COUNTERPOINT

AN OFFICIAL PUBLICATION OF THE PENNSYLVANIA DEFENSE INSTITUTE
An Association of Defense Lawyers and Insurance Executives, Managers and Supervisors APRIL 2021

PENNSYLVANIA SUPREME COURT OVERRULES *AZZARELLO*, BUT SIX YEARS LATER THE PBI SUGGESTED JURY INSTRUCTIONS CONTINUE TO RESIST BURIAL OF THE "*AZZARELLO* DOCTRINE"

(VOLUME 4 – 2021 UPDATES AND ADDENDA TO PROPER SUGGESTED STANDARD JURY INSTRUCTIONS)

By James M. Beck, Esquire, Reed Smith, Philadelphia, PA; William J. Conroy, Campbell, Conroy & O'Neil, Berwyn, PA; William J. Ricci, Esquire, Ricci, Tyrrell, Johnson & Grey, LLP, Philadelphia, PA; C. Scott Toomey, Esquire, Littleton Park Joyce Ughetta & Kelly LLP, Radnor, PA

INTRODUCTION AND HISTORICAL OVERVIEW

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), namely: (1) Pennsylvania's strict liability design defect law remains grounded in the Restatement (Second) 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 products liability; (3) *Azzarello* is expressly 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 ("***Volume 1***") was inspired by then-recent 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" confirmed, the Bar Institute SSJI are only *suggested*, and are not submitted to the Pennsylvania Supreme Court or to anyone else for approval.

Volume 1 identified numerous, systematic and recurring problems with the "new" Bar Institute SSJI, in particular: (1) they ignored the overruling of *Azzarello* by retaining core "any element" jury instruction language drawn directly from *Azzarello*, and repudiated by *Tincher;* (2) they ignored *Tincher*'s requirement that a "defective condition unreasonably dangerous" to the user is the "normative principle" of Pennsylvania products liability, and that at trial the jury must be so instructed; (3) they contained numerous unfounded assertions of law on corollary issues that the *Tincher* Court expressly declined to address, and for future incremental resolution; and (4) all of the PBI departures from *Tincher* construed Pennsylvania law in a one-sided fashion beneficial only to plaintiffs.

Finally, ***Volume. 1*** explained how in June 2016, more than 50 legal organizations, business and insurance organizations, firms and experienced products liability lawyers formed an *ad hoc* group, which then invited the sub-committee responsible for the Bar Institute SSJI to open a dialogue to work toward a consensus set of SSJI that would accurately reflect the paradigm *Tincher* decision. As almost all **COUNTERPOINT** readers already know, the PBI sub-committee completely ignored that invitation.

In the face of the PBI sub-committee's unwillingness even to discuss the pervasive inaccuracies of the Bar Institute SSJI, a group of experienced practitioners took action. Together, this so-called *Tincher* "Group" totals more than 200 years of experience in litigating products liability cases at the trial and appellate court levels. That Group's efforts continue today, nearly five years later.

Under the umbrella of the Pennsylvania Defense Institute ("PDI"), and with the endorsement of the Philadelphia Association of Defense Counsel ("PADC"), 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

We encourage comments from our readers
Write: Pennsylvania Defense Institute
P.O. Box 6099
Harrisburg, PA 17120
Phone: 800-734-0737 FAX: 800-734-0732
Email: cwasilefski@padefense.org or lgamby@padefense.org

Carol A. VanderWoude, Esquire . . . . . Co-Editor
Tiffany Turner, Esquire . . . . . Co-Editor

Counterpoint has been designed by the Pennsylvania Defense Institute to inform members of developments in defense-related legislation, relevant and significant cases and court decisions, and any other information which is of interest to the membership.

suggested jury instructions that accurately reflected the dictates of the Pennsylvania Supreme Court in *Tincher*, its progeny, and prior precedent to the extent that it was unaffected by the overruling of *Azzarello*.

The results of more than one year's worth of deliberation, drafting and redrafting were first 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 the PDI and PADC ("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 October 2017 PDI SSJI reflected not only the considered judgment and experience of the drafters and numerous attorneys who reviewed and offered valuable suggestions and input, but they also reflected the collective judgment of the Pennsylvania Defense Institute, the largest statewide voice for the defense bar, whose Board of Directors unanimously approved their publication.

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 complete 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 were given the same corresponding numbers.

Each of the initially published instructions within the PDI SSJI was accompanied by a detailed "rationale" outlining the grounds, reasoning, and authority under current Pennsylvania law on which it stands. For many of the instructions, the reasoning and rationale emanate directly from *Tincher* itself, as well as from cases applying *Tincher*. The remaining instructions rested on Pennsylvania precedent unaffected by *Azzarello*. Not only did each rationale provide the reasoning on which the PDI SSJI are based, but it also explained the deficiencies in the corresponding sections of the Bar Institute SSJI. The copious citations allowed any court or practitioner to confirm their validity with minimal effort.

As noted, the PDI SSJI were not and are not intended to take the place of considered advocacy. Nor is it intended that courts would employ the PDI SSJI reflexively to every case; rather, courts are 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, PDI, and PADC, continue to welcome that scrutiny, as these organizations stand behind the PDI SSJI as fundamentally fair, and more faithful to the language and reasoning of *Tincher* than the Bar Institute SSJI. The PDI SSJI are designed and intended to pass any such scrutiny.

***"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 products 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,"**[1] published in the April 2018 edition of **COUNTERPOINT,** the authors explained that *Tincher II* unequivocally resolved the following:

- *Tincher I* overruled *Azzarello,* and after 36 years returned Pennsylvania to 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* products 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* established that the Bar Institute SSJI were erroneous and now expressly disapproved on the critical definition of "defect." *Tincher II* constitutes controlling precedent that the position taken 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 (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.

Such 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.[2]

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 the PDI SSJI by no means ended the *Tincher* Group's work. A longstanding problem with the Bar Institute SSJI has been lack of timely, meaningful updates. Thus, the Group 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 looked into other areas and issues where additional suggested standard instructions would be appropriate.

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

As before, the 2019 version of the suggested instructions were expressly approved by both PDI and PADC.

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) was published in the May 2019 edition of COUNTERPOINT. The 2019 PDI/PADC SSJI were attached to this third installment. In addition to updating the previous September 2017 "rationale" for each suggested instruction with additional citations – including but by no means limited to the dispositive "*Tincher II*" decision – the *Tincher* Group *added* several new Suggested Standard Jury Instructions.

The following is the index to the 2019 PDI/PADC SSJI, whose contents were described in detail in Volume 3:

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
16.35	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

THE 2020 PBI SSJI "REVISIONS"

Belatedly, the PBI SSJI (Civ.) §16.10 was "revised" in 2020 to "remove" the overruled *Azzarello*-era jury instruction that a product is defective if it "lacks any element necessary to make it safe for its intended use." In the face of *Tincher I and II*, the committee now had to concede that controlling precedent has declared the *Azzarello* charge to be reversible error. But, that was it. No changes were made to any of the numerous other sections of the PBI SSJI that continue to rely on overruled *Azzarello*-based conceptions of "strict" liability.

