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PENNSYLVANIA SUPREME COURT OVERRULED *AZZARELLO* IN 2014, BUT TEN YEARS LATER THE GHOST OF *AZZARELLO* CONTINUES TO HAUNT!

(VOLUME 5 – 2024 UPDATES AND ADDENDA TO COUNTER SUGGESTED STANDARD JURY INSTRUCTIONS)

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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

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On The Inside

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accurately reflect the paradigm *Tincher* decision. As all **COUNTERPOINT** readers 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 then so-called *Tincher* "Group" totaled more than 200 years of experience in litigating products liability cases at the trial and appellate court levels.

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 Re-Instatement (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 (first ed.)

These suggested jury instructions, endorsed by the PDI and PADC ("PDI SSJI"), were prepared as accurate recitations of the law, based on decisions of courts actually applying *Tincher* as the basis of Pennsylvania's products liability law. These instructions were based on the legal and logical premise that, by expressly overruling *Azzarello*, the Pennsylvania 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*** - 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 ordered 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. For many of the instructions, the reasoning and rationale emanated 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 considered advocacy. Nor was it intended that courts would employ the PDI SSJI reflexively to every case; rather, courts were and have been expressly encouraged to apply the same scrutiny and judgment to these suggested instructions that they would apply to the Bar Institute SSJI.

***"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 1"* 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;
- 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 improper on the critical definition of "defect."

Tincher II indeed remains controlling precedent that the position historically taken in the PDI SSJI on that issue remains correct, and that using the PBI's *Azzarello*-based definition of "defect" is "fundamental" – and thus reversible – error.

Finally, the authors outlined what they believed to be the clear legal and logical 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 - or so they thought! – would inform a 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.

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 did not end the Tincher Group's work. A longstanding problem with the Bar Institute SSJI was the 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.

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 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 PBI 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 continued to rely on overruled *Azzarello*-based conceptions of "strict" liability.

SSJI (Civ.) §16.10, ***offered nothing to replace*** the repudiated "any element" language, thereby leaving the jury with no defect standard at all. TO THIS DAY, 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 PBI revision remained 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 continued to "omit . . . the critical 'unreasonably dangerous' limitation on liability, it "fails to define the term 'defect' clearly, and

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consequently fails to guide the jury in distinguishing products safe and un-safe for their intended use." *Id*. at 371. This was unacceptable, and it remained at the heart of why the defense community continued 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

In 2021, little else had changed significantly in Pennsylvania law since the 2019 version of the PDI/PADC SSJI. Beyond *Roverano*, there had been a few more, mostly federal, decisions recognizing the availability of negligence-related principles and concepts in strict liability cases. These were added to the "Rationale" sections of appropriate instructions. Overall, up to that point in time the Pennsylvania appellate court system produced surprisingly few products liability decisions involving the strict liability issues covered by the SSJI over the past two years.

THEN CAME *SULLIVAN v. WERNER*

Later in 2021, in *Sullivan v. Werner Co.*, 253 A.3d 730 (Pa. Super. 2021), a strict liability case involving allegedly defective scaffolding, a 3-judge panel of the Pennsylvania Superior Court (Pennsylvania's intermediate appellate Court) held that, under Pennsylvania's interpretation of the Restatement (Second) of Torts §402A (1965):

> [I]t is irrelevant if a product is designed with all possible care, including whether it has complied with all industry and governmental standards, because the manufacturer is still liable if the product is unsafe. . . . Under such reasoning, evidence of industry standards may be excluded because those standards do not go to the safety of the product itself but to the manufacturers' "possible care in preparation of product," which is irrelevant to whether a product is unsafe or strict liability is established. *Id.* at 747 (citation omitted).

The Superior Court panel thus held that it was not an abuse of discretion by the Trial Court to exclude evidence of a product's compliance with industry standards and government regulations altogether in a strict liability design defect case.

Sullivan was appealed to the Pennsylvania Supreme Court. In addition to appellants, numerous *Amici* weighed in, including PDI and PADC. At issue was the viability of the Pennsylvania Supreme Court's 1987 decision in *Lewis v. Coffing Hoist Division*, 528 A.2d 590, 593-94 (Pa. 1987), *per se* excluding such compliance evidence in product liability cases, in the wake of the apparent "paradigm shift" in Pennsylvania products liability law unanimously announced by the 2014 Pennsylvania Supreme Court in *Tincher*. The *Lewis* decision had been expressly grounded in the highly criticized decision in *Azzarello v. Black Brothers Co., Inc.*, 391 A.2d 1020 (Pa. 1978), that was expressly overruled by *Tincher*. PDI and PADC put any further revisions to the PBI SSJI on hold until that appeal was decided.

Unfortunately, the defense essentially lost the *Sullivan v. Werner Co.* appeal in the Pennsylvania Supreme Court. In an Opinion Announcing the Judgment of the Court ("OAJC") issued by three of the six sitting Justices of the Pennsylvania Supreme Court right before Christmas 2023, the decision of the 3-judge panel of the Pennsylvania Superior Court was affirmed. *Sullivan v. Werner Co*, 306 A.3d 846 (Pa. 2023) (OAJC).

There was a 3-3 split by the then current 6-member Supreme Court on whether to retain Pennsylvania's historic categorical bar against such compliance evidence in product liability cases. Three Justices (Justices Mundy, Wecht and Dougherty) voted in favor of continuing the *per se* exclusion in *Lewis*. The concurring opinion authored by Justice Donohue indicated that the trial record was insufficient to require admissibility under an abuse of discretion standard. The 2 dissenting Justices (Chief Justice Todd and Justice Brobson) disagreed strongly with the *per se* exclusion. Importantly, no one opinion commanded a majority.[1]

The core of the adverse reasoning is this paragraph, in the Opinion Announcing the Judgment of the Court:

> We reaffirm *Lewis* and hold that evidence of a product's compliance with governmental regulations or industry standards is inadmissible in design defect cases to show a product is not defective under the risk-utility theory. To be clear, compliance evidence is simply evidence of the ultimate conclusion that a product complies with government regulations or industry standards, *i.e.*, that a government agency or industry organization would deem the product not defective. It is not evidence of the underlying attributes of the product that make it compliant with regulations or standards, which is presumably admissible subject to the ordinary Rules of Evidence. We agree with the *Lewis* Court's assessment that the focus of a design defect case must be limited to the characteristics of the product, and not the conduct of the manufacturer or seller. *See Lewis*, 528 A.2d at 593. Compliance evidence does not prove any characteristic of the product; rather, it diverts attention from the product's attributes to both the manufacturer's conduct and whether a standards-issuing organization would consider the product to be free from defects. Neither of these considerations are pertinent to a risk-utility analysis.

306 A.3d at 861-62. This conclusion overlooks that *Lewis* was decided in 1987, during the *Azzarello* era and **was expressly grounded in *Azzarello's* bright line exclusion** of negligence concepts in strict liability cases. It further ignores that in the seminal *Tincher* case decided 10 years ago, the Pennsylvania Supreme Court unanimously and expressly overruled *Azzarello* and its bright line exclusion, returning to the jury the decision whether a product was unreasonably dangerous when sold.

Tincher intentionally did not address

the viability of *Lewis* and cases like it, keeping its focus on the narrow questions before the Court while prescribing that the law be allowed to develop incrementally based on principles consistent with *Tincher's* tenets.

Bear in mind, the *Tincher* Supreme Court was much different than the *Sullivan* Supreme Court: Justice Todd was the only member of the Court to participate in both *Tincher* and *Sullivan*

Notably, the OAJC made no distinction between a product's compliance with industry standards (whether "voluntary" or incorporated by an OSHA or other regulation) or compliance with mandatory government codes and regulations – the result, exclusion, is the same.

Because of the 3-3 split on the core admissibility issue, Werner considered requesting re-argument before the 7 Justice Court. The risk of converting the 3-3 split to an unfavorable majority was, on the record before the Court, too great.

Pennsylvania is now the *only state in the country* with this rule that precludes evidence of compliance with governmental and industry standards in strict product liability cases (Montana, the only other holdout, having passed a statute in 2023). This is one more reason why, in the wake of the *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), personal jurisdiction decision, discussed *infra*, plaintiffs' counsel from across the country will have the incentive, and the ability, to file their product liability cases in Pennsylvania.

A legal conclusion by the Supreme Court is not a holding that binds lower courts unless a majority adopts it. Since the OAJC did not command a majority, the conclusion announced only in the OAJC, not adopted by the concurrence or dissent, is thus not binding on lower courts. What remains binding is the Superior Court panel decision that *Sullivan* affirmed.

The three Justices who joined in the OAJC would categorically rule that evidence that a product conformed to an OSHA or other government regulation, or to an ANSI or other industry standard is *per se* inadmissible in a strict products liability case, while indisputably remaining relevant to similar claims sounding in negligence.

The concurring opinion of Justice Donohue agrees that the trial court in *Sullivan* did not abuse its discretion in excluding the evidence of a product design's compliance with OSHA regulations and ANSI standards on this record, but appears to leave the door open for admitting such evidence in another case with a different record:

> Based on the record in this case developed on [plaintiffs'] Motion *in Limine* . . . and [defendants'] response thereto, the trial court did not abuse its discretion by disallowing the evidence. In my view, the complicated legal issue presented in this appeal is unfortunately not resolvable because of the undeveloped evidentiary record and undirected advocacy in the trial court.
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> From the outset, I was struck by the omission from the record of the actual ANSI or OSHA standard sought to be admitted. . .. [B]aldly stating that a product complied with [relevant] standards is meaningless to a court tasked with determining the relevancy of the evidence. . .. A trial court would be within its exercise of discretion to exclude the evidence if it concluded that a sub-trial on the weight to be given to [the] standards would confuse the jury and distort the focus from the product at issue.

