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THE AZZARELLO- INSPIRED 6TH EDITION OF THE PBI-PUBLISHED SUGGESTED STANDARD JURY INSTRUCTIONS IN PRODUCT LIABILITY CASES: “THE BEAT GOES ON!” (Volume 6)

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THE HISTORICAL CONTEXT

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 reiterated the key holdings of the Pennsylvania Supreme Court’s seminal 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 notorious attempt at “social engineering;” (3) *Azzarello* is expressly overruled; and (4) the critical question in strict liability design defect cases under *Tincher* and sec. 402A, namely whether a “defective condition *unreasonably dangerous*” to the user existed at the time the product was sold, is now returned to the jury for resolution.

The first installment (“*Volume I*”) was inspired by the 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”), published in 2015.

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 the core “any element” jury instruction language drawn directly from *Azzarello*, which was expressly 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 left 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.

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 for Products Liability that would accurately reflect the paradigm *Tincher* decision. The PBI sub-committee ignored that invitation.

In the face of the PBI sub-committee’s unwillingness to discuss the pervasive inaccuracies of the Bar Institute SSJI, a group of experienced practitioners acted. Together, the members of this self-proclaimed “*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 re-drafting the September 2017 Counter Suggested Standard Jury Instructions for Products Liability (“PDI SSJI”), endorsed by both the Pennsylvania Defense Institute and the Philadelphia Association of Defense Counsel were first published in September 2017 and attached to the second

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requires that the product be “unreasonably dangerous,” and the jury must be instructed accordingly. *Id.* at 401-02.

FOLLOW-UP EFFORTS BY THE DEFENSE BAR TO HAVE JURIES IN PRODUCTS LIABILITY TRIALS INSTRUCTED ON THE LAW CONSISTENT WITH TINCHER.

The 2017 publication of the PDI SSJI did not end the *Tincher* Group’s work by any means. A longstanding problem with the PBI SSJI was the lack of timely, meaningful updates. Thus, the *Tincher* 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 considered 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 PDI SSJI (Products) was 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 to the PDI SSJI.

THE 2020 PBI SSJI PRODUCT LIABILITY “REVISIONS” (AND THE PDI & PADC RESPONSE)

The PBI SSJI (Civ.) §16.10 finally 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

installment of this series, entitled “**Pennsylvania Supreme Court Overrules *Azzarello*, Only to Have PBI Suggested Jury Instructions Seek *Azzarello*’s Reinstatement (Volume 2 – Proper Suggested Standard Jury Instructions)**,” published in the October 2017 edition of **COUNTERPOINT**.³

These September 2017 PDI SSJI were prepared as accurate recitations of the law, based on *Tincher* itself as well as decisions of courts properly applying *Tincher* as the basis of Pennsylvania’s products liability law. These suggested 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.

For the convenience of practitioners and the Courts, these instructions were ordered and numbered to follow as closely as possible the organizational layout of the PBI SSJI and were offered as direct alternatives to the PBI SSJI.

Each of these September 2017 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 was taken 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 initial 2017 PDI SSJI were based but also explained the deficiencies in the corresponding sections of the PBI SSJI.

As noted, it was never intended that courts would employ the 2017 PDI SSJI reflexively to every case; rather, courts were expressly encouraged to apply the same scrutiny and judgment to these suggested instructions that they would apply to the Bar Institute SSJI, and to utilize those applicable to a particular case.

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*”)**. In the same case (following remand) the Superior Court held 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***,” 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;
- proof of “defect” under the Restatement of Torts (Second), §402A

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.

Most concerning, the PBI 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. This clear and unequivocal language is mandated by the Supreme Court. There is no legal basis to ignore it.

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!

This omission was unacceptable, and it remained at the heart of why the defense published **Products Liability Suggested Standard Jury Instructions pursuant to *Tincher v. Omega-Flex, Inc.*, 104 A.3d 328 (Pa. 2014), 2021 Edition.**

(published and appended to the corresponding May 2021 COUNTERPOINT article in this series, Volume 4).