Significantly, the 2020 revision to PBI SSJI (Civ.) §16.10, ***offered nothing to replace*** the repudiated "any element" language, thereby leaving the jury with no defect standard at all. The PBI instructions continue to omit any mention – in any instruction – of the §402A "unreasonably dangerous" element of defect, which the Pennsylvania Supreme Court has twice recognized as the "normative principle" of strict liability. *Roverano v. John Crane, Inc.*, 226 A.3d 526, 540 (Pa. 2020) (quoting *Tincher*, 104 A.3d at 400). Accordingly, the 2020 revision remains dramatically at odds with *Tincher*, which condemned the practice of "providing juries with minimalistic instructions that . . . lack essential guidance concerning the nature of the central conception of product defect." *Tincher*, 104 A.3d at 371. That "central concept" adopted by *Tincher* is that any alleged defect must render the product "unreasonably dangerous" at the time of its original sale.

Tincher expressly restored to the Pennsylvania jury the determination of whether claimed defects are unreasonably dangerous. *Tincher*, 104 A.3d at 407. "The crucial role of the trial court is to prepare a jury charge that explicates the meaning of 'defective condition' within the boundaries of the law." *Id*. at 408. This principle is beyond dispute. Yet, the 2020 PBI SSJI §1610 revision continues to "omit[] the critical 'unreasonably dangerous' limitation on liability, it "fails to define the term 'defect' clearly, and consequently fails to guide the jury in distinguishing products safe and unsafe for their intended use." *Id*. at 371. This is unacceptable, and it remains at the heart of why the defense community must continue to advocate for a different set of standard jury instructions that, unlike those PBI propounds, remain faithful to the Pennsylvania Supreme Court's remaking of strict liability in *Tincher*.

PRODUCTS LIABILITY SUGGESTED STANDARD JURY INSTRUCTIONS PURSUANT TO, *TINCHER V. OMEGA-FLEX, INC.* 104 A.3d 328 (Pa. 2014), 2021 EDITION

Surprisingly, little else has changed significantly in Pennsylvania law since the 2019 version of the PDI/PADC SSJI. Beyond *Roverano*, which this update addresses, there have been a few more, mostly federal, decisions recognizing the availability of negligence-related principles and concepts in strict liability cases. These have been added to the "rationale" sections of appropriate instructions. Overall, the Pennsylvania appellate court system has produced surprisingly few products liability decisions involving the strict liability issues covered by the SSJI over the past two years.

More than six years after *Tincher's* unanimous - and long overdue - paradigm restoration of Pennsylvania products liability law to a level of pre-*Azzarello* "sanity," the PBI continues to ignore this reality. As promised, the "*Tincher* Group" continues to monitor the development of Pennsylvania products liability caselaw and has now published the **March 2021 Edition of the PDI / PADC SSJI (*attached*)**. The 2021 Edition augments the 2019 Edition to reflect recent court decisions and supplies up-to-date comprehensive rationale to support each Instruction request.

As with the 2019 update, these will be circulated to all Pennsylvania federal and state court judges. We are optimistic that trial judges will continue to charge juries with appropriate portions of these instructions, in preference to the erroneous instructions published by the PBI.

ENDNOTES

[1]**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.

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

Product Liability

Suggested Standard Jury Instructions

Pursuant to

Tincher v. Omega Flex, Inc.,

104 A.3d 328 (Pa. 2014)

2021 Edition – Supersedes 2019 Edition

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 defect 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 defect in the product was a substantial factor in causing harm to the plaintiff.

RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict products 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.

SSJI (Civ.) §16.10 was belatedly revised in 2020 to remove the overruled *Azzarello*-era jury 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"). Controlling precedent has declared the *Azzarello* charge to be reversible error. *See Tincher*, 104 A.3d at 378-79 (criticizing *Azzarello* standard as "impractical" and noting that the "every element" language had been taken out of context); *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399 (Pa. Super. 2018) (*Azzarello* charge is "a paradigm example of fundamental error") ("*Tincher II*").

The 2020 revision to SSJI (Civ.) §16.10, however, offered nothing to replace the repudiated "any element" language, thus leaving the jury with no defect standard at all. The 2020 revision thus is diametrically contrary to *Tincher*, which condemned the practice of "providing juries with minimalistic instructions that . . . lack essential guidance concerning the nature of the central conception of product defect." 104 A.3d at 371. That "central conception" adopted by *Tincher* is that any alleged product defect must be "unreasonably dangerous." The Supreme Court recently reiterated that "that the notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." *Roverano v. John Crane, Inc.*, 226 A.3d 526, 540 (Pa. 2020) (quoting *Tincher*, 104 A.3d at 400). *Tincher* restored to the jury the determination

of whether claimed defects are unreasonably dangerous. 104 A.3d at 407. "The crucial role of the trial court is to prepare a jury charge that explicates the meaning of 'defective condition' within the boundaries of the law," *Id.* 408. Therefore, the revised §1610 continues to "omit[] the critical 'unreasonably dangerous' limitation on liability" and thus "fails to define the term 'defect' clearly, and consequently fails to guide the jury in distinguishing products safe and unsafe for their intended use." *Id.* at 371.

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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised").

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 the product 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 refusal to exclude 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).

"[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 products 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). *See* instruction §16.80.

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 products 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." *Roverano v. John Crane, Inc.*, 226 A.3d 526, 540 (Pa. 2020) (quoting *Tincher*, 104 A.3d at 400). *Accord Dunlap v. Federal Signal Corp.*, 194 A.3d 1067, 1071 (Pa. Super. 2018) ("plaintiff ... had to prove that [defendant's product] was unreasonably dangerous").

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in products 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), *appeal dismissed*, 500 A.2d 428 (Pa. 1985).

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 recognizing that strict liability "is not the same" as a "traditional claim[] of negligence," 104 A.3d at 400, *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. Instead of 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., Roverano*, 226 A.3d at 542 (strict liability involves a "duty to make . . . the product . . . free from 'a defective condition unreasonably dangerous to the consumer'") (quoting *Tincher*, 104 A.3d at 383); *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); *Timmonds v. Agco Corp.*, 2019 WL 7249164, at *20 (Pa. C.P. Philadelphia Co. Aug. 27, 2019) (instructing jury on "defective condition unreasonably dangerous"); *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 omits the §402A phrase "unreasonably dangerous," thereby "providing juries with minimalistic instructions that . . . lack essential guidance concerning the nature of the central conception of product defect." *Tincher*, 104 A.3d at 371. That "central conception" is that any alleged product defect must be "unreasonably dangerous." *Roverano*, 226 A.3d at 540 (a "'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action") (quoting *Tincher*, 104 A.3d at 400). *Tincher* restored to the jury the determination of whether claimed defects are unreasonably dangerous. 104 A.3d at 407. "The crucial role of the trial court is to prepare a jury charge that explicates the meaning of 'defective condition' within the boundaries of the law." *Id.* 408. Therefore, the

revised §1610 continues to "omit[] the critical 'unreasonably dangerous' limitation on liability" and thus "fails to define the term 'defect' clearly, and consequently fails to guide the jury in distinguishing products safe and unsafe for their intended use." *Id.* at 371.

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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised").

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); *Dunlap v. Federal Signal Corp.*, 194 A.3d 1067, 1073 (Pa. Super. 2018) (*Tincher* requires evidence that an alternative design is "more effective for all users," not just plaintiff); *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 products 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). An ordinary consumer "'read[s] and heed[s]' the warnings and expects exactly what they state." *Chandler v. L'Oreal USA, Inc.*, 774 F. Appx. 752, 754 (3d Cir. 2019) (applying Pennsylvania law).

