §402A "unreasonably dangerous" defect construct ***in the same case***, *Tincher II* paves the way, legally and logically, for jurors in Pennsylvania strict liability trials to hear and evaluate evidence that had for three decades been excluded by decisions such as *Lewis v. Coffing Hoist Div.*, 528 A.2d 590, 593 (Pa. 1987), that are expressly grounded in the now-overruled *Azzarello* bar against anything that hinted at "negligence."
>
> There is no longer any ***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 governmental regulations;
> - a product's compliance with industry standards, customs, and practices;
> - a product's compliance with design and performance standards set by independent professional organizations;
> - state-of-the-art at the time the product was sold;
> - causative conduct on the part of a plaintiff and others; and
> - a plaintiff's contributory fault.

All of this evidence obviously informs the jury's evaluation of the design choices made by the manufacturer and the consequent integrity of the product under either prong of the *Tincher* two-

part coordinate test that the jury must apply to determine if a product design created an "unreasonably dangerous" defect.[5]

Products Liability Suggested Standard Jury Instructions Pursuant to, *Tincher v. Omega-Flex, Inc.* 104 A.3d 328 (Pa. 2014), 2019 Edition.

The 2017 publication of these suggested instructions by no means ended the *Tincher* Group's work. Another longstanding problem with the Bar Institute SSJI has been lack of timely updates. Thus, the group has continued to monitor the development of post-*Tincher* products liability caselaw and to refine and adjust the PDI SSJI and their stated rationale accordingly. In addition, the *Tincher* Group has looked into other areas and issues where additional suggested standard instructions would be appropriate. And as "just fortune" would have it, along with various trial and intermediate appellate decisions addressing the practical application of *Tincher*'s prescripts, along came *Tincher II* as a formal *Tincher* redux!

As promised in the October 2017 edition of **COUNTERPOINT**, the *Tincher* Group has further refined and expanded upon the original September 2017 published PDI SSJI. The Committee has now published the attached **Products Liability Suggested Standard Jury Instructions Pursuant to Tincher v. Omega-Flex, Inc., 104 A.3d 328 (Pa. 2014), 2019 Edition**.

In addition, the 2019 suggested instructions have now been considered and approved by Pennsylvania's other major organization of defense counsel, the Philadelphia Association of Defense Counsel ("PADC"). Accordingly, we refer to the 2019 version as the "PDI/PADC SSJI."

These 2019 PDI/PADC SSJI are attached to this Third Installment. In addition to updating the previous September 2017 "Rationales" for each suggested instruction with additional citations − including but by no means limited to the dispositive "*Tincher II*" decision − the *Tincher* Group has *added* several new Suggested Standard Jury Instructions. Here is a complete index to the 2019 PDI/PADC SSJI:

Products Liability Suggested Standard Jury Instructions Pursuant to *Tincher v. Omega-Flex, Inc.*, 104 A.3d 328 (Pa. 2014), September 2019 Edition

[5] Accord, COUNTERPOINT, Dec. 2018 Ed., by James M. Beck Esquire, Reed Smith, Philadelphia, "Admissibility of Compliance Evidence Post-Tincher."

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**

16.35 **Strict Liability – Post-Sale Duty To Warn (NEW)**

16.40 **"Heeding Presumption" For Seller/Defendant Where Warnings or Instructions Are Given**

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**

16.70 **Strict Liability – Factual Cause (NEW)**

16.80 **Strict Liability – (Multiple Possible Contributing Causes) (NEW)**

16.85 **Strict Liability – (Multiple Possible Contributing Exposures) (NEW)**

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**

16.150 **Strict Liability – Component Part (NEW)**

16.175 **Crashworthiness – General Instructions**

16.176 **Crashworthiness – Elements**

16.177 **Crashworthiness – Safer Alternative Design Practicable Under the Circumstances**

What follows is a specific description of the new sections of the 2019 PDI/PADC SSJI:

16.35 Strict Liability – Post-Sale Duty to Warn

As noted in the Rationale to this instruction, "Pennsylvania recognized a post-sale duty to warn in *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992) . . . limited by negligence considerations of reasonableness and practicality." This added Instruction emphasizes the limited circumstances in which this duty exists under Pennsylvania law. Specifically: (1) the alleged defect must have existed at the time the product left the defendant's control; (2) the potential harm must be "both substantial and preventable;" (3) the defendant must have learned of the risk before plaintiff

suffered harm so that it could take reasonable steps to warn foreseeable users; and (4) a reasonable means must have existed to allow the post-sale warning to be acted upon so as to prevent the harm. First and foremost, because under *Tincher* Pennsylvania remains a §402A jurisdiction, ***before the jury may consider a post-sale duty to warn, it must first find, under §402A, both that the product had an unreasonably dangerous defect, and that this defect existed at the time the product was sold***. See PDI/PADC SSJI §§16.10, 16.20(1).