THEN ALONG CAME SULLIVAN v. WERNER, 2021 - 2023

As of the summer of 2021, little else had changed significantly in Pennsylvania products liability law since the 2019 version of the PDI SSJI. However, in late 2021, in *Sullivan v. Werner Co.*, 253 A.3d 730 (Pa. Super. 2021), a strict liability case involving allegedly defective scaffolding, a three-judge panel of the Pennsylvania Superior 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).

Id. at 747. While recognizing that *Tincher* “returned the question of whether a product is ‘unreasonably dangerous’ . . . back to the jury,” *id.* at 742-43, the Superior Court panel nevertheless 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), an *Azzarello*-era decision *per se* excluding such compliance evidence in product liability cases in the wake of the paradigm shift in Pennsylvania products liability law unanimously an-

nounced by the Pennsylvania Supreme Court in *Tincher* in 2014. 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*. The appeal focused on whether to retain Pennsylvania’s historic *Azzarello/Lewis* categorical bar against introduction of compliance evidence in product liability cases. PDI and PADC put any further revisions to the PBI SSJI on hold until that appeal was decided.

Unfortunately, the defense lost the *Sullivan v. Werner Co.* appeal in the Pennsylvania Supreme Court. In a non-precedential Opinion Announcing the Judgment of the Court (“OAJC”) issued by three of the six then-sitting Justices of the Pennsylvania Supreme Court, the decision of the Superior Court panel was affirmed. *Sullivan v. Werner Co.*, 306 A.3d 846 (Pa. 2023) (OAJC). Three 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, and delineated scenarios where admissibility may indeed be proper. The two dissenting Justices (Chief Justice Todd and Justice Brobson) disagreed strongly with the *per se* exclusion. Importantly, no one opinion commanded a majority.⁴

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 admis-

sible 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 ignored 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 ignored that in the seminal *Tincher* case decided 11 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.⁵

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.

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 courts⁶ What remains binding is the Superior Court panel decision that *Sullivan* affirmed.⁷

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

Following *Sullivan*, the *Tincher* Group went back to work. They carefully ana-

lyzed the implications of the *Sullivan* plurality decisions in the comprehensive article **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)**, *Counterpoint*, September 2024. Attached to that article were **2024 Updates to the PDI SSJI**, addressing the issues raised by the three *Sullivan* Supreme Court plurality decisions, suggesting practical counter-instructions in various contexts, discussing recent state and federal district court decisions dealing with products related issues since 2019, and proposing several additional suggested jury instructions on topics not previously addressed. As before, the 2019 version of the PDI SSJI (Products) was expressly approved by both PDI and PADC. This 2024 edition of the PDI SSJI remains the most current iteration.

The *Tincher* group anticipates a new edition to reflect anticipated Pennsylvania Superior and Supreme Court decisions in early to mid 2026 on a number of key issues that will affect the trial of product liability cases in the Commonwealth.

PBI'S RECENTLY PUBLISHED 6TH EDITION OF ITS SUGGESTED STANDARD JURY INSTRUCTIONS (PRODUCTS) RETAINS THE PROBLEMATIC ELEMENTS OF ITS POST-TINCHER PREDECESSORS, AND TAKES A FURTHER STEP TO ABROGATE RECOGNIZED LIMITATIONS ON THE SO-CALLED "HEEDING PRESUMPTION" IN PRODUCT LIABILITY CASES

Since 2015, PDI SSJI have included "affirmative use" of a "heeding presumption" – namely that where a product warning is found to be "inadequate," then the plaintiff will be presumed to have read and heeded an adequate warning, had one been given. However, while the PBI SSJI (6th ed.) cite *Viguers v. Phillip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005) (per curiam), they completely ignore the workplace context at the core of the *Viguers* analysis. *Viguers*

explicitly limited any heeding presumption to workplace injuries. "[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." *Id.* at 538. Two other published, precedential Superior Court opinions have likewise rejected extending any heeding presumption to strict liability cases generally. *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 fact pattern as *Viguers*)

The new 2025 6th edition of the PBI SSJI doubles down on the previous error, purporting to recognize a generalized heeding presumption. New section 16.40⁸ states:

The law presumes [plaintiff] would read and heed adequate warnings or instructions. If [plaintiff] proves the warning was not adequate, ***you may presume that an adequate warning would have caused [plaintiff] to avoid the injury*** (emphasis added).⁹