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.*, *Izzarelli v. R.J. Reynolds Tobacco Co.*, 136 A.3d 1232, 1246 (Conn. 2016) ("the shortcomings of the ordinary consumer expectation test have been best illustrated in relation to complex designs"); *Cavanaugh v. Stryker Corp.*, ___ So.3d ___, 2020 WL 5937405, at *5 (Fla. App. Oct. 7, 2020) ("the consumer expectations test cannot be logically applied here, where the product in question is a complex medical device"); *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 original) (applying Colorado law); *Brown v. Raymond Corp.*, 432 F.3d 640 (6th Cir. 2005) (ordinary consumer has no expectation regarding safety of forklift design) (applying Tennessee law).

The contrary SSJI (Civ.) §16.20 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. Section 16.20 thus "employ[s] an incorrect definition of a product 'defect' in light of the Supreme Court's decision" in *Tincher*, and "undervalues the importance of the Supreme Court's decision" in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) ("*Tincher II*"). 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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised").

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 products 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 Dunlap v. Federal Signal Corp.*, 194 A.3d 1067, 1070 (Pa. Super. 2018) (listing Wade factors as "[t]he relevant factors" in risk-utility analysis after *Tincher*"); *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 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*. Section 16.20 thus "employ[s] an incorrect definition of a product 'defect' in light of the Supreme Court's decision" in *Tincher*, and "undervalues the importance of the Supreme Court's decision" in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) ("*Tincher II*").

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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised").

* * *

The contrary SSJI (Civ.) §16.20 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 "countervailing considerations [that] 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 products 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." *Roverano v. John Crane, Inc.*, 226 A.3d 526, 540 (Pa. 2020) (quoting *Tincher*, 104 A.3d at 400). *Accord Dunlap v. Federal Signal Corp.*, 194 A.3d 1067, 1071 (Pa. Super. 2018) ("plaintiff . . . had to prove that [defendant's product] was unreasonably dangerous" due to inadequate warnings); *Kurzinsky v. Petzl America, Inc.*, 794 F. Appx. 187, 189_ (3d Cir. 2019) (product must be "'unreasonably dangerous' absent adequate warnings") (applying Pennsylvania law).

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in products 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), *appeal dismissed*, 500 A.2d 428 (Pa. 1985).

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 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); *Chandler v. L'Oreal USA, Inc.*, 774 F. Appx. 752, 754 (3d Cir. 2019) (applying *Tincher* to warning claim); *Whyte v. Stanley Black & Decker*, 2021 WL 230986, at *7 (W.D. Pa. Jan. 22, 2021) ("To succeed on a strict-liability failure-to-warn claim, the plaintiff must establish ... that the product was sold in a defective condition 'unreasonably dangerous' to the user"); *Igwe v. Skaggs*, 258 F. Supp.3d 596, 609-10 (W.D. Pa. 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*, thereby "providing juries with minimalistic instructions that ... lack essential guidance concerning the nature of the central conception of product defect." *Tincher*, 104 A.3d at 371. That "central conception" is that any alleged product defect must be "unreasonably dangerous." *Roverano*, 226 A.3d at 540 (a "'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action") (quoting *Tincher*, 104 A.3d at 400). *Tincher* restored to the jury the determination of whether claimed defects are unreasonably dangerous. 104 A.3d at 407. "The crucial role of the trial court is to prepare a jury charge that explicates the meaning of 'defective condition' within the boundaries of the law," *Id.* 408. Therefore, the revised §1610 continues to "omit[] the critical 'unreasonably dangerous' limitation on liability" and thus "fails to define the term 'defect' clearly, and consequently fails to guide the jury in distinguishing products safe and unsafe for their intended use." *Id.* at 371.

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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised"). 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.

16.35 STRICT LIABILITY – POST-SALE DUTY TO WARN

The duty to provide an adequate product warning can arise even after the product is sold, under certain circumstances. First, as you were instructed earlier, the product's unreasonably dangerous condition must have existed at the time the product left the defendant's control. Second, the potential harm must be both substantial and preventable. Third, the defendant must have learned about the risk created by the product's unreasonably dangerous condition sufficiently before the plaintiff suffered harm so that the defendant could take reasonable steps to warn reasonably foreseeable users about the risk. Fourth, a reasonable and practical means must have existed so that the defendant's post-sale warning would have been received and acted upon, either by the plaintiff, or by someone else in a position to act, in a way that would have prevented the plaintiff's harm.

Factors 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.

RATIONALE

Pennsylvania recognized a post-sale duty to warn in *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992). In *Walton*, there was "no dispute" that the product was defective. *Id.* at 456. As discussed in the rationale for Instruction §16.10, strict liability under the Restatement (Second) of Torts §402A (1965), requires that the product defect exist when the product leaves the defendant's control. In *DeSantis v. Frick Co.*, 745 A.2d 624 (Pa. Super. 1999), the court applied §402A's defect-at-sale requirement to the *Walton* post-sale duty to warn, holding that "whether the claim is grounded in negligence or strict liability, no post-sale duty to warn about changes in technology existed where the product was not defective at the time of sale." *Id.* at 630-31. Thus, 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* Instructions §§16.10, 16.20(1).

The duty recognized in *Walton* was limited by negligence considerations of reasonableness and practicality. 610 A.2d at 459 ("sellers must make reasonable attempts to warn the user or consumer"). "[T]he peculiarities of the industry . . . support[ed] the imposition" of a post-sale duty to warn. The product was not an "ordinary good . . . that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate." *Id.* It was "not mass-produced or mass-marketed," but rather was "sold in a small and distinct market" in which product servicers were a "convenient and logical points of contact." *Id.* Moreover, the manufacturer "remained in contact" with such servicers "for the very purpose of keeping [them] current on all pertinent information." *Id.* All these factors made imposition of a post-sale duty to warn "proper." *Id.*

Walton's reliance on considerations of reasonableness and practicality is consistent with the subsequent general abolition of the dichotomy between negligence and strict liability. *See Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 380-81 (Pa. 2014) ("strict" separation of negligence and strict liability concepts is "undesirable"; "elevat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative" not "consistent with reason," and "validate[d] the suggestion that the cause of action, so shaped, was not viable"). *Tincher* also confirmed Restatement §402A as the basis for strict products liability in Pennsylvania. 104 A.3d at 399. Thus, *DeSantis* correctly rejected Restatement (Third) of Torts, Products Liability §10 (1998), which would have extended post-sale warning duties to products that were not defective when they left the defendant's control. *Accord Inman v. General Electric Co.*,

2016 WL 5106939, at *6 (W.D. Pa. Sept. 20, 2016) (following *DiSantis* post-*Tincher*); *Trask v. Olin Corp.*, 2016 WL 1255302, at *9 n.20 (W.D. Pa. March 31, 2016) (same).

No post-sale duty to warn has been imposed on "common business appliances." *Habecker v. Clark Equipment Co.*, 797 F. Supp. 381, 388 (M.D. Pa. 1992), *aff'd*, 36 F.3d 278 (3d. Cir. 1994); *Boyer v. Case Corp.*, 1998 WL 205695, at *1-2 (E.D. Pa. 1998) (same). *See Ierardi v. Lorillard, Inc.*, 777 F. Supp. 420, 423 (E.D. Pa. 1991) (impossible to give post-sale warnings to cigarette smokers). There must be "logical and convenient locations through which [product] manufacturers can contact customers" before a post-sale duty to warn can exist. *Trask*, 2016 WL 1255302, at *10 (post-*Tincher*).