This added instruction also references the important practical considerations recognized in *Walton*, namely "[f]actors that you may consider in deciding if a post-sale warning should have been given include the nature of the product, the nature and likelihood of harm, the feasibility and expense of issuing a warning, whether the claimed defect was repairable, whether the product was mass-produced, or alternatively sold in a small and distinct market, whether the product's users could be easily identified and reached, and the likelihood that the product's purchasers would be unaware of the risk of harm." These considerations of reasonableness and practicality are totally consistent, even more than when *Walton* was originally decided, with *Tincher*'s general abolition of the dichotomy between negligence and strict liability.

Finally, the Rationale reiterates that no duty to recall or retrofit a product exists under Pennsylvania law.

16.70 Strict Liability – Factual Cause

This added instruction expressly relies upon the first paragraph of the Bar Institute SSJI 16.70, which correctly defines Pennsylvania's "but for" causation requirement. However, as explained in the Rationale, this instruction ***eliminates*** the Bar Institute SSJI's comment that "'foreseeability,' and thus abnormal use, were 'stricken from strict liability' as 'a test of negligence,'" a contention that is no longer viable considering *Tincher's* general abolition of the dichotomy between negligence and strict liability. *Tincher,* 104 A.3d at 380-81.

The mishmash of other topics mentioned in Bar Institute SSJI 16.70 is separately addressed in the PDI/PADC SSJI. Proper use of evidence of a plaintiff's conduct is addressed in PDI/PADC SSJI 16.122(4). Crashworthiness is addressed in our instructions 16.175, 16.176, and 16.177.

16.80 Strict Liability – (Multiple Possible Contributing Causes)

This added instruction reinforces Pennsylvania law, which establishes "substantial factor" as the appropriate concurrent causation standard. *E.g.*, *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1037, n.2 (Pa. 2016). The Bar Institute SSJI's causation charge does not apply the "substantial factor" concurrent cause language repeatedly employed by the Pennsylvania Supreme Court; instead, that Instruction incorrectly uses only "factual cause," a vague term never approved as an adequate causation standard by the Pennsylvania Supreme Court. Given the well-established Pennsylvania legal pedigree of "substantial factor" causation, and that terminology's superior ability to convey

the concept of causation to the jury in language laypersons can understand, this added instruction adopts "substantial factor" as the standard for charging the jury.

16.85 Strict Liability – (Multiple Possible Contributing Exposures)

This added Instruction states the refined "substantial factor" charge that has been adopted in asbestos litigation. It sets forth "frequency, regularity and proximity" test from *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 227 (Pa. 2007). Specifically, to establish that an alleged exposure was a substantial factor in causing a plaintiff's harm, the plaintiff must establish that the exposure was: (1) sufficiently frequent; (2) with sufficient regularity; and (3) "sufficiently proximate" that it contributed to the harm.

While Pennsylvania courts have limited this test to matters involving asbestos exposure, the Rationale suggests that this charge might be applied to "other multiple exposure cases involving other hazardous substances." *See Melnick v. Exxon Mobil Corp.*, 2014 WL 10916974, at *7 (Pa. Super. June 8, 2014) (mem.).

16.150 Strict Liability – Component Part

Restatement (Second) of Torts §402A (1965), as adopted by *Tincher*, does not come to any conclusions about the liability of component part manufacturers. *Id.* §402A comment q. On numerous occasions, Pennsylvania law has recognized that components involve special considerations. This added instruction addresses these special unique considerations. *See, e.g., Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 479 (Pa. 1991). The jury is to be instructed that a component part is not defective if the entity produced a component which met the requirements of the manufacturer of the completed product. The charge does provide two exceptions which will not relieve a component part manufacturer from liability: (1) if the completed product manufacturer's requirements were "obviously deficient;" and (2) if the component supplier substantially participated in the design or preparation of other, defective parts of a completed product. Both exceptions are well established by Pennsylvania authority.

As the Rationale states, the exceptions stated in this instruction are also recognized by Restatement (Third) of Torts, Products Liability §5 & comment e (1998). While *Tincher* declined to adopt the Third Restatement wholesale, it did not address, let alone criticize, the Third Restatement's approach to component part liability, which has won widespread acceptance.

The *Tincher* Group's Work Continues!!

As before, the April 2019 publication of the expanded and updated PDI/PADC SSJI is part of an ongoing process. The *Tincher* Group continues to monitor the post-*Tincher* development of the Pennsylvania products liability precedent and will refine and adjust these Suggested Instructions as well as their stated Rationale as needed. In addition, the *Tincher* Group will continue to consider

other areas and issues where additional guidance and instructions may be appropriate. Any member of PDI or PADC wishing to comment should feel free to contact any of this Article's authors.