Sullivan, Donohue Concurrence, 306 A.3d at 864-67 (citations and footnote omitted).

Justice Donohue's concurrence appears to support admission of compliance evidence on the following showing: (1) the industry standard or government regulation at issue is relevant to one or more of the factors identified as relevant to the jury's determination whether a product is unreasonably dangerous (*see* concurring opinion, 306 A.3d at 865 & nn,4-6, 867); (2) the actual industry standard or government regulation is offered into evidence (*id.* at 866); and (3) the proponent offers sufficient evidence of how the standard or regulation was developed and its purpose (*id.* at 866-67). Justice Donohue finds that such a showing was not made in this case, justifying the trial court's exclusion of the evidence. She does not say directly whether such a showing would be sufficient to justify admission of compliance evidence, but the entire thrust of her concurrence suggests that it would be.

Finally, the two dissenting Justices argued that evidence of a product design's compliance with government regulations and industry standards should be categorically admissible to show that the product is not defective, subject to the rules of evidence:

> [U]nder Pennsylvania's broad relevancy rules, governmental and industry standards should be admissible in products liability design defect matters. Additionally, the overwhelming majority of our sister states find governmental and industry standards evidence to be admissible. . .. [T]he OAJC's exclusion of governmental and industrial standards to defend against a defective product claim, at its core, reflects a mistrust of our jury system and suggests juries cannot understand these complex matters. . .. Our entire jury system relies upon the adversarial presentation of evidence and argumentation. It should be no different in the area of products liability.

Sullivan, Dissent, 306 A.3d at 870-71 (citation omitted).

In the authors' opinion, in pending design defect cases in Pennsylvania, the manufacturer must offer the evidence required by Justice Donohue's opinion to have any chance of success. This evidence would include comprehensive expert reports addressing to the *Wade/Barker* factors relevant to the issues in the case, and a detailed engineering analysis that expressly ties compliance with applicable industry standards and/or government regulations to those factors. Such expert reports should explain, preferably based on the expert's first-hand knowledge, the history and express purpose of each such standard or regulation, namely

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it's focus on the characteristics, performance, testing and safety of the product design, the composition of the standards promulgation committee, periodic updates, and where applicable an industry standard's incorporation into a government regulation or state or municipal code. We strongly recommend making a detailed offer of proof during trial, including presentation of all relevant compliance evidence *in camera* if allowed.

Apart from evidence of the fact of a product's compliance, the actual testing and evaluations conducted for compliance purposes should certainly be admissible (without the label "compliance testing"), especially when plaintiffs' experts suggest that the manufacturer should have conducted additional, different testing.

It is also important to be on guard for, and to resist, plaintiffs' attempts to place their own negligence-based arguments and evidence before the jury - what the *Sullivan* OAJC would consider "conduct-based" evidence and argument - into strict product liability cases. Examples of this sort of allegation are "failure to test," "failure to take action when they knew of a problem with the design and of other similar occurrences," and references to other manufacturer's designs as being "safer alternatives."

Pennsylvania recognizes only "three different types of defective conditions that can give rise to a strict liability claim: design defect, manufacturing defect, and failure-to-warn defect." *E.g.*, *Sullivan*, 306 A.3d at 850 n.1 (*quoting Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1170 (Pa. 1995)). These sorts of allegations focus on the defendant manufacturer's claimed conduct, and therefore sound in negligence and under the OAJC should be excluded. But if a trial Court opts to allow this type of evidence, then at every opportunity the defense should be prepared to argue that the door to evidence of compliance and the manufacturer's conduct has been opened – and make a clear record at every opportunity to present the theretofore excluded compliance evidence.

We should also be prepared to address these anticipated arguments *in limine* where it is strategically advantageous to do so.

Likewise, as confirmed in another "trailing" *Azzarello* era Pennsylvania Supreme Court decision, *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 544 (Pa. Super. 2009), "governmental and industry standards are admissible in a plaintiff's case." *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 544 (Pa. Super. 2009). In the view of the *Sullivan dissent*, "it is patently unfair to allow such standards into evidence in a plaintiff's case, but not in the defense's case. If evidence of governmental and industry compliance was irrelevant to strict liability, then such evidence should be inadmissible for both plaintiff and defendant alike." *Sullivan*, Dissent, 306 A.3d at 871. But in the meantime, if plaintiffs expressly open the door to such compliance evidence in their case, then the defense should likewise "march through that door" with its own compliance evidence.

Another aspect of *Sullivan* is that the OAJC discussion is limited to the "risk utility test," since the consumer expectation "test" was not at issue during the *Sullivan* trial. OAJC, 306 A.3d at 860. None of the three opinions discuss admissibility under the consumer expectations test. Query: wouldn't a reasonable consumer expect a product to comply with applicable industry standards and government regulations? And might such analysis give even the three OAJC Justices pause? The last sentence in the OAJC specifically states that "compliance with industry or government standards is not admissible in design defect cases to show a product is not defective under the risk-utility theory." *Id.* at 863.

Another important question is how conflict of law principles may affect application of the *Sullivan* OACJ's exclusionary rule. There are two aspects to this question, and they may well cut in different directions. As everyone now knows, *Mallory*, 600 U.S. 122, held that a "unique" Pennsylvania long-arm statute, imposing "general" personal jurisdiction on any Pennsylvania-registered foreign corporation, passed constitutional muster under the due process grounds raised in the United States Supreme Court. Most (if not all) major product manufacturers are registered in most, if not all, states. Thus (unless and until the Dormant Commerce Clause is, *per* Justice Alito, successfully invoked to possibly strike down this statute) any plaintiff anywhere in the country can sue Pennsylvania-registered product manufacturers in Pennsylvania courts on matters having no factual connection with the Commonwealth.

The first aspect of choice of law is whether *Sullivan's per se* ban on compliance evidence is "substantive" or "procedural" with respect to *Mallory* progeny cases that must apply another state's "substantive" law. The second aspect involves the "substantive" versus "procedural" divide, between State and Federal Courts, both applying Pennsylvania law. This question is an application of *Hanna v. Plumer*, 380 U.S. 460 (1965), since in Federal Court the admissibility of evidence is governed by the Federal Rules of Evidence. *E.g.*, *Rolick v. Collins Pine Co.,* 975 F.2d 1009, 1013 (3d Cir. 1992).

These two aspects have divergent implications. Taking the second one first, in *Rollick*, the Third Circuit held that the admissibility of standards compliance generally (not in a strict liability case) is governed by the relevance standards of the Federal Rules of Evidence, not by Pennsylvania law. In Pennsylvania-law diversity cases in federal court, the Third Circuit thus has already held that the admissibility of standards compliance evidence is governed by the relevance standards of Fed. R. Evid. 401, *et seq*. See *Covell v. Bell Sports, Inc.*, 651 F.3d 357, 366 (3d Cir. 2011) (federal rules "control in this case because they are 'arguably procedural'").

> The issue to be decided here is whether the OSHA regulation is admissible in a diversity action as evidence of the standard of care owed by the defendants to the plaintiff. . .. Since the question involves the admission of evidence in a federal court, the Federal Rules of Evidence control. . .. We can think of no reason under the Federal Rules of Evidence why the OSHA regulation is not relevant evidence of the standard of

> care once it is determined, as we have done, that under Pennsylvania law the defendants could owe plaintiff a duty of care. . .. [We] "borrow" the OSHA regulation for use as evidence of the standard of care owed to plaintiff.

Rolick, 975 F.2d at 1013-14. Similarly, in *Forrest v. Beloit Corp*., 424 F.3d 344, 354 (3d Cir. 2005), the court held that whether evidence of lack of similar occurrences was admissible, pre-*Tincher,* was a procedural question governed by the federal rules in diversity cases, not by an on-point Pennsylvania Supreme Court decision:

> While the well-reasoned decision [of the Pennsylvania Supreme Court] provides useful guidance, the question presented is governed by federal rather than state law. The admissibility of the evidence ultimately turns on a balancing of its probative value versus its prejudicial effect, and we have held that in a federal court the Federal Rules of Evidence govern procedural issues of this nature.

Id. at 354 (citations omitted). *Cf. Diehl v. Blaw-Knox*, 360 F.3d 426, 431 n.3 (3d Cir. 2004) (pre-*Tincher* product liability case; "assessment of the dangers of unfair prejudice and confusion of the issues are procedural matters that govern in a federal court notwithstanding a state policy to the contrary"); *Kelly v. Crown Equipment Co*., 970 F.2d 1273, 1278 (3d Cir. 1992) (federal rule admitting subsequent remedial measures "is 'arguably procedural,' and therefore governs in this diversity action notwithstanding Pennsylvania law to the contrary"). Thus, the weight of controlling federal circuit law is that post-*Sullivan,* Pennsylvania's *per se* exclusion of standards compliance evidence would not apply in federal court, given the liberal relevance standards of Fed. R. Evid. 401 and 402.

However, there is language in the *Sullivan* OAJC that plaintiffs will use to assert that the exclusionary rule is a matter of substantive Pennsylvania law. As we have already discussed, the OAJC states that standards compliance "is not evidence of the underlying attributes of the product . . ., which is presumably admissible subject to the ordinary Rules of Evidence." 306 A.3d at 861. That would suggest that Pennsylvania substantive law places limits on compliance evidence beyond the scope of, at least, Pennsylvania's evidentiary rules. Similarly, the closing paragraph of the OAJC embracing the "minority position" invokes "the social and economic policy of this Commonwealth" as grounds to keep standards compliance evidence away from Pennsylvania jurors. *Id.* at 863. We also note that *Lewis* itself predates the adoption of the Pennsylvania Rules of Evidence.