The factors in the second paragraph are drawn not only from *Walton*, but also from the extensive discussion in *Patton v. Hutchinson Wil-Rich Manufacturing Co.*, 861 P.2d 1299, 1315 (Kan. 1993).

Beyond warnings, no duty to recall or retrofit a product exists under Pennsylvania law. *Lynch v. McStome & Lincoln Plaza Assocs.*, 548 A.2d 1276, 1281 (Pa. Super. 1988); *Sliker v. National Feeding Systems, Inc.*, 52 D.&C.5th 65, 92-93 (Pa. C.P. Clarion Co. 2015) (post-*Tincher*); *Habecker v. Copperloy Corp.*, 893 F.2d 49, 54 (3d Cir. 1990) (applying Pennsylvania law); *Talarico v. Skyjack, Inc.*, 191 F. Supp.3d 394, 398-401 (M.D. Pa. 2016) (post-*Tincher*); *McLaud v. Industrial Resources, Inc.*, 2016 WL 7048987, at *8 (M.D. Pa. 2016) (post-*Tincher*); *Inman*, 2016 WL 5106939, at *7 (post-*Tincher*); *Padilla v. Black & Decker Corp.*, 2005 WL 697479, *7 (E.D. Pa. 2005); *Girard v. Allis Chalmers Corp.*, 787 F. Supp. 482, 486 n,3 (W.D. Pa. 1992); *Boyer*, 1998 WL 205695, at *2. Nor has a general post-sale duty to warn been imposed on a successor corporation, corporate affiliates, or third-party suppliers, *See LaFountain v. Webb Industies Corp.*, 951 F.2d 544, 549 (3d Cir. 1991) (applying Pennsylvania law); *Zhao v. Skinner Engine Co.*, 2013 WL 6506125, at *4 & n.13 (E.D. Pa. Dec. 10, 2013); *Olejar v. Powermatic Division*, 1992 WL 236960, at *5 (E.D. Pa. Sept. 17, 1992); *Gillyard v. Eastern Lift Truck Co.*, 1992 WL 25826, at *3 (E.D. Pa. Feb. 7, 1992).

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); *Chandler v. L'Oreal USA, Inc.*, 774 F. Appx. 752, 754 (3d Cir. 2019) ("a reasonable consumer 'read[s] and heed[s]' the warnings and expects exactly what they state") (applying Pennsylvania law); *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); *Chandler v. L'Oreal USA, Inc.*, 774 F. Appx. 752, 754 (3d Cir. 2019) (applying Pennsylvania law); *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 products 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.*, 52 D.&C.5th 65, 68-69(Pa. C.P. Clarion Co. 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); *Chandler v. L'Oreal USA, Inc.*, 340 F. Supp.3d 551, 562-64 (W.D. Pa. 2018) (not applying heeding presumption in consumer product case where plaintiff failed to read warning), *aff'd*, 774 F. Appx. 752 (3d Cir. 2019).

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.

16.70 STRICT LIABILITY – FACTUAL CAUSE

If you find that the product was defective, the defendant is liable for all harm caused to the plaintiff by such defective condition. A defective condition is the factual cause of harm if the harm would not have occurred absent the defect. In order for the plaintiff to recover in this case, the defendant's conduct must have been a factual cause of the accident.

RATIONALE

This instruction incorporates the first paragraph of PBI SSJI (Civ) 16.70, which is a correct statement of the "but for" causation requirement of Pennsylvania law. "But for" causation is a well-established element in ordinary Pennsylvania product liability cases. *E.g.*, *Summers v. Giant Food Stores, Inc.,* 743 A.2d 498, 509 (Pa. Super. 1999); *First v. Zem Zem Temple*, 686 A.2d 18, 21 & n.2 (Pa. Super. 1996); *Klages v. General Ordnance Equipment Corp.*, 367 A.2d 304, 313 (Pa. Super. 1976); *E.J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F. Supp. 883, 889 (E.D. Pa. 1985) (followed in *Summers* and *First*). Where more than one possible cause of the plaintiff's harm is at issue, *see* instruction 16.80, below.

The PBI commentary, however, is no longer viable after *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014). Its suggestion that "foreseeability," and thus abnormal use, were "stricken from strict liability" as "a test of negligence" is no longer the law. While recognizing that strict liability "is not the same" as a "traditional claim[] of negligence," 104 A.3d at 400, *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).

The PBI commentary as to abnormal use, relying on the plurality decision in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975), is also obsolete in that *Berkebile* was overruled, specifically as to abnormal use, by *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1100 (Pa. 2012) (rejecting "non-precedential sentiments raised by the lead opinion in *Berkebile* that 'abnormal use' is to be used as rebuttal evidence only"). As confirmed in *Reott*, abnormal use remains a well-established strict liability defense in Pennsylvania. *See also Barnish v. KWI Building Co.*, 980 A.2d 535, 544-45 (Pa. 2009); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 617-18 (Pa. 1982); *Brill v. Systems Resources, Inc.*, 592 A.2d 1377, 1379 (Pa. Super. 1991); *Metzgar v. Playskool Inc.*, 30 F.3d 459, 464-65 & n.9 (3d Cir. 1994) (applying Pennsylvania law).

Other topics mentioned in PBI SSJI (Civ) 16.70 are separately addressed in these suggested instructions. The proper use of evidence of a plaintiff's conduct is addressed in suggested instruction 16.122(4). Crashworthiness is addressed in suggested instructions 16.175, 16.176, and 16.177.

16.80 STRICT LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING CAUSES)

In this case you must evaluate evidence of several possible causes, including a defective condition in the defendant's product, to decide which, if any, are factual causes of the plaintiff's harm. A possible cause becomes a factual cause of the plaintiff's harm when it was a substantial factor in bringing that harm about. In order for the plaintiff to recover in this case, the defective condition in the defendant's product thus must have been a substantial factor in bringing about the plaintiff's harm. More than one substantial factor may combine to bring about the plaintiff's harm.

You should use your common sense in determining whether each possible cause was a substantial factor in bringing about the plaintiff's harm. A substantial factor must be an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the plaintiff's harm.

RATIONALE

This instruction restores the "substantial factor" concurrent causation test of Restatement (Second) of Torts §431 (1965), in concurrent cause cases. "We have adopted a 'substantial factor' standard for legal causation." *Commonwealth v. Terry*, 521 A.2d 398, 407 (Pa. 1987). The Pennsylvania Supreme Court has repeatedly confirmed "substantial factor" as the proper concurrent causation standard specifically in product liability cases. "In a products liability action, Pennsylvania law requires that a plaintiff prove . . . that the [product] defect was the substantial factor in causing the injury." *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1037 n.2 (Pa. 2016) (quoting *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997)). *See Betz v. Pneumo Abex LLC*, 44 A.3d 27, 58 (Pa. 2012); *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1165 (Pa. 2010); *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007); *Harsh v. Petroll*, 887 A.2d 209, 213 n.9 (Pa. 2005). *See also* Restatement (Second) of Torts §431 (1965).