We present both sides of this issue because the other choice of law question, namely what law applies to *Mallory* progeny cases otherwise governed by non-Pennsylvania law, suggests the opposite conclusion. Pennsylvania procedural rules – but not Pennsylvania substantive law – apply in Pennsylvania courts. *E.g.*, *Commonwealth v. Sanchez,* 716 A.2d 1221, 1223 (Pa. Super. 1998). We have not seen this particular aspect litigated, but T.*M. v. Janssen Pharmaceuticals, Inc.,* 214 A.3d 709 (Pa. Super. 2019), held that the standard for admission of expert testimony was "procedural" and therefore Pennsylvania's *Frye* rule applied, not Texas' stricter expert admissibility standard, in a case governed by Texas substantive law. *Id.* at 721-22. It also appears that, unlike the OAJC, the Donohue Concurrence treats the issue as procedural, since it employed the abuse of discretion standard applicable to evidentiary rulings, rather than the *de novo* standard governing legal questions used by the OAJC.

Thus, in articulating their positions following *Sullivan,* defense counsel needs to carefully consider the differences and similarities between these two "substance"/" procedures" tests – recognizing that what is considered "substantive" and what is "procedural" has the potential to affect the application of *Sullivan*'s post-*Tincher* exclusionary rule differently. To the extent that courts deem the two applications of "substance" versus "procedure" analogously (although the two tests are not congruent), what restricts the exclusionary rule in one situation, may well expand it in the other.

Finally, if a plaintiff is seeking punitive damages, standards compliance evidence is admissible notwithstanding "strict liability" being the underlying cause of action. The Pennsylvania Supreme Court so held in *Phillips v. Cricket Lighters*, 883 A.2d 439 (Pa. 2005):

> [A]t the time this [product] was sold, it complied with all safety standards. Of course, compliance with safety standards does not, standing alone, automatically insulate a defendant from punitive damages; it is a factor to be considered in determining whether punitive damages may be recovered.

Id. at 447. So a demand for punitive damages negates *Sullivan*, since by definition punitive damages are all about a defendant's conduct. If bifurcation of punitive damages is at issue, should a product manufacturer's conduct be presented in the first phase, standards compliance should be admissible as well.

In sum, while reiterating *Tincher's* validity, clearly the Supreme Court's three Justice Opinion Affirming the Order of the Superior Court is at odds with *Tincher's* abrogation of bright line distinctions between negligence and strict liability concepts in product liability cases before a jury, defendants will have to live with the consequences for the foreseeable future. We expect every trial Judge and the Superior Court judge to follow the three-justice OAJC, and in any event the Superior Court's *Sullivan* decision is binding.

However, the authors remain hopeful that a majority of the Pennsylvania Supreme Court, if and when presented with an appropriate record on appeal (as delineated in Justice Donohue's concurring opinion), will confirm that evidence of a products compliance with industry product safety standards and government regulations may under appropriate (and probably limited) circumstances be considered by a jury under the risk-utility and consumer expectation tests, with appropriate guiding instructions by the trial court.

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PRODUCTS LIABILITY SUGGESTED STANDARD JURY INSTRUCTIONS PURSUANT TO *TINCHER v. OMEGA-FLEX, INC.* 104 A.3d 328 (Pa. 2014), 2024 EDITION (Supersedes 2021 Edition)

The 2024 Edition of the Product Liability Suggested Standard Jury Instructions is attached and contains updates to the 2021 suggested instructions and the "Rationale" for each instruction, reflecting all recent decisions by Pennsylvania Appellate, Common Pleas and Federal District courts dealing with product liability issues. In particular, PDI SSJI §§123(1-2), 124(1-2) reflect the *Sullivan* ruling discussed above.

These instructions preserve the prescriptions of *Tincher & Tincher II*, which in the authors' judgment remain the fundamental benchmark for product liability law in Pennsylvania in the post-*Azzarello* era.

The included Instructions:

16.10 GENERAL RULE OF STRICT LIABILITY

16.20(1) STRICT LIABILITY – DESIGN DEFECT − DETERMINATION OF DEFECT

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

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

16.70 STRICT LIABILITY – FACTUAL CAUSE

16.80 STRICT LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING CAUSES)

16.85 STRICT LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING EXPOSURES)

16.90 STRICT LIABILITY – MANUFACTURING DEFECT – MALFUNCTION THEORY

16.122 STRICT LIABILITY – UNKNOWABILITY OF CLAIMED DEFECTIVE CONDITION

16.123(1) STRICT LIABILITY – COMPLIANCE WITH PRODUCT SAFETY STATUTES OR REGULATIONS

16.123(2) NEGLIGENCE – COMPLIANCE WITH PRODUCT SAFETY STATUTES OR REGULATIONS

16.124(1) STRICT LIABILITY – COMPLIANCE WITH INDUSTRY STANDARDS

16.124(2) NEGLIGENCE – COMPLIANCE WITH INDUSTRY STANDARDS

16.125 STRICT LIABILITY – PLAINTIFF CONDUCT EVIDENCE

16.150 STRICT LIABILITY – COMPONENT PART

16.175 CRASHWORTHINESS – GENERAL INSTRUCTIONS

16.176 CRASHWORTHINESS – ELEMENTS

16.177 CRASHWORTHINESS – SAFER ALTERNATIVE DESIGN PRACTICABLE UNDER THE CIRCUMSTANCES

Defense counsel are encouraged to carefully consider the applicability of these counter-instructions where and as appropriate.

As with the 2021 update, these 2024 counter SSJI (Product Liability) will be circulated to all Pennsylvania federal and state court judges.

SEE 2024 REVISIONS ATTACHED

ENDNOTE

[1]Recall that at the time these decisions were published in December, there was a vacancy on the Court due to the sudden death of Justice Max Baer. This vacancy was recently resolved by the election of Superior Court Judge Daniel McCaffrey in November's general election. Justice McCaffrey was sworn in as the seventh Justice in January, 2024.

Product Liability

Suggested Standard Jury Instructions

Pursuant to

Tincher v. Omega Flex, Inc.,

104 A.3d 328 (Pa. 2014)

2024 Edition – Supersedes 2021 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.

As to defect, 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." Since *Tincher*, the Supreme Court has 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); *see Sullivan v. Werner Co.*, 306 A.3d 846, 860 (Pa. 2023) ("the duty is to provide a product free from a defective condition unreasonably dangerous to the consumer") (opinion announcing the judgment of the court). "*Tincher* also returned the question of whether a product is 'unreasonably dangerous' . . . back to the jury." *Sullivan v. Werner Co.*, 253 A.3d 730, 742-43 (Pa. Super. 2021), *aff'd by an equally divided court*, 306 A.3d 846 (Pa. 2023.

"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," *Tincher*, 104 A.3d 408. Therefore, the revised §16.10 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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168 & n.42 (Pa. 2020) (describing SSJI (Civ.) 13.230 as "ill-advised").

Other post-*Tincher* 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. Strict liability is imposed on the manufacturer who places a product into the market in a defective condition unreasonably dangerous to users of the product. 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); *see Sullivan v. Werner Co.*, 306 A.3d 846, 860 (Pa. 2023) ("the duty is to provide a product free from a defective condition unreasonably dangerous to the consumer") (opinion announcing the judgment of the court). *Accord Timmonds v. AGCO Corp.*, 2021 WL 1351868, at *3 (Pa. Super. April 12, 2021) (in table at 253 A.3d 276) (plaintiff "must demonstrate that the design of the machine results in an unreasonably dangerous product"); *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.

Strict liability "is not the same" as a "traditional claim[] of negligence," 104 A.3d at 400; *see Sullivan*, 306 A.3d at 860 ("the duty involved in strict liability . . . is different from the duty of due care

in negligence") (opinion announcing the judgment of the court., However, *Azzarello*'s "strict" separation of negligence and strict liability concepts was "undesirable." *Tincher*, 104 A.3d at 380-81.

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; *Sullivan*, 306 A.3d at 860 ("*Tincher* replaced the *Azzarello* standard with a 'composite test'"). 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"), *aff'd* 2021 WL 1351868 (Pa. Super. April 21, 2021); *Shujauddin v. Berger Building Products, Inc.*, 2023 WL 3819363, at *3 (E.D. Pa. June 5, 2023) ("A defective product is one that is "unreasonably dangerous" to the consumer."); *McPeak v. Direct Outdoor Products, LLC*, 2022 WL 4369966, at *4 (E.D. Pa. Sept. 20, 2022) ("*Tincher* returned the question of whether a product is "unreasonably dangerous"... back to the jury"); *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").

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 3-4; Arkansas – AMJI Civ. 1017; Colorado – CJI Civ. 14:1, 14:3; Connecticut – CJBCivJI 3.10-1; Florida – FSJI (Civ.) 403.7b; Idaho – IDJI 10.04; Illinois – IPJI-Civ. 400.06, 400.06A; Indiana – IN-JICIV 2103, 2117, 2121; Kansas – KS-PIKCIV 128.17; Louisiana – La. CJI §11:01; Maryland – MPJI-Cv 26:12; Massachusetts – CIVJI MA 11.3.1, 11.3.2; Minnesota – 4A MPJI-Civ. 75.20; Mississippi – MMJI Civ. §§3600-03; Missouri – MAJI (Civ.) 25.04; Nebraska – NJI2d Civ. 11.24; Nevada – NVPJI (Civ.) 7.2, 7.6; New Hampshire – NHCivJI 23.1-23.2; North Dakota – NDPJI-Civ. §C-21.00; Oklahoma – OUJI-CIV 12.1, 12.3; Oregon – UCJI No. 48.01-48.04; Rhode Island – RIJI Civ. §§2001-2002.1, 2002.3; South Carolina – SCRC – Civ. §§32-41 to 41-45; Tennessee – TPI-Civ. 10.01; Texas – TX-PJC 71.4; Utah – MUJI 2d CV CV1001-1002, 1006; Virginia – VPJI §34.075-34.076 (implied warranty); Wyoming – WCPJI (Civil) 11.01. *Compare*: Georgia – GSPJI 62.640 ("reasonable care"); Montana – MT ST §27-1-719(1) (recent statute specifying "unreasonably dangerous"); New Jersey – NJ-JICIV 5.40D-2 ("reasonably safe"); New Mexico – NMRA, Civ. UJI 13-1407 ("unreasonable risk"); New York – NYPJI 2:120 ("not reasonably safe"); Vermont – VTCVJI §6-6-10 ("reasonable care"); Washington – WPI Civ. 110.02 ("not reasonably safe"); West Virginia – W.Va.P.J.I. §403 ("not reasonably safe"); Wisconsin – Wis JI-Civil 3260.1 ("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"). Post-*Tincher* appellate decisions are silent. Post-*Tincher* trial courts tend to retain intended use/user. *Muniz v. Stober*, 2023

WL 6929320, at *2 (E.D. Pa. Oct. 19, 2023). 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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168 & n.42 (Pa. 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); *McPeak v. Direct Outdoor Products, LLC*, 2022 WL 4369966, at *4 (E.D. Pa. Sept. 20, 2022) (use of "a material that obstructs inspection" created jury question for consumer expectations test); *Davidson v. Peggs Co.*, 2022 WL 3867908, at *5 (W.D. Pa. Aug. 30, 2022) (consumer expectation test applicable to shopping cart).

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*., 308 So.3d 149, 155 (Fla. App. 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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168 & n.42 (Pa. 2020) (describing SSJI (Civ.) 13.230 as "ill-advised").

16.20(3) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

Risk-Utility

The plaintiff claims that [he/she] was harmed by a product that was defective in that it was unreasonably dangerous under the risk-utility test.

The risk-utility test requires the plaintiff to prove how a reasonable manufacturer should weigh the benefits and risks involved with a particular product, and whether the omission of any feasible alternative design proposed by the plaintiff rendered the product unreasonably dangerous.

In determining whether the product was defectively designed under the risk-utility test, and whether its risks outweighed the benefits, or utility, of the product, you may consider the following factors:

[Not all factors apply to every case; charge only on those reasonably raised by the evidence.]

(1) The usefulness, desirability and benefits of the product to all ordinary consumers – the plaintiff, other users of the product, and the public in general – as compared to that product's dangers, drawbacks, and risks of harm;

(2) The likelihood of foreseeable risks of harm and the seriousness of such harm to foreseeable users of the product;

(3) The availability of a substitute product which would meet the same need and involve less risk, considering the effects that the substitute product would have on the plaintiff, other users of the product, and the public in general;

(4) The relative advantages and disadvantages of the design at issue and the plaintiff's proposed feasible alternative, including the effects of the alternative design on product costs and usefulness, such as, longevity, maintenance, repair, and desirability;

(5) The adverse consequences of, including safety hazards created by, a different design to the plaintiff, other users of the product, and the public in general;

(6) The ability of product users to avoid the danger by the exercise of care in their use of the product; and

(7) The awareness that ordinary consumers would have of dangers associated with their use of the product, and their likely knowledge of such dangers because of general public knowledge, obviousness, warnings, or availability of training concerning those dangers.

RATIONALE

This instruction should only be given after the court has made a threshold finding that the risk-utility test is appropriate, under the facts of a given case, as outlined below.

"One method to prove a product was in a 'defective condition unreasonably dangerous,' *i.e.*, in breach of the strict liability duty, is the risk-utility test." *Sullivan v. Werner Co.*, 306 A.3d 846, 863 (Pa. 2023) (opinion announcing the judgment of the court). 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.*

In defining this "cost-benefit analysis," Pennsylvania relies 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)); *Sullivan v. Werner Co.*, 253 A.3d 730, 742 (Pa. Super. 2021), *aff'd by an equally divided court*, 306 A.3d 846 (Pa. 2023) (same). 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 Sullivan*, 253 A.3d at 742 ("[u]nder the risk-utility standard," the Wade factors are "for the factfinder to balance when determining whether a product is defective"); *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'"); *Timmonds v. Agco Corp.*, 2019 WL 7249164, at *21-22 (Pa. C.P. Philadelphia Co. Aug. 27, 2019) (modified Wade factors "properly presented the jury with the concepts applicable to" risk-utility), *aff'd*, 2021 WL 1351868 (Pa. Super. April 12, 2021) (in table at 253 A.3d 276).

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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168 & n.42 (Pa. 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 Sullivan*, 306 A.3d at 849 ("a plaintiff must prove that" the defendant's " product [was] in a defective condition"); *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); *Bradley v. Amazon.com, Inc*., 2023 WL 4494149, at *4 (E.D. Pa. July 12, 2023) (plaintiff "must prove that "the lack of warning rendered the product unreasonably dangerous"); *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").

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.) §16.30 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 §16.30 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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168& n.42 (Pa. 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 Liebig v. MTD Products, Inc.*, ___ F. Supp.3d ___, 2023 WL 5517557, at *4 (E.D. Pa. Aug. 25, 2023) (post-sale warning duty limited to products "sold in limited number into a distinct market that facilitates traceability"); *Walls v. Medtronic, Inc.*, 2019 WL 6839942, at *4 (E.D. Pa. Dec. 16, 2019) ("any post-sale duty to warn under Pennsylvania law is extremely narrow"); *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); *Liebig*, 2023 WL 5517557, at *4 n.6 (post-*Tincher*); *Bradley v. Amazon.com, Inc.*, 2023 WL 4494149, at *5 (Mag. E.D. Pa. July 12, 2023) (post-*Tincher*), *certif. denied*, 2023 WL 7196427 (Mag. E.D. Pa. Sept. 20, 2023); *Cleaver v. Honeywell International, LLC*, 2022 WL 2442804, at *4 (E.D. Pa. March 31, 2022) (post-*Tincher*) *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); *Brewer v. Troy-Bilt LLC*, 2023 WL 7167564, at *5 (E.D. Pa. Oct. 31, 2023) (plaintiff "would not have been harmed . . . had he obeyed the existing warnings"); *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*); *Zuzel v. Cardinal Health, Inc.*, 565 F. Supp.3d 623, 639 (E.D. Pa. 2021) ("In most failure to warn cases, a plaintiff is not entitled to a presumption that she would heed any additional warnings that were provided."); *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 Pa. Bar Institute's SSJI 16.50 is deficient because it omits this post-*Coward* precedent limiting the scope of the heeding presumption.

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 plaintiff or other relevant actor did not, in fact, read a warning, not only would any presumption be rebutted, but as a matter of law any inadequacy in that warning cannot have caused the plaintiff's injury. *Sherk v. Daisy-Heddon, a Div. of Victor Comptometer Corp.*, 450 A.2d 615, 619 (Pa. 1982) (warning non-causal where parent "did not open the box or read the instructions"); *Allstate Property & Casualty Insurance Co. v. Haier US Appliance Solutions, Inc.*, 2022 WL 906049, at *9-10 (M.D. Pa. March 28, 2022) (summary judgment granted; causation "speculative" plaintiffs never read relevant portions of product manual); *Nelson v. American Honda Motor Co.*, 2021 WL 2877919, at *6-7 (Mag. W.D. Pa. May 17, 2021) (no heeding presumption can apply where the plaintiff "never received, read, or relied on" any warnings), *adopted*, 2021 WL 2646840 (W.D. Pa. June 28, 2021); *Flanagan v. MartFive LLC*, 259 F. Supp.3d 316, 321 (E.D. Pa. 2017) (summary judgment granted against warning claim where plaintiff "testified under oath that he did not read these materials"); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439, 454 (E.D. Pa. 2016) ("[a]s [plaintiff] admits he never read the Operator's Manual, the purported inadequacy of the unread warnings therein could not have caused his injury"); *Mitchell v. Modern Handling Equipment Co.*, 1999 WL 1825272, at *7 (Pa. C.P.. June 11, 1999) ("that Plaintiff failed to read the existing instructions confirms the conclusion that any allegedly inadequate instructions were not the proximate cause of Plaintiff's accident"), *aff'd mem*., 748 A.2d 1260 (Pa. Super. 1999).

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.*, *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1100 (Pa. 2012); *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*, 55 A.3d at 1100 (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). For a thorough discussion of the role of third-party negligence in the product liability context, *see Timmonds v. AGCO Corp.*, 2021 WL 1351868, at *39-40 (Pa. Super. April 12, 2021) (in table at 253 A.3d 276).

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 on 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; *Grasinger v. Caterpillar, Inc.*, 2023 WL 4846843, at *13 (W.D. Pa. July 28, 2023); *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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168 & n.42 (Pa. 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 STRICT LIABILITY – 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* "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"). "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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168 & n.42 (Pa. 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).

16.123(1) STRICT LIABILITY – COMPLIANCE WITH PRODUCT SAFETY STATUTES OR REGULATIONS

{Defendants are encouraged to lay the foundation of record, per the concurring opinion of Justice Donohue in *Sullivan v. Werner Co.*, 306 A.3d 846, 863 (Pa. 2023), and request the following cautionary instruction about compliance evidence on the record established in the instant case. See also the discussion in the RATIONALE, below for other bases for arguable admission of compliance evidence}

You have heard evidence that the [product] complied with the [identify applicable product safety statute or regulation]. While compliance with that [statute/regulation] is not conclusive, it is a factor you should consider in determining whether or not [state the issue as to which the compliance evidence is relevant].