The second paragraph is based on the concurrent causation jury charge affirmed in *Roverano v. John Crane, Inc.*, 177 A.3d 892, 899 (Pa. Super. 2017), *reversed o other grounds,* 226 A.3d 526 (Pa. 2020) (apportionment issues). "[T]he jury should consider [whether] the plaintiff's exposure to each defendant's product "was on the one hand, a substantial factor or a substantial cause or, on the other hand, whether the defendant's conduct was an insignificant cause or a negligible cause." *Id.* at 897 (quoting *Rost*, 151 A.3d at 1049). "[W]e have consistently held that multiple substantial causes may combine and cooperate to produce the resulting harm to the plaintiff." *Id.* at 898

While the PBI's SSJI (Civ.) initially enunciated the correct "substantial factor" concurrent causation standard (*e.g.* SSJI (Civ.) §8.04 (1980 revision), the current suggested instructions, use only "factual cause," a vague term that has not been recognized as an adequate causation standard by the Pennsylvania Supreme Court. SSJI (Civ.) §§16.70. 16.80, 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, these suggested instructions adopt "substantial factor" as the standard for charging the jury.

16.85 STRICT LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING EXPOSURES)

In this case you must evaluate evidence of the [plaintiff's/decedent's] exposure to asbestos from several possible sources. In order to recover from any of the defendants, plaintiff must establish that [s/he/the decedent] inhaled asbestos fibers from that defendant's product(s), and that the [plaintiff's/decedent's] exposure from that defendant's product(s) was a substantial factor in causing the [plaintiff's/decedent's] harm. You may find asbestos exposure to be such a substantial factor if you believe that evidence establishes that the [plaintiff/decedent] was exposed to that defendant's asbestos containing product(s): (1) sufficiently frequently; (2) with sufficient regularity; (3) and the exposure was sufficiently proximate – that is, [s/he] was close enough to the product – that it contributed to [his/her] harm. You must make this determination as to each defendant separately. However, more than one substantial factor may combine to bring about the [plaintiff's/decedent's] harm.

You should use your common sense in determining whether each possible cause was a substantial factor in bringing about the [plaintiff's/decedent's] harm. A substantial factor must be an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the plaintiff's harm.

RATIONALE

In asbestos litigation, the "substantial factor" concurrent causation test (see Instruction §16.80) has been refined to require the plaintiff to produce "evidence concerning the frequency, regularity, and proximity of [the plaintiff's or the decedent's] exposure to asbestos-containing products sold by" each defendant. *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007). *See also Betz v. Pneumo Abex LLC*, 44 A.3d 27, 56-57 (Pa. 2012) (discussing application of frequency, regularity, and proximity test); *Nelson v. Airco Welders Supply*, 107 A.3d 146, 157-58 (Pa. Super. 2014) (en banc) (same). "Our decisions in *Gregg* and *Betz* aligned Pennsylvania with the majority of other courts adopting the 'frequency, regularity, and proximity' test." *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016).

Under this test, "to create a jury question, a plaintiff must adduce evidence that exposure to defendant's asbestos-containing product was sufficiently 'frequent, regular, and proximate' to support a jury's finding that defendant's product was substantially causative of the disease." *Rost*, 151 A.3d at 1044. Such evidence varies from case to case, but must "tak[e] into consideration exposure history, individual susceptibility, biological plausibility, and relevant scientific evidence (including epidemiological studies)." *Id.* at 1046 (footnote omitted). A single, or *de minimis* exposure to a defendant's product is insufficient. *Id.* at 1048 ("causation experts may not testify that a single exposure (i.e., 'one or a *de minimis* number of asbestos fibers') is substantially causative"); *Vanaman v. DAP, Inc.*, 966 A.2d 603, 610 (Pa. Super. 2009) (en banc) ("very minimal exposure is insufficient to implicate a fact issue concerning the substantial-factor causation").

The rest of this instruction incorporates the general instruction on substantial factor causation discussed in Instruction §16.80.

Because the frequency, regularity, and proximity test has often been applied in asbestos mesothelioma cases, this instruction includes as optional phrasing consistent with a wrongful death action.

While the frequency, regularity, and proximity test has to date been limited to asbestos litigation, it is possible that this test might apply in other multiple exposure cases involving other hazardous substances. *See Melnick v. Exxon Mobil Corp.*, 2014 WL 10916974, at *7

(Pa. Super. June 9, 2014) (mem.) (test applies in "exposure cases," which could include benzene).

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.*, 251 F. Supp.3d 844, 851-52 (E.D. Pa. 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; *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. Feb. 9, 2016) (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*, 980 A.2d at 541 (quoting *Rogers*, 656 A.2d at 754); *accord Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 830 n.10 (Pa. 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); *Chandler v. L'Oreal USA, Inc.*, 774 F. Appx. 752, 754 (3d Cir. 2019) (defect inference of malfunction theory defeated by "facts indicating that the plaintiff was using the product in violation of the product directions") (applying Pennsylvania law). 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*. *See Chandler v. L'Oreal USA, Inc.*, 340 F. Supp.3d 551, 564-65 n.4 (W.D. Pa. 2018) (applying *Tincher* to manufacturing defect case), *aff'd*, 774 F. Appx. 752, 754 (3d Cir. 2019). 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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised"). 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.

While recognizing that strict liability "is not the same" as a "traditional claim[] of negligence," in *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 400 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 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 (Cal. 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, *Tincher*, acknowledged that negligence and strict liability frameworks are necessarily intertwined" and that "nested within the framework of strict liability lie principles of negligence." *Amig v. County of Juniata*, 432 F. Supp.3d 481, 489 (M.D. Pa. 2020). *Tincher* thereby "overturned more than 35 years of Pennsylvania product liability precedent." *Plaxe v. Fiegura*, 2018 WL 2010025, at *6 (E.D. Pa. April 27, 2018).

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*, 258 F. Supp.3d 596, 611 (W.D. Pa. 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.*, 168 A.3d 359 (Pa. Super. 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 products 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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised"). 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).

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.

While recognizing that strict liability "is not the same" as a "traditional claim[] of negligence," in *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 400 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 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 (Cal. 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, *Tincher*, acknowledged that negligence and strict liability frameworks are necessarily intertwined" and that "nested within the framework of strict liability lie principles of negligence." *Amig v. County of Juniata*, 432 F. Supp.3d 481, 489 (M.D. Pa. 2020). In so doing, *Tincher* "overturned more than 35 years of Pennsylvania product liability precedent." *Plaxe v. Fiegura*, 2018 WL 2010025, at *6 (E.D. Pa. April 27, 2018).

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); *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).

Neither *Webb* nor *Dunlap v. Federal Signal Corp.*, 194 A.3d 1067 (Pa. Super. 2018), support continuation of *Azzarello*-era evidentiary exclusions. *Webb* chose to apply pre-*Tincher* law to a pre-*Tincher* trial due to concerns about *Tincher*'s "retroactivity." 148 A.3d at 482-83. "The continued viability of the evidentiary rule espoused in *Lewis* and *Gaudio* [was] not before us" in *Dunlap*. 194 A.3d at 1072 n.8.

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). *See Graham v. Check*, __ A.3d __, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised"). Here, the SSJI ignore *Tincher*'s "significant[] alter[ation of] the common law framework for strict products liability." *High*, 154 A.3d at 347.

April 2019

2021

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.

While recognizing that strict liability "is not the same" as a "traditional claim[] of negligence," in *Tincher v. Omega Flex, Inc.,* 104 A.3d 328, 400 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 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 (Cal. 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, *Tincher*, acknowledged that negligence and strict liability frameworks are necessarily intertwined" and that "nested within the framework of strict liability lie principles of negligence." *Amig v. County of Juniata*, 432 F. Supp.3d 481, 489 (M.D. Pa. 2020). *Tincher* thereby "overturned more than 35 years of Pennsylvania product liability precedent." *Plaxe v. Fiegura*, 2018 WL 2010025, at *6 (E.D. Pa. April 27, 2018).