RATIONALE

Evidence that the product at issue complied with the requirements of an applicable product safety statute or governmental regulation is "irrelevant to whether a product is unsafe or strict liability is established," and therefore inadmissible in a product liability action brought solely on a strict liability theory. *Sullivan v. Werner Co.*, 253 A.3d 730, 747 (Pa. Super. 2021), *aff'd by an equally divided court*, 306 A.3d 846 (Pa. 2023).

> Whether a manufacturer has complied with industry or government standards goes to whether it "exercised all possible care in preparation of product" in making the design choice, not on whether there was a design defect in the product itself. Under [Restatement Second §402A], it is irrelevant if a product is designed with all possible care, including whether it has complied with all industry and governmental standards, because the manufacturer is still liable if the product is unsafe.

Id. Because *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), "neither explicitly nor implicitly overrules the exclusion of industry standards in a products liability case," §402A "provides sufficient reason to exclude such evidence." 306 A.3d at 748. On further appeal three justices of the Pennsylvania Supreme Court agreed that "evidence of a products' compliance with . . . government standards is not admissible in design defect cases to show a product is not defective under the risk-utility theory." *Sullivan v. Werner Co.*, 306 A.3d 846, 863 (Pa. 2023) (opinion announcing the judgment of the court).When compliance evidence is simply inadmissible, there is no reason for a jury to receive any instruction about it, except in where it is admitted for some purpose other than to prove that a product is not defective. Several such possibilities may, or may not, exist.

The Supreme Court's opinion announcing the judgment of the court in *Sullivan*, leaves open the possibility that compliance evidence might be relevant if the plaintiff pursues a consumer-expectation-based defect theory. *See* Instruction 16.20(2). The relevance of compliance evidence in a consumer expectation case was explained in the *Azzarello* era decision, *Estate of Hicks v. Dana Cos.*, that "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 943, 966 (Pa. Super. 2009) (en banc).

Compliance evidence has always been admissible where the plaintiff is also seeking punitive damages. *E.g.*, *Phillips v. Cricket Lighters*, 883 A.2d 439, 447 (Pa. 2005) ("compliance with safety standards does not, standing alone, automatically insulate a defendant from punitive damages; it is a factor to be considered in determining whether punitive damages may be recovered"; *Nigro v. Remington Arms Co.*, 637 A.2d 983, 990 (Pa. Super. 1994) (compliance "evidence is material and admissible to refute [a plaintiff's] claim for punitive damages").

During the period that strict liability was governed by *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), compliance evidence could also be admitted, at the plaintiff's option, by the plaintiff "opening the door" to such evidence. *E.g.*, *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 544 (Pa. Super. 2009); *Elick v. Ford Motor Co.*, 2010 WL 2612631, at *1(W.D. Pa. June 29, 2010). As *Sullivan* declared compliance evidence "irrelevant," it is uncertain whether this option still exists after *Tincher*. *See* Pa.

R. Evid. 402 ("Evidence that is not relevant is not admissible."). Neither the Superior Court nor the Supreme Court opinion announcing the judgment of the court in *Sullivan* mentioned "door opening."

In a risk-utility case where the plaintiff seeks to prove a feasible alternative design, *see* Instruction 16.20(3), evidence that the plaintiff's proposed alternative does not comply with applicable safety standards would be relevant to whether the plaintiff's alternative was, in fact, feasible. *See Wolfe v. McNeil-PPC, Inc.*, 773 F. Supp.2d 561, 572-73 (E.D. Pa. 2011) (where no government "approved alternative form" for the product exists, "there is no available alternative design of the drug for defendants to adopt").

Finally, the existence of applicable safety statutes or regulations may arise obliquely, such as an expert's qualifications including service on a relevant governmental committee or other body. In any or all of these situations, the above cautionary instruction may be appropriate.

Whether compliance evidence is admissible as relevant to product defect, and thus whether an instruction should be given, may also depend on choice of law issues. In federal court, it is well-established that the Federal Rules of Evidence govern in diversity cases otherwise subject to state law. *E.g.*, *Covell v. Bell Sports, Inc.*, 651 F.3d 35, 36-37 (3d Cir. 2011); *Moyer v. United Dominion Industries, Inc.*, 473 F.3d 532, 546 (3d Cir. 2007); *Diehl v. Blaw-Knox*, 360 F.3d 426, 431 & n.3 (3d Cir. 2004); *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1013 (3d Cir. 1992). This rule applies to compliance evidence that is admissible under the relevance standard of Fed. R. Evid. 402:

> The issue to be decided here is whether the OSHA regulation is admissible in a diversity action as evidence of the standard of care owed by the defendants to the plaintiff. . . . Since the question involves the admission of evidence in a federal court, the Federal Rules of Evidence control. . . . We can think of no reason under the Federal Rules of Evidence why the OSHA regulation is not relevant evidence of the standard of care once it is determined, as we have done, that under Pennsylvania law the defendants could owe plaintiff a duty of care.

Rolick, 975 F.2d at 354. *See Kelly v. Crown Equipment Co.*, 970 F.2d 1273, 1278 (3d Cir. 1992) (strict product liability case; federal rule admitting subsequent remedial measures "is 'arguably procedural,' and therefore governs in this diversity action notwithstanding Pennsylvania law to the contrary"). Thus, Third Circuit product liability cases applying Pennsylvania law require, post-*Sullivan*, that the relevance standards of Fed. R. Evid. 401 and 402, rather than Pennsylvania's exclusion of compliance evidence, apply in federal court.

A significant amount of product liability litigation involving non-Pennsylvania plaintiffs has been filed in Pennsylvania following *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). Since Pennsylvania is now the only state in the country to bar admission of compliance evidence in strict product liability trials, whether Pennsylvania's peculiar rule applies to such cases depends on whether other state's evidentiary policies are considered substantive law. *E.g.*, *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1285 (Pa. Super. 2018), *aff'd*, 240 A.3d 537 (Pa. 2020). A number of states, have passed statutes requiring admission of government standards compliance evidence in various circumstances. *E.g.*, Ariz. Rev. Stat. §§12-689, 12-701; Ark. Code §16-116-105(a); Colo. Rev. Stat. §13-21-403(1)(b); Fla. Stat. §768.1256; Ind. Code §34-20-5-1(2); Kan. Stat. §60-3304(a); Mich. Comp. Laws §600.2946(4); Mont. Stat. §27-1-719(7); N.J. Stat. §2A:58C-4; N.C. Gen. Stat. §99B-6(b)(3-4); N.D. Cent. Code §28-01.3-09; Tenn. Code §29-28-104; Tex. Rev. Civ. Prac. & Rem. Code §§82.007-82.008; Utah Code §78B-6-703; Wash. Stat. §7.72.050(1); Wis. Stat. §895.047(3)(b). These statutes support treating the admissibility of compliance evidence as substantive in *Mallory* progeny cases.

16.123(2) NEGLIGENCE – 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 defendant was negligent in its design of the product.

RATIONALE

This instruction is to be given where the jury has heard evidence that the product at issue complied with the requirements of an applicable product safety statute or governmental regulation in a product liability trial involving a negligence claim. In contrast to strict liability, this type of compliance evidence has always been admissible in Pennsylvania actions alleging negligence. "[E]vidence of industry standards relating to the design of the [product] involved in this case, and evidence of its widespread use in the industry, go to the reasonableness of the appellant's conduct in making its design choice." *Lewis v. Coffing Hoist Div.*, 528 A.2d 590, 594 (Pa. 1987). *Accord Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 965 (Pa. Super. 2009) (en banc) (conformity to "governmental regulations" tends to establish "the reasonableness of the manufacturer's conduct"); *Dallas v. F.M. Oxford, Inc.*, 552 A.2d 1109 (Pa. Super. 1989) (we "condone[] the admission of . . . private and governmental regulations regarding a particular business or industry" in negligence cases); *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").

16.124(1) STRICT LIABILITY – COMPLIANCE WITH INDUSTRY STANDARDS

{Defendants are encouraged to lay the foundation of record, per the concurring opinion of Justice Donohue in *Sullivan v. Werner Co.*, 306 A.3d 846, 863 (Pa. 2023), and request the following cautionary instruction about compliance evidence on the record established in the instant case. See also the discussion in the RATIONALE, below for other bases for arguable admission of compliance evidence}

You have heard evidence that the [product] complied with the [identify applicable industry standard]. While compliance with that standard is not conclusive, it is a factor you should consider in determining whether or not [state the issue as to which the compliance evidence is relevant].

RATIONALE

Evidence that the product at issue complied with industry-wide standards is "irrelevant to whether a product is unsafe or strict liability is established," and therefore inadmissible in a product liability action brought solely on a strict liability theory. *Sullivan v. Werner Co.*, 253 A.3d 730, 747 (Pa. Super. 2021), *aff'd by an equally divided court*, 306 A.3d 846 (Pa. 2023).

> Whether a manufacturer has complied with industry or government standards goes to whether it "exercised all possible care in preparation of product" in making the design choice, not on whether there was a design defect in the product itself. Under [Restatement Second §402A], it is irrelevant if a product is designed with all possible care, including whether it has complied with all industry and governmental standards, because the manufacturer is still liable if the product is unsafe.

Id. Because *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014), "neither explicitly nor implicitly overrules the exclusion of industry standards in a products liability case," §402A "provides sufficient reason to exclude such evidence." 306 A.3d at 748. On further appeal three justices of the Pennsylvania Supreme Court agreed that "evidence of a products' compliance with industry standards is not admissible in design defect cases to show a product is not defective under the risk-utility theory." *Sullivan v. Werner Co.*, 306 A.3d 846, 863 (Pa. 2023) (opinion announcing the judgment of the court).

When compliance evidence is simply inadmissible, there is no reason for a jury to receive any instruction about it, except in where it is admitted for some purpose other than to prove that a product is not defective. Several such possibilities may, or may not, exist.

The Supreme Court's opinion announcing the judgment of the court in *Sullivan*, leaves open the possibility that compliance evidence might be relevant if the plaintiff pursues a consumer-expectation-based defect theory. *See* Instruction 16.20(2). The relevance of compliance evidence in a consumer expectation case was explained in the *Azzarello* era decision, *Estate of Hicks v. Dana Cos.*, that "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 943, 966 (Pa. Super. 2009) (en banc).

Compliance evidence has always been admissible where the plaintiff is also seeking punitive damages. *E.g.*, *Phillips v. Cricket Lighters*, 883 A.2d 439, 447 (Pa. 2005) ("compliance with safety standards does not, standing alone, automatically insulate a defendant from punitive damages; it is a factor to be considered in determining whether punitive damages may be recovered"; *Nigro v. Remington Arms Co.*, 637 A.2d 983, 990 (Pa. Super. 1994) (compliance "evidence is material and admissible to refute [a plaintiff's] claim for punitive damages").

During the period that strict liability was governed by *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), compliance evidence could also be admitted, at the plaintiff's option, by the plaintiff "opening the door" to such evidence. *E.g.*, *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 544 (Pa. Super. 2009); *Elick v. Ford Motor Co.*, 2010 WL 2612631, at *1(W.D. Pa. June 29, 2010). As *Sullivan* declared compliance evidence "irrelevant," it is uncertain whether this option still exists, after *Tincher*. *See* Pa. R. Evid. 402 ("Evidence that is not relevant is not admissible."). Neither the Superior Court nor

the Supreme Court opinion announcing the judgment of the court in *Sullivan* mentioned "door opening."

In a risk-utility case where the plaintiff seeks to prove a feasible alternative design, *see* Instruction 16.20(3), evidence that the plaintiff's proposed alternative does not comply with applicable safety standards would be relevant to whether the plaintiff's alternative was, in fact, feasible. *See Wolfe v. McNeil-PPC, Inc.*, 773 F. Supp.2d 561, 572-73 (E.D. Pa. 2011) (where no government "approved alternative form" for the product exists, "there is no available alternative design of the drug for defendants to adopt").

Finally, the existence of applicable standards may arise obliquely, such as an expert's qualifications including service on a relevant industry standards committee or other body. In any or all of these situations, the above cautionary instruction may be appropriate.

Whether compliance evidence is admissible as relevant to product defect, and thus whether an instruction should be given, may also depend on choice of law issues. In federal court, it is well-established that the Federal Rules of Evidence govern in diversity cases otherwise subject to state law. *E.g.*, *Covell v. Bell Sports, Inc.*, 651 F.3d 35, 36-37 (3d Cir. 2011); *Moyer v. United Dominion Industries, Inc.*, 473 F.3d 532, 546 (3d Cir. 2007); *Diehl v. Blaw-Knox*, 360 F.3d 426, 431 & n.3 (3d Cir. 2004); *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1013 (3d Cir. 1992). This rule applies to compliance evidence that is admissible under the relevance standard of Fed. R. Evid. 402:

> The issue to be decided here is whether the OSHA regulation is admissible in a diversity action as evidence of the standard of care owed by the defendants to the plaintiff. . . . Since the question involves the admission of evidence in a federal court, the Federal Rules of Evidence control. . . . We can think of no reason under the Federal Rules of Evidence why the OSHA regulation is not relevant evidence of the standard of care once it is determined, as we have done, that under Pennsylvania law the defendants could owe plaintiff a duty of care.

Rolick, 975 F.2d at 354. *See Kelly v. Crown Equipment Co.*, 970 F.2d 1273, 1278 (3d Cir. 1992) (strict product liability case; federal rule admitting subsequent remedial measures "is 'arguably procedural,' and therefore governs in this diversity action notwithstanding Pennsylvania law to the contrary"). Thus, Third Circuit product liability cases applying Pennsylvania law require, post-*Sullivan*, that the relevance standards of Fed. R. Evid. 401 and 402, rather than Pennsylvania's exclusion of compliance evidence, apply in federal court.

A significant amount of product liability litigation involving non-Pennsylvania plaintiffs has been filed in Pennsylvania following *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). Since Pennsylvania is now the only state in the country to bar admission of compliance evidence in strict product liability trials, whether Pennsylvania's peculiar rule applies to such cases depends on whether other state's evidentiary policies are considered substantive law. *E.g.*, *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1285 (Pa. Super. 2018), *aff'd*, 240 A.3d 537 (Pa. 2020). A number of states, have passed statutes requiring admission of industry standards compliance evidence in various circumstances. *E.g.*, Ark. Code §16-116-204(a)(2); Fla. Stat. §768.1256; Ind. Code §34-20-5-1(1); Mich. Comp. Laws §600.2946(1); N.D. Cent. Code §28-01.3-09; Tenn. Code §29-28-105(b); Utah Code §78B-6-703; Wash. Stat. §7.72.050(1). These statutes support treating the admissibility of compliance evidence as substantive in *Mallory* progeny cases.

16.124(2) NEGLIGENCE – COMPLIANCE WITH INDUSTRY STANDARDS

You have heard evidence that the [product] complied with the [identify applicable industry standard]. While compliance with that standard is not conclusive, it is a factor you should consider in determining whether the defendant was negligent in its design of the product.

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 industry product safety standard in a product liability trial involving a negligence claim. In contrast to strict liability, this type of compliance evidence has always been admissible in Pennsylvania actions alleging negligence. "[E]vidence of industry standards relating to the design of the [product] involved in this case, and evidence of its widespread use in the industry, go to the reasonableness of the appellant's conduct in making its design choice." *Lewis v. Coffing Hoist Div.*, 528 A.2d 590, 594 (Pa. 1987). *Accord Birt v. Firstenergy Corp.*, 891 A.2d 1281, 1290 (Pa. Super. 2006) ("evidence of industry standards and regulations is generally relevant and admissible on the issue of negligence"); *Dallas v. F.M. Oxford, Inc.*, 552 A.2d 1109 (Pa. Super. 1989) (we "condone[] the admission of . . . private and governmental regulations regarding a particular business or industry" in negligence cases); *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"); *Wentz v. Black & Decker (U.S.) Inc.*, 2023 WL 316786, at *9 (W.D. Pa. Jan. 19, 2023) ("industry standards are only one ingredient, which the jury can assess along with the rest of the evidence").

16.125 STRICT LIABILITY – PLAINTIFF CONDUCT EVIDENCE

You have heard evidence about the manner that the plaintiff[s] used the product. You may consider this evidence to evaluate whether the product was in a defective condition and unreasonably dangerous to an ordinary user. However, a plaintiff's failure to exercise care while using a product does not require your verdict to be for the defendant, if you find that this plaintiff was not acting as an ordinary user.

[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 Sullivan v. Werner Co.*, 253 A.3d 730, 748 (Pa. Super. 2021) ("a plaintiff's conduct is not always irrelevant in strict liability" because "the plaintiff's use of the product may be relevant as it relates to causation"),, *aff'd by an equally divided court*, 306 A.3d 846 (Pa. 2023). But, "a defendant cannot use contributory negligence concepts to excuse a product's defect or reduce recovery by comparing fault." *Id.* Evidence that showed nothing more than "a plaintiff's comparative or contributory negligence" was not admissible. *Reott*, 55 A.3d 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. *Sullivan*, 253 A.3d at 742; *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 can be 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, and the plaintiff must have acted as an objective "ordinary" user. *Cote v. Schnell Industries*, 2022 WL 16815032, at *4 (M.D. Pa. Nov. 8, 2022) ("a plaintiff's alleged own lack of due diligence" is insufficient).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); *Sullivan*,

253 A.3d at 748-49. 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 "are not binding," and "are guides only." *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022). They "have not been adopted by our supreme court," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). *See Graham v. Check*, 243 A.3d 153, 168 & n.42 (Pa. 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.

16.150 STRICT LIABILITY – COMPONENT PART

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*.

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LET THE SUNSHINE IN: EXPLORING THE IMPACT OF PENNSYLVANIA'S SUNSHINE ACT ON SCHOOL BOARD DECISION-MAKING

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I. INTRODUCTION

Open meeting laws exist in each state and at the federal level, emphasizing the significant value placed on public awareness of and participation in government decision making. Demanding Transparency in Local Government: An Analysis of Trib Total Media, Inc. v. Highlands School District, 21 Widener L.J. 539, 541 (2012). Consider Pennsylvania's Sunshine Act, initially passed on July 3, 1986; its very first lines declare that "the right of the public to be present at all meetings and to witness the deliberation, policy formulation and decision making of agencies is *vital* to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." 65 Pa.C.S.A. § 702(a) (emphasis added). In fact, the predecessor to the Sunshine Act as we know it today was passed in 1974 in order to "curb corruption and abuse of power by opening the decision-making processes of governmental agencies to greater public participation, scrutiny, and accountability" following the infamous Watergate scandal. Demanding Transparency, 21 Widener L.J. at 541; Tom Mistick and Sons, Inc. v. City of Pittsburgh, 130 Pa. Commw. 234, 237, 567 A.2d 1107, 1108 (1989).

These considerations are especially salient in the context of decision making by public school boards, given their fundamental role in shaping the minds of our country's youngest citizens. School districts today are regularly confronted with difficult, often polarizing questions on important subjects, such as the parameters of school curricula and student rights. Under such circumstances, it is paramount that school boards protect themselves, their students, their stakeholders, and their decision-making processes by understanding and adhering to applicable open meeting laws.