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 (Pa. 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); *Amig*, 432 F. Supp.3d at 489 (*Tincher* "leaves open the ability to introduce negligence-based evidence like industry standards"); *Vitale v. Electrolux Home Products, Inc.*, 2018 WL 3868671, at *3 (E.D. Pa. Aug. 14, 2018) ("*Tincher* blurred the bright line demarcation between negligence theories and strict products liability . . . in favor of the admissibility of evidence of compliance with industry standards to defend against strict liability claims"); *Mercurio v. Louisville Ladder, Inc.*, 2018 WL 2465181, at *7 (M.D. Pa. May 31, 2018) (following *Cloud* and *Rapchak*); *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.*, 52 D.&C.5th 65, 83 (Pa. C.P. Clarion Co. 2015) (industry standards evidence admissible as "particularly relevant to factor (2)" of *Tincher*'s risk/utility approach).

Neither *Webb* nor *Dunlap v. Federal Signal Corp.*, 194 A.3d 1067 (Pa. Super. 2018), support continuation of *Azzarello*-era evidentiary exclusions. *Webb* chose to apply pre-*Tincher* law to a pre-*Tincher* trial due to concerns about *Tincher*'s "retroactivity." 148 A.3d at 482-83. "The continued viability of the evidentiary rule espoused in *Lewis* and *Gaudio* [was] not before us" in *Dunlap*. 194 A.3d at 1072 n.8.

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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised"). 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. *See Chandler v. L'Oreal USA, Inc.*, 774 F. Appx. 752, 754 (3d Cir. 2019) ("a reasonable consumer 'read[s] and heed[s]' the warnings and expects exactly what they state") (applying Pennsylvania law). 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). Because strict liability "is not the same as . . . the more colloquial notion of 'fault,'" this instruction avoids that term. *Roverano v. John Crane, Inc.*, 226 A.3d 526, 542 (Pa. 2020).

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. *Elgert v. Siemens Industry, Inc.*, 2019 WL 1318569, at *12 (E.D. Pa. March 22, 2019); *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.*, 168 A.3d 359 (Pa. Super. 2017); *Sliker v. National Feeding Systems, Inc.*, 52 D.&C.5th 65, 74-76 (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. *Elgert*, 2019 WL 1318569, at *12 (plaintiff's admission that he "messed up"; failure to read instruction manual); *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*, 52 D.&C.5th 65, 77 (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 Roverano*, 226 A.3d at 538-39; *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). *See Graham v. Check*, ___ A.3d ___, 2020 WL 7565192, at *10 & n.42 (Pa. Dec. 22, 2020) (describing SSJI (Civ.) 13.230 as "ill-advised"). 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.

A component part, used to make a completed product assembled by the completed product's manufacturer, is not in a defective condition or unreasonably dangerous if the [manufacturer/seller/distributor] of the component produced a component that met the requirements of the manufacturer of the completed product, unless you find: (1) the completed product manufacturer's requirements were obviously deficient, or (2) the component supplier substantially participated in the [design/preparation] of the completed product.

A [manufacturer/seller/distributor] of a component part who produced a component that met the specifications and requirements set forth by the assembler of the completed product, is not liable for harm resulting from unreasonably dangerous defects in other part(s) of the completed product that the component part [manufacturer/seller/distributor] did not produce, unless you find that the component part [manufacturer/seller/distributor] substantially participated in the [design/preparation] of those other part(s) of the completed product.

RATIONALE

Restatement (Second) of Torts §402A (1965), as adopted by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), does not address liability considerations involving component parts. *Id.* §402A comment q. Pennsylvania law has recognized special considerations concerning component parts on numerous occasions. *See Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 479 (Pa. 1991) ("untenable" to impose duties of a completed product assembler on a "manufacturer [that] supplies a mere component of a final product that is assembled by another party"); *Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 564 A.2d 1244, 1247 (Pa. 1989) (component not defective where "the placement of the [relevant components] were all decisions made by [the completed product assembler] in manufacturing the [completed product]").

> [T]he appellant's argument on this appeal amount[s] to no more than an assertion that knowledge of a potential danger created by the acts of others gives rise to a duty to abate the danger. We are not prepared to accept such a radical restructuring of social obligations.

Id. at 1248.

Component part suppliers are strictly liable for defects that render the components they supply unreasonably dangerous. *E.g.*, *Walton v. Avco Corp.*, 610 A.2d 454, 456-57 (Pa. 1992); *Burbage v. Boiler Engineering & Supply Co.*, 249 A.2d 563, 566 (Pa. 1989); *Kephart v. ABB, Inc.*, 2015 WL 1245825, at *11 (W.D. Pa. Mar. 18, 2015) (post-*Tincher*). The component part doctrine does not affect the liability of a complete product manufacturer for incorporating defective components into the overall product. *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 716 (3d Cir. 2018) (applying Pennsylvania law).

A component part supplier's compliance with the specifications or requirements of the assembler of the completed product ordinarily shields the component supplier from liability. *E.g. Wenrick*, 564 A.2d at 1246-47 (compliance with assembler's decisions precluded liability); *Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 70 (Pa. Super. 2005) (same with respect to assembler's contractual specifications); *Summers v. Giant Food Stores, Inc.*, 743 A.2d 498, 508-09 (Pa. Super. 1999) (component purchaser's refusal to buy non-defective component held sole cause of injury); *Taylor v. Paul O. Abbe, Inc.*, 516 F.2d 145, 148 (3d Cir. 1975) (compliance with assembler's specifications precluded liability) (applying Pennsylvania law); *Willis v. National Equipment Design Co.*, 868 F. Supp. 725, 728-29 (E.D. Pa. 1994) (same), *aff'd without op.*, 66 F.3d 314 (3d Cir. 1995); *Lesnefsky v. Fisher & Porter Co.*, 527 F. Supp. 951, 955 (E.D. Pa. 1981) ("no public policy is served by requiring the component manufacturer to hire experts, at great cost, to review specifications provided by an experienced purchaser in order to determine whether the product design will be safe"). Liability is allowed where the component part supplier,

rather than the completed product assembler, prepared the component's specifications. *Stecyk v. Bell Helicopters Textron, Inc.*, 1996 WL 153555, at *12 (E.D. Pa. Apr. 2, 1996).

The maker of a non-defective component part could not be liable where the plaintiff's "injury [was] caused by another component part, manufactured by another company" and the component part supplier "did not participate in the decisions regarding the design [of the completed product] or the location of" any other component. *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1302, 1310 (3d Cir. 1995) (applying Pennsylvania law); *accord Kurzinsky v. Petzl America, Inc.*, 2019 WL 220201, at *4 (E.D. Pa. Jan. 16, 2019) ("component manufacturers are not required to warn of all dangers associated with any system into which they can be incorporated") (post-*Tincher*), *aff'd*, 794 F. Appx. 187 (3d Cir. 2019); *Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626, 654 & n.75 (E.D. Pa. 2015) ("a component part is a separate 'product' for purposes of application of Section 402A") (post-*Tincher*).