This article aims to provide guidance to Pennsylvania schools about best practices to ensure compliance with the Commonwealth's Sunshine Act. It will begin by providing an overview of the Sunshine Act's provisions. Next, it will identify school board practices which may be vulnerable to Sunshine Act challenges, as illustrated by recent Pennsylvania litigation. Finally, this article will conclude by highlighting best practices that school boards and school districts may adopt in order to minimize the risk of Sunshine Act challenges and maximize the meaningful participation of residents in their decision-making process.

II. THE SUNSHINE ACT, GENERALLY

With certain specified exceptions, the Sunshine Act requires that "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public[.]" 65 Pa.C.S.A. § 704. Such a meeting must be publicly noticed at least 24 hours in advance by publication or circulation within the political subdivision where it is to take place, except in the case of emergency. Additionally, an agenda enumerating the business to be considered must be shared at least 24 hours in advance by physical posting at the location of the meeting and the principal office of the agency, as well as online, if applicable. Id. at § 709. The meeting must provide an opportunity for residents and taxpayers to comment on matters of public concern. Id. at § 710.1. Attendees may not be prohibited from recording the proceedings of a meeting. Id. at § 711. Finally, the Act requires that "[w]ritten minutes… be kept of all open meetings of agencies." 65 Pa.C.S.A. § 706. Such minutes must include: the date, time, and place of the meeting; the names of members present; the substance of all official actions and a record of votes taken thereon; and the names of all citizens who participated, as well as the subject of their testimony. Id.

Importantly, not every gathering constitutes a meeting triggering the requirements of the Sunshine Act. Under the Act, a meeting occurs, and thus must be open to the public, if "[a]ny prearranged gathering of an agency" is "attended or participated in by a quorum of the members of [the] agency" and is "held for the purpose of deliberating agency business or taking official action." Id. at § 703. The Pennsylvania Commonwealth Court has clarified that "deliberations," as they are contemplated by the Sunshine Act, do not include informal inquiry, questioning, discussion, or debate amongst agency members. *See*, *e.g.*, Conners v. West Greene Sch. Dist., 569 A.2d 978, 983 (Pa. Commw. 1989). Further, "agency business" is not merely any business considered by the agency, but rather is limited to "[t]he framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action." 65 Pa.C.S.A. § 703. Similarly, "official action" has been defined to include only "(1) [r]ecommendations made by an agency pursuant to statute, ordinance or executive order[;] (2) [t]he establishment of policy by an agency[;] (3) [t]he decisions on agency business made by an agency[; and] (4) [t]he vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order." Id. In other words, where a conference produces no votes or decisions on a legal proposal, and no recommendation or establishment of policy emerges, no "official action" has taken place. *See*, *e.g.*, Ackerman v. Upper Mt. Bethel Tp., 567 A.2d 1116, 1119

(Pa. Commw. 1989).

III. MODERN CHALLENGES

A. Addressing Last-Minute Business: Coleman v. Parkland School District

Board members, administrators, and other public school district stakeholders can likely remember an occasion (or a few) on which important business affecting the district arose in the eleventh hour, just prior to a scheduled school board meeting. Such was the situation faced by the Parkland School District at its monthly board meeting on October 26, 2021. The teachers' association had voted to approve a new Collective Bargaining Agreement ("CBA") that very morning, meaning that consideration of the CBA was absent from the board meeting agenda, published 24 hours in advance on October 25, 2021. Coleman v. Parkland Sch. Dist., 305 A.3d 238, 241 (Pa. Commw. 2023). Nevertheless, the newly approved CBA was added to the agenda by motion at the outset of the October 26 school board meeting, as shown in the publicly posted meeting minutes. Id. The school board subsequently voted to authorize its President to execute the CBA. Id. Ratification of the board's vote regarding the CBA was placed on the agenda for the following school board meeting, to be held on November 16, 2021, 24 hours in advance. Id. at 242.

Jarrett Coleman, a district resident, filed a Complaint in the Court of Common Pleas of Lehigh County on the basis that the board had acted improperly to approve and execute the new CBA. Id. Coleman claimed that, while there were three exceptions to the general requirement that agenda items be posted at least 24 hours in advance of a public meeting, none applied to the school board's consideration of the CBA. Id. at 245. He identified these exceptions as: "(1) emergency business; (2) *de minimis* business not involving fund expenditure or entering into a contract that arises within the 24 hours preceding the meeting; or (3) *de minimis* business raised by a resident/taxpayer during the meeting that does not involve fund expenditure or entering into a contract." Id. (*citing* 65 Pa.C.S. § 712.1). Coleman argued that the newly executed CBA should be invalidated on this basis. Following an unfavorable determination, Coleman appealed to the Pennsylvania Commonwealth Court.

The Commonwealth Court agreed with Coleman that three exceptions existed to the general requirement of 24-hour advance notice for agenda items at public meetings and that approval and execution of the school district's CBA, which "involved expenditure of significant funds and/or entering into a contract without prior public notice," violated the provisions of the Sunshine Act. Id. at 249. However, the court refused to invalidate the CBA that the school board had approved and executed. Notably, it acknowledged that "[f]ailure to comply with the Sunshine Act [did] not *automatically* render the CBA null and void[,]" as "'a court's decision to invalidate an agency's action for violation of the Sunshine Act is discretionary, not obligatory.'" Id. at 249-50 (*quoting* Baribault v. Zoning Hearing Bd. of Haverford Tp., 236 A.3d 112, 120 (Pa. Commw. 2020) (*citing* 65 Pa.C.S. § 713)) (emphasis added). Most significantly, the court noted that "'[s]hort of fraud…, *most any Sunshine Act infraction could [be] cured by subsequent ratification at a public meeting*. Otherwise, governmental action in an area would be gridlocked with no possible way of being cured once a Sunshine Act violation was found to have occurred.'" Id. at 250 (*quoting* Lawrence Cty. v. Brenner, 135 Pa. Commw. 619, 582 A.2d 79, 84 (1990) (citation omitted). Thus, because the Parkland School District school board had properly ratified the execution of the CBA at its November 16, 2021 meeting, the court determined that it had cured its Sunshine Act violation from its October 25, 2021 meeting.As such, Coleman v. Parkland School District well illustrates an important consideration for school boards faced with last-minute business: while every effort should be made to comply with all obligations under the Sunshine Act, most errors and infractions will not lead to automatic invalidation of the action taken. So long as board members and district administrators are quick to recognize and act on such errors and infractions, they can be cured, and the action taken preserved, by ratification at a subsequent meeting.

*B. Waiting on the Claim: I-Lead Charter School-Reading v. Reading School District*Individuals who wish to challenge a perceived Sunshine Act violation should act quickly to do so, as illustrated by the court's disposition in I-Lead Charter School-Reading v. Reading School District. In that case, the plaintiff charter school, I-Lead, claimed that the Reading School District had improperly held closed meetings on various occasions to deliberate about revoking I-Lead's charter to operate. I-Lead Charter Sch. – Reading v. Reading Sch. Dist., 2017 WL 2653722 (E.D. Pa. June 20, 2017). The Sunshine Act requires that alleged violations be brought within 30 days of an open meeting or within 30 days of the *discovery* of a closed meeting; however, in no case may a challenge be asserted more than one year after the date of the meeting in question. Id. at *5.Significantly, I-Lead had asserted in its amended Complaint that it had discovered the alleged Sunshine Act violation within thirty days prior to commencing the action. Id. at *5. However, the court deemed this conclusory allegation insufficient to satisfy the applicable statute of limitations. It noted that I-Lead "provide[d] no allegations or evidence to support" that it had timely brought suit insofar as it failed to identify the dates of the challenged closed meetings or the date on which such meetings were discovered. Id.I-Lead Charter School-Reading v. Reading School District illustrates that the statute of limitations applicable to Sunshine Act claims is a brief one. As such, perceived Sunshine Act violations should be acted on quickly. Furthermore, individuals who wish to challenge an action under the Sunshine Act should take care to identify the date of such action, as well as the date on which they learned of it. Failure to note such details may well prove fatal to the claim.

C. Public Access Versus Public Safety: Herring v. Pittston Area School District

Questions regarding such issues as student health and safety, student rights, and curricula are of great importance to both parents and students. The potential social and emotional implications of such questions raise the possibility of heightened tensions amongst stakeholders at school

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board meetings and beyond, as illustrated in a recent matter in Luzerne County. In Herring v. Pittston Area School District, a 2021 school board meeting was forcibly postponed in light of safety concerns after a group of attendees became disruptive and refused to follow the district's then-in-place masking policy. Herring v. Pittston Area Sch. Dist., No. 2021-CV-12581 (Luz. Cty. 2021). Prior to the rescheduled meeting, the district's security team devised and implemented a temporary identification requirement for all school board meeting attendees. This security measure was in place for the following two school board meetings and removed when it became apparent that the security risk had subsided. District resident Benjamin Herring challenged the identification requirement as violating the Sunshine Act's open meetings provision after he was barred from attending the next school board meeting after refusing to show a Pennsylvania driver's license.

The trial court granted the school district's Motion for Summary Judgment on two grounds. First, it determined that no "official action" had been taken by the school board and that no "deliberations" had taken place upon any "agency business[,]" because the temporary identification requirement was fully devised and implemented by the school district's security team without any input or action by the school board. Second, the court acknowledged that Herring had been provided an opportunity to attend these meetings, as he possessed a valid Pennsylvania driver's license, and chose not to take it by refusing to show identification. In so finding, the court opined that "it [did] not appear to be too much of a burden to require photo identification" at the school board meetings.

Importantly, Herring v. Pittston Area School District illustrates that the right of public access to school board meetings is not impeded by safety considerations. While the Act's open meeting provisions require that the public be granted access to school board meetings, school districts can and should take action to address threats to the safety of their constituents.

IV. CONCLUSION

The cases above demonstrate that the Sunshine Act has the potential to implicate nearly every action taken or considered by school boards. As such, school boards must be intimately familiar with the Act's requirements. Most notably, school boards should: be aware of the contours of the exceptions to the Act's open meeting provisions, so that those exceptions are not applied too broadly; ensure that public notice of meetings is provided in accordance with the law; and act quickly to identify and remedy violations when they occur.

Justice Louis Brandeis famously quipped that "sunshine is the best disinfectant." At its core, the Sunshine Act is designed to promote and ensure governmental transparency. In the public-school context, where governmental transparency is of paramount importance, the Act provides necessary guardrails to guarantee that citizens are afforded a meaningful opportunity to participate in public decision-making processes that affect themselves, their children, and their communities.

PROJECT LITIGATE
LAWYER'S INITIATIVE TO IMPROVE NEXT GENERATION ATTORNEYS TRIAL EXPERIENCE

MAKE THE PLEDGE TO SUPPORT PROJECT LITIGATE

Pennsylvania Supreme Court Justice Christine Donohue has initiated a movement to provide new and inexperienced lawyers an avenue to develop courtroom skills in an age where such opportunities to develop such skills have been reduced. This situation has occurred because of the decline in the number of cases going to jury trial and the more general use of virtual technologies resulting in the number of occasions for lawyers lacking experience to gain that experience. New and experienced lawyers have found it difficult to obtain trial and litigation experience. Discussions among lawyers and judges led to the conclusion that this situation affects the career growth of next generation of litigators and has an impact on the bar's general obligation to the public to have a continuous and sufficient number of adequately trained and experienced litigation attorneys available to competently serve the needs of the public.

In order to move this initiative forward, Justice Donohue raised this issue at several meetings of a special ad hoc committee of the Pennsylvania Conference of State Trial Judges ("PTCSJ"). PTCSJ has adopted a Resolution and "endorses and supports the efforts of Project LITIGATE and encourages law firms to Take the Pledge. Be it resolved that the PCSTJ encourages our members to adopt the best practices recommended by our task force." As a result of those meetings, Justice Donohue recommended that there was a need for a grass roots committee comprising of lawyers and law firms in an attempt to raise the awareness of this issue. At the request of Justice Donohue, John P. Gismondi, Esquire, organized a state-wide committee tasked with the job of creating a program and introduce an initiative to meet the goal to assure that the next generation of litigators can gain litigation experience and appropriate training. In order to form the committee, Mr. Gismondi contacted the leadership of various bar organizations including: Pennsylvania Bar Association; Pennsylvania Defense Institute; American College of Trial Attorneys; Pennsylvania Association of Justice; Philadelphia Association of Defense Counsel; Philadelphia Trial Lawyers Association; and Academy of Trial Lawyers of Allegheny County. Each organization appointed two representatives to work with the committee.

The committee met several times during the Winter of 2022-2023 and spent a considerable amount of time discussing specific policies and practices that firms could adopt in an attempt to provide early exposure for young and/or inexperienced lawyers to litigation tasks such as case planning, preparation for and taking depositions, oral arguments, and the actual trial of cases. After much discussion regarding these general topics, the committee refined these aspects of litigation and developed "The LITIGATE Pledge". The use of the word "Pledge" creates a commitment to the initiative without mandating that the firms do anything. The entire purpose of this movement is to create a shared commitment within each firm taking the pledge and to create a greater awareness in the broader bar community of the needs of aspiring litigators and to create a sustained effort by the members of the bar to address these needs.

Following these committee meetings and the development of "Project LITIGATE" and "The LITIGATE Pledge", each member of the committee was tasked to return to their organizations and discuss this initiative with the intent of having the organization adopt a resolution encouraging its membership to "Take the Pledge". PDI's representatives on this committee were Stuart Sostmann, Esquire, Marshall Dennehey Warner Coleman & Goggin, and Daniel Stofko, Esquire, Margolis Edelstein. Stu and Dan reported back to the PDI Board of Directors and PDI adopted a resolution to participate in "Project LITAGATE" and encourage the PDI firms and membership to "Take the Pledge" and sign "The LITIGATE Pledge".

The pledge consists of a number of suggested actions that will assist in training and preparing the new generation of trial attorneys. The pledge asks law firms to adopt and implement, where feasible, the following:

- Provide a series of in-house educational/training sessions in which senior trial attorneys make presentations and/or lead discussion on all aspects of litigation skills;
- Regularly include less experienced associate attorneys in pre-trial activities such as drafting of pleadings, discovery planning, case strategy sessions, client and witness interviews, drafting of deposition questions, and witness preparation;
- Encourage associate attorneys to observe depositions, and then gradually over time allow them to assume an increasing degree of responsibility to conduct part or all of depositions;
- Encourage associate attorneys to observe oral arguments, and then gradually over time allow them to assume an increasing degree of responsibility to make oral argument to trial and appellate courts;
- Include associate attorneys as participants in the final stages of trial preparaton;
- Include associate attorneys as members of the trial team and allow them gradually over time to assume responsibility for examining individual witnesses and eventually trying an entire case to a jury;

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- Encourage associate attorneys to seek pro bono or other similar assignments which provide opportunities to acquire litigation experience;
- Institute a program, procedure or custom whereby associate attorneys receive regular feedback and critique as they perform each of the above tasks.
- Request trial judges to adopt practices which encourage the participation of young associates in motions and trial presentations.

The items listed in the pledge are common sense items that should be implemented by the firms to train their young associates not only to participate in this initiative but are necessary to provide clients with the best possible legal service and to assure that there is a consistent and planned succession of experienced litigators to meet the litigation needs of the firm's clients.

Following the adoption of the resolution, PDI has engage in conversations with Pennsylvania Association of Justice, Philadelphia Trial Lawyers Association, and Philadelphia Association of Defense Counsel along with judges representing PCSTJ regarding possible joint programs to provide needed training and opportunities for the next generation of litigators to obtain the benefit of educational programs provided by experienced trial attorneys from both sides of the spectrum. Meetings are still occurring, and programs are being discussed, developed, and organized to meet this need.

Additionally, PDI featured Justice Donohue in a panel discussion including Judge John McNally, Court of Common Pleas for Dauphin County, Joseph Froetschel, Esquire, Phillips Froetschel, Plaintiffs' representative, and Jason M. Banonis, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Defendants' representative, regarding Project LITIGATE and the need for concentration and effort to train the next generation of litigators at the PDI Annual CLE and Conference at OMNI Bedford Springs. Copies of "The LITIGATE Pledge" were provided to the attendees with the request that they take the pledge back to their firms for consideration and hopefully signing the pledge and committing to the effort of assuring that the next generation of trial attorneys are trained and prepared to take the reins as the older generation retires.

IN ORDER TO KEEP THE INITIATIVE ALIVE AND TO ENCOURAGE PDI MEMBER FIRMS TO "TAKE THE PLEDGE", PDI IS AGAIN REQUESTING THAT EACH OF THE MEMBERS TAKE THIS ARTICLE AND THE ATTACHED "The LITIGATE Pledge" TO THE LEADERS OF THEIR FIRMS AND REQUEST THAT THE FIRM JOIN IN "Project LITIGATE", SIGN THE PLEDGE AND HAVE IT RETURNED TO PDI FOR SPECIAL RECOGNITION AS A SUPPORTER OF "Project LITIGATE".

PDI is developing a page on the PDI Website that will list all firms that are pledged to "Project LITIGATE" and are committed to assure that well trained and experienced litigators are available in the future to service the needs of the firm's clients and the general public.

FROM COUNTERPOINT'S EDITORS:

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PROJECT
LITIGATE
TRAINING TOMORROW'S TRIAL ATTORNEYS

Project LITIGATE

Lawyers Initiative To Improve next Gen Attorneys' Trial Experience

The LITIGATE Pledge

WE, the attorneys of _____ (firm), recognize that it is becoming increasingly difficult for aspiring trial attorneys to acquire litigation skills, and we further recognize that it is our obligation to encourage, promote and facilitate young attorneys' development of litigation and trial advocacy skills.

AND, THEREFORE, WE HEREBY PLEDGE to adopt, as far as feasible, the following practices to help prepare and train the next generation of trial attorneys:

- Provide a series of in-house educational/training sessions in which senior trial attorneys make presentations and/or lead discussion on all aspects of litigation skills;
- Regularly include less experienced associate attorneys in pre-trial activities such as drafting of pleadings, discovery planning, case strategy sessions, client and witness interviews, drafting of deposition questions, and witness preparation;
- Encourage associate attorneys to observe depositions, and then gradually over time allow them to assume an increasing degree of responsibility to conduct part or all of depositions;
- Encourage associate attorneys to observe oral arguments, and then gradually over time allow them to assume an increasing degree of responsibility to make oral argument to trial and appellate courts;
- Include associate attorneys as participants in the final stages of trial preparation;
- Include associate attorneys as members of the trial team and allow them gradually over time to assume responsibility for examining individual witnesses and eventually trying an entire case to a jury;
- Encourage associate attorneys to seek pro bono or other similar assignments which provide opportunities to acquire litigation experience; and,
- Institute a program, procedure or custom whereby associate attorneys receive regular feedback and critique as they perform each of the above tasks.
- Request trial judges to adopt practices which encourage the participation of young associates in motions and trial presentations.

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