The exceptions stated in this instruction, for transparently inadequate specifications and substantial participation in design or preparation of other, defective parts of a completed product, are 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. *E.g. Ramos v. Brenntag Specialties, Inc.*, 372 P.3d 200, 204 (Cal. 2016) (Restatement §5 "accurately reflect[s]" the law); *In re New York City Asbestos Litigation*, 59 N.E.3d 458, 478 (N.Y. 2016) (applying Restatement §5 substantial participation standard); *Gudmundson v. Del Ozone*, 232 P.3d 1059, 1073-74 (Utah 2010) (collecting cases). Similar rules exist in negligence. *See* Restatement (Second) of Torts § 404, comment a ("chattels are often made by independent contractors. . . . In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer.").

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. *Svetz v. Land Tool Co.*, 513 A.2d 403 (Pa. Super. 1986) (motorcycle helmet); *Craigie v. General Motors,* 740 F. Supp. 353, 360 (E.D. Pa. 1990) (characterizing *Svetz*).

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; *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*.

THEORETICAL AND PRACTICAL LIMITATIONS OF THE CONSUMER EXPECTATIONS METHOD OF PROOF IN ASSESSING COMPLEX PRODUCT DESIGNS

By James M. Beck, Esq., Reed Smith; William J. Ricci, Esq. Ricci, Tyrrell & Grey
Daniel J. Kain, Esq., Littleton Park Joyce Ughetta & Kelly

When the Pennsylvania Supreme Court held in *Tincher* that a plaintiff may prove a strict liability design defect claim through a 1) risk-utility and/or 2) consumer expectations method of proof, Pennsylvania's product liability practitioners wondered how *Tincher's* composite defect standard would play out in every-day practice. *See Tincher v. Omega Flex, Inc*., 104 A.3d 328 (Pa. 2014). Experience has seen courts limit *Tincher's* consumer expectations lens to relatively rare cases where an inference of defect can be drawn from basic product risks, such as the inherently caustic nature of wet concrete. *See High v. Pennsy Supply, Inc.*, 154 A.3d 341, 349 (Pa. Super. 2017). Limited application of *Tincher's* consumer expectations test reflects the experience of several jurisdictions nationwide that have adopted a similar composite design defect framework. As the design of most products requires a balancing of risks and utility and accompanying expert opinion to explain complex design, engineering and testing concepts to lay jurors, the consumer expectations method of proof will apply rarely.

The consumer expectations test originates from comment (i) to Restatement (Second) of torts §402A. Comment (i) provides that for a product to be considered unreasonably dangerous, the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics – an objective knowledge standard. *Tincher* restates the standard as "the danger [in the product] is unknowable and unacceptable to the average or ordinary consumer." *See Tincher*, 104 A.3d at 335. *Tincher* does not provide a citation for the dual "test" of unknowability and unacceptably as stated in the Pennsylvania Supreme Court's opinion. Nor does any other state articulate the consumer expectations test in the same way. *Tincher* offers no practical guidance beyond this objective test, described in *Tincher* as the "average or ordinary consumer," the "ordinary consumer" and the "reasonable con-sumer." *See Tincher*, 104 A.3d at 387.

Within *Tincher*, the Pennsylvania Supreme Court discussed two situations in which the consumer expectations method of proof suffers from significant "theoretical and practical limitations." 104 A.3d at 388. The first scenario involves a product whose danger is obvious or within the ordinary consumer's contemplation. *Id*., *citing*, *Ahrens v. Ford Motor Co*., 340 F.3d 1142 (10th Cir. 2003). The second and *more common* scenario involves a product whose *complexity* exceeds the ordinary consumer's contemplation such that the consumer expectations method of proof raises the risk of arbitrary and unpredictable jury verdicts. *Id*.

A few Pennsylvania courts have addressed the first scenario, *Tincher*'s "unknowability" prong. Where the claimed risk is, in fact, already known, the "unknowability" prong, by definition cannot be met, and a consumer expectation-based defect claim necessarily fails. *Igwe v. Skaggs*, 258 F. Supp.3d 596, 611 (W.D. Pa. 2017). In *Kurzinsky v. Petzl America, Inc.*, No. CV 17-1234, 2019 WL 220201 (E.D. Pa. Jan. 16, 2019), *aff'd*, 794 F. App'x 187 (3d Cir. 2019), the consumer expectations test failed because the claimed product defect – that the angle of a home-made "zip line" would cause it to "accelerate with any increased force." *Id.* at *6. "The average and ordinary consumer . . . would know and appreciate its basic dangers." *Id. Kurzinsky* relied on a similar ruling in *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp. 3d 439 (E.D. Pa. 2016), which held that a consumer expectation-based defect claim was defeated by the common knowledge that a power table saw would cut through any material in its path, including human fingers. *Id.* at 451-52. Conversely, plaintiff's consumer expectations claim survived in *High* because the same could not be said for the caustic nature of wet concrete. While that risk was also the result of concrete's fundamental physical properties, it was not as obvious a risk as gravitational acceleration or a high-speed saw blade. *High*, 154 A.3d at 350 (finding a fact issue "whether an ordinary consumer would reasonably anticipate and appreciate the dangerous condition of concrete"). *Accord Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790 (Pa. C.P. Mifflin Co. Sept. 23, 2016) (risk of leak from water cooler was obvious), *aff'd mem*., 168 A.3d 359 (Pa. Super. 2017) (table).

As to the second prong, *Tincher* recognized the risk of arbitrary and unpredictable jury verdicts when a lay jury evaluates a complex product design through a consumer expectations lens. *See Tincher*, 104 A.3d at 388, *citing*, *Heaton v. Ford Motor Co*., 435 P.2d 806, 809 (Or. 1967). An injury might result from the use of a product in a way that does not engage an ordinary consumer's reasonable minimum assumptions about safe performance. *See Tincher*, 104 A.3d at 388, *citing*, *Soule v. Gen. Motors Corp.*, 882 P.2d 298,308 (Cal. 1994). For example, an ordinary consumer will have no idea how an automotive product should perform in all foreseeable situations or how safely such product should perform under all foreseeable hazards. *Id*.

Given the theoretical and practical limitations of the consumer expectations test, courts across the country have restricted its use to *res ipsa*-like cases in which an inference of defect can be drawn from the mere happening of a product-related accident. *See, e.g., Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 194 (2016); *see also* Twerski & J. Henderson, *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 Brook. L. Rev. 1061, 1108 (2009); Restatement (Second) of torts § 402A, cmt. (i) (listing *res-ipsa* like illustrations).

In a case on which the *Tincher* Court relied heavily, California's Supreme Court found the consumer expectations theory inapplicable to cases involving complex product design. *See Soule v. Gen. Motors Corp*., 882 P.2d 298 (Cal. 1994). The *Soule* Court held that the trial court committed error in sending the complex automotive design defect case to the jury under a consumer expectations instruction. *Id*. at 301, 310. In support of its holding, the California Supreme Court noted that the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defectiveness because "[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made." *Id*. at 305, *quoting* Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss.L.J. 825, 829 (1973). When the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk and benefit, the *Soule* Court held that the case should not be resolved simply on the basis of ordinary consumer expectations. *See Soule*, 882 P.2d at 305.

Where the complexity of a product and related mechanism of injury is sufficiently complex as to require expert opinion evidence, the consumer expectations theory *does not* and *cannot* apply. As the California Supreme Court stated: "one can hardly imagine what credentials a witness must possess before he can be certified as an expert on the issue of ordinary consumer expectations." *See Soule*, 882 P.2d at 306, *quoting*, Schwartz, *Foreword: Understanding Products Liability*, 67 Cal.L.Rev. 435, 480 (1979). In the rare *res ipsa*-like instance that the minimum safety of a product lies within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. *See Soule*, 882 P.2d at 308. Use of expert testimony for that purpose would invade the jury's function and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product's users. *Id*.

The *Tincher* Court explained that when devising a design defect theory, the plaintiff as the master of the claim must evaluate *inter alia* "the theoretical limitations of either alternative standard of proof" and "the evidence available or likely to become available for trial." *See Tincher*, 104 A.3d at 406. As a corollary, the defendant may seek to dismiss any overreaching by the plaintiff via appropriate motion and objection. *Id*. at 407. Following *Tincher*, defendants have successfully objected to plaintiffs' "overreaching" efforts to apply the consumer expectations method of proof to fact patterns involving complex, usually mechanical, product designs. *See, e.g*., *Yazdani v. BMW of North America*, 188 F. Supp.3d 486, 493 (E.D. Pa. 2016) ("consumer expectations test is inappropriate because" the risk at issue "is beyond the everyday understanding of the ordinary consumer") (motorcycle engine); *Wright*, 175 F. Supp.3d at 453 (a "reasonable consumer would not expect a [product] that did not purport to self-align to be a self-aligning") (table saw); *DeJesus v. Knight Industry & Associates*, No. 10-07434, 2016 WL 4702113, at *8-9 (E.D. Pa. Sept. 8, 2016) (consumer expectations test failed because "[t]he circumstance in which the accident occurred is not one within an ordinary juror's common experience") (industrial lift table); *Capece v. Hess Maschinenfabrik GmbH & Co. KG,* 2015 WL 1291798, at *3 (M.D. Pa. Mar. 20, 2015) (plaintiff conceded "*Tincher*'s consumer expectations test is inappropriate") (concrete block maker); *cf. Punch v. Dollar Tree Stores, Inc*., No. 12-cv-154, 2015 WL 7769223, at *5 (Mag. W.D. Pa. Nov. 5, 2015), *adopted*, 2015 WL 7776601 (W.D. Pa. Dec. 2, 2015) (no consumer expectation test where product put to unintended use by an unintended user) (tweezers).

These holdings are consistent with those nationally applying a similar consumer expectations framework. *See, e.g*., *Izzarelli v. R.J. Reynolds Tobacco Co*., 136 A.3d 1232, 1246 (Conn. 2016) ("the shortcomings of the ordinary consumer expectation test have been best illustrated in relation to complex designs"); *Cavanaugh v. Stryker Corp*., ___ So.3d ___, 2020 WL 5937405, at *5 (Fla. App. Oct. 7, 2020) ("the consumer expectations test cannot be logically applied here, where the product in question is a complex medical device"); *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") (applying Colorado law); *Brown v. Raymond Corp*., 432 F.3d 640 (6th Cir. 2005) (ordinary consumer has no expectation regarding safety of forklift design) (applying Tennessee law).

While a host of trial courts (both state and federal) have dismissed the consumer expectations method of proof in cases involving complex product design, no Pennsylvania appellate court has reached a direct holding on the issue. However, a 2019 concurring opinion from the Pennsylvania Superior Court raised marked skepticism over the applicability of the consumer expectations test in cases involving complex product design:

"[W]hile **I have reservations as to whether the consumer expectation test properly could be applied** to Davis' claim, **as it does not appear certain that a consumer would be knowledgeable enough to form expectations regarding the design of a fuel tank**, no party has raised that issue on appeal."

See Davis v. Volkswagen Group of Am., Inc. 2019 WL 3252054, at *13 (Pa. Super. July 19, 2019) (Stabile, J., concurring) (emphasis added) (citable memorandum opinion).

The *Tincher* Court emphasized that it did not purport to foresee and account for the myriad implications or potential pitfalls as yet unarticulated or unappreciated. *See Tincher*, 104 A.3d at 406. As such, the Pennsylvania Supreme Court wished for *Tincher's* progeny to develop incrementally as the Court provides reasoned explications of principles pertinent to factual circumstances of the cases that come before it. *Id*. The inapplicability of *Tincher's* consumer expectations method of proof to cases involving complex product designs presents a critically important incremental issue for Pennsylvania's appellate courts to address when the proper case arises.

MINNESOTA LAWYERS MUTUAL'S

Defense Program

INSURANCE SPECIFICALLY DESIGNED AND RATED FOR DEFENSE FIRMS

PDI's Endorsed Professional Liability Carrier

Members of the PDI have access to MLM's Defense Program, offering a lawyers' professional liability policy with preferred pricing and enhanced coverage.

Two Ways to Save

- **Preferred pricing** for firms with substantial insurance defense practice
- **A 5% membership credit** - Credit applied to premium on a per attorney basis

Enhanced Coverage*

- **Additional Claim Expense** - Benefit equal to one-half of the policy single limit, up to a maximum of $250k per policy period
- **Increased Supplementary Payment Limit** - From $10k to $25k - this includes loss of earnings if you attend a trial at our request and coverage for costs and fees incurred defending disciplinary claims
- **Aggregate Deductible** - Caps the total amount the insured will have to pay in total deductibles regardless of the number of claims in a single policy period

*See www.mlmins.com for qualification details

PENNSYLVANIA DEFENSE INSTITUTE

"We are proud that PDI has selected MLM as its endorsed carrier to offer coverage to its membership. MLM has long been recognized as a financially stable and consistent carrier for Pennsylvania lawyers, and we're thrilled to work in partnership with PDI to benefit members of the association."

Paul Ablan, President and CEO

Protect your firm with the ***premium savings*** and ***enhanced coverage*** offered to you as a member of the PDI.

Apply for a quote online!

www.mlmins.com

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY

Contact
Jeff Brien, Esq.
Regional Sales Director
215-495-2866
jbrien@mlmins.com

021042020

PENNSYLVANIA DEFENSE INSTITUTE
Application for Membership

Eligibility for Membership:
Those persons shall be qualified for membership and may continue to hold membership herein who are:

Members of the Pennsylvania Bar actively engaged in the practice of civil law, who individually devote a substantial portion of their time on litigated matters, to the defense of damage suits on behalf of individuals, insurance companies or corporations.

Full-time executives, managerial or supervisory employees, of insurance companies, self-insurers, or corporations who individually devote a substantial portion of their time to claim administration or to matters with a direct impact upon claims administration including legislation activities.

Please complete the information requested on this form and mail or fax this application with your check (payable to the Pennsylvania Defense Institute) to: **Pennsylvania Defense Institute, P.O. Box 6099, Harrisburg, PA 17112, FAX: 800-734-0732**

To ensure proper credit, please supply all names of applicants or have each new member complete a copy of this application.

Annual Membership Fees
- ☐ 1-9 members per organization: $265 per member
- ☐ 10 or more members per organization: $240 per member
- ☐ Retired members: $25 per member

Name _____

Firm or Company _____

Address _____

_____

E-mail Address _____

Telephone Number _____

If you are an attorney, please provide the following information:

(1) Name, address, telephone number and company affiliation for two current clients you represent in defense litigation matters:

_____

_____

_____

_____

_____

_____

(2) Name, address, telephone number of two members of the Pennsylvania Bar who can confirm that you devote a substantial portion of your practice on litigation matters in defense of damage suits on behalf of individuals, insurance companies or corporations.

_____

_____

_____

_____

_____

_____

_____
Signature

_____
Date

Description of Present Responsibitilies _____

_____

_____