Not only does the 6th edition PBI SSJI remove the workplace context limitation established by the Superior Court – binding precedent unless and until the Pennsylvania Supreme Court has spoken otherwise – but these latest iterations seek to lay the path for proof of **causation**. Under current Pennsylvania law, this is anathema. To be clear, *the Pennsylvania Supreme Court has never adopted or even discussed the "heeding presumption" as a substitute for affirmative proof of causation in asbestos cases, toxic tort cases generally – in or outside the workplace, or in any other context.*

The heeding presumption is a supposed reverse corollary of Restatement (Second) of Torts §402A, comment j (1965), which provides: "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." 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*, 837 A.2d at 538.¹⁰

Davis v. Berwind Corp., focused on the element of defect, *not* causation, as the operative consideration under comment j. *Davis* affirmed the Superior Court’s holding that the defendant was entitled to judgment *n.o.v* was based on the Supreme Court’s conclusion that the warnings provided with the machine were adequate, rendering that product reasonably safe and not defective, and thereby fulfilling the manufacturer’s duty under §402A. Causation had nothing to do with that result.

Likewise, in *Gigus v. Giles & Ransome, Inc.*, 868 A.2d 459 (Pa. Super. 2005) the Superior Court expressly held as dispositive that where a 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 a defective condition, nor is it unreasonably dangerous. The law presumes that warnings will be obeyed, and where a product is safe for use when warnings are followed, it is not defective, nor unreasonably dangerous. Citing *Fletcher v. Raymond Corp.*, 623 A.2d 845, 848 (Pa. Super. 1993). Current Pennsylvania appellate precedent thus precludes any “heeding presumption” in deciding causation in strict liability warning claims outside of the limited context of asbestos employment litigation. No Pennsylvania appellate decision has ever permitted what PBI SSJI 16.140 states as a jury charge.

While several federal trial courts ostensibly applying Pennsylvania law have “predicted” that the Pennsylvania Supreme Court would adopt a generalized heeding presumption, *cf. Bloom v. Medical Depot, Inc.*, 2025 LX 449634, 2025 WL 2803913 (E.D. Pa. Sept. 30, 2025); *Twigg v. Varsity Brands Holding Co.*, 2025 U.S. Dist. Lexis 41690, 2025 WL 747512 (M.D. Pa. March 7, 2025), those decisions are contrary to controlling Superior Court authority, and thus cannot support a jury charge to a Pennsylvania state-court jury. Federal predictions are

just that, and cannot overrule binding state-law authority. *E.g., Herold v. Univ. of Pittsburgh*, 329 A.3d 1159, 1186 n.18 (Pa. 2025) (“a federal circuit court decision ... is not binding on us”); *Hoy v. Angelone*, 720 A.2d 745, 750 (Pa. 1998) (“it is axiomatic that [federal] decisions are not binding”); *Staub v. Toy Factory, Inc.*, 749 A.2d 522, 531 (Pa. Super. 2000). (“United States District Court opinions construing Pennsylvania law are not binding on this court”).

Finally, the two “Deans of product liability scholarship,” professors Henderson & Twerski, said it best in 1990, and it remains true today:

Thus, when comment j. says that “the seller may reasonably assume,” it is not referring to a presumption that any individual plaintiff actually did read and heed the warning; to the contrary, it is certain from the outset that at least some consumers will not have done so. Rather, comment j says that if the warning is adequate and is likely to reach many, if not all, consumers, then for purposes of determining whether the defendant has discharged his underlying duty to warn it reasonably may be assumed that consumers will act on the warning. Once the conclusion is reached that the defendant has satisfied this duty, the plaintiff claim fails at the threshold and the question of individualized quotation never arises.

To insist that any particular plaintiff should enjoy a presumption of individualized causation when adequate warnings are not given because the defendant enjoys such a presumption when warnings are given is to rely on false logic. Comment j never addresses the causation issue, as such, nor does it create any presumption of individualized causation benefiting defendant. All it says, is that if the defendant provides an adequate warning, he fulfills his duty of care, and that, in determining the adequacy of the warning, courts will examine its likely effects on reasonable consumers, generally, not the actual effects on particular consumers. Thus, to rely on comment j to derive a presumption of actual, individual causation for plain-

tiffs in failure to warn cases is to commit serious error. (emphasis added).

Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U.L. Rev. 265, 279 (1990).

In sum,

- 1) the 6th edition of the PBI SSJI (6th ed.) neither addresses nor corrects any of the blatant inconsistencies with post-*Tincher* Pennsylvania product liability law that the “*Tincher* group” has addressed since 2015;
- 2) the PBI SSJI (6th ed.) steadfastly refuse to adhere to the express *Tincher* 2014 directive – reinforced in *Tincher II* – that “unreasonably dangerous,” the “normative principle” upon which a product manufacturer’s liability is based, be returned to the jury for its consideration and decision; and now,
- 3) the PBI SSJI (6th ed.) purports not only to remove any limitations on the contextual (i.e. employment) applicability of section 402A, comment j, but suggests its offensive use to ease the plaintiff’s burden to establish causation, which is contrary to multiple binding Superior Court decisions.

Fortunately, as mentioned in footnote 1, *supra*, 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.

ENDNOTES

¹The authors wish to acknowledge Francis P. Burns III, Member, Ricci, Tyrrell, Johnson & Grey, for the his invaluable analysis of and insights into the “heeding” – related issues addressed in this article.

²As 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.** “Precedential decisions,” not mere “suggested” jury instructions, have binding legal status. Therefore, “suggested” jury instruction are “not binding” and are a “guide[] only.” *Cowher v. Kodali*, 283 A.3d 794, 808 (Pa. 2022).

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

⁴At 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 subsequently resolved by the election of Superior Court Judge Daniel McCaffrey.

⁵Notably, 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.

⁶The 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 rule that evidence of a product's compliance with industry product safety standards and government regulations may under appropriate

circumstances be considered by a jury under the risk-utility and consumer expectation tests, with appropriate guiding instructions by the trial court.

⁷Pennsylvania 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).

⁸The PBI 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).

⁹The PBI SSJI concedes this corollary to comment j is likewise rebuttable. *See, e.g., Coward v.*

Owens-Corning Fiberglas Corp., 729 A.2d 614, 621 (Pa. Super. 1999), *appeal granted*, 743 A.2d 920 (Pa. 1999) (the *Coward* allocatur grant was never pursued due to the defendant's bankruptcy). *Coward* outlined the presumption rebuttal process based on then existing Pennsylvania Supreme Court precedent.

¹⁰The 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. 104 A.3d at 399. Thus, the comment j presumption remains the law of Pennsylvania.



A POST-SULLIVAN WORLD REQUIRES A STRONG EXPERT REPORT

By Lauren E. Purcell, Esquire, Marshall Dennehey Warner Coleman & Goggin

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When passing words of wisdom down to a younger attorney, any seasoned attorney will advise that an expert will either make or break a case. In the wake of *Sullivan v. Werner Company*, 306 A.3d 846 (Pa. 2023), this wisdom is especially true.

To establish a strict products liability claim, a plaintiff must prove that the product was defective and contained a design defect, a manufacturing defect, or a failure to warn defect. A design defect is established by using either (or both) the consumer expectations test or risk-utility test. The consumer expectations test examines whether the product's danger is unknowable and unacceptable to the average or ordinary consumer.

In contrast, the risk-utility test analyzes factors to determine whether a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden/cost of taking precautions. Pennsylvania courts have used the *Wade* factors, which include:

(1) The usefulness and desirability of the product – its utility to the user and to the public as a whole[;] (2) The

safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury[;] (3) The availability of a substitute product which would meet the same need and not be as unsafe[;] (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility[;] (5) The user's ability to avoid danger by the exercise of care in the use of the product[;] (6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions[;] (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Tincher v. Omega Flex, Inc., 104 A.3d 328, 389-90 (Pa. 2014) (*quoting* J. Wade, "On the Nature of Strict Tort Liability for Products," 44 MISS. L.J. 837-38 (1973)). Courts have also used the *Barker* factors, which include:

(1) The gravity of danger posed by the

challenged design[;] (2) The likelihood that such danger would occur[;] (3) The mechanical feasibility of a safer alternative design[;] (4) The financial cost of an improved design[;] (5) The adverse consequences to the product and to the consumer that would have resulted from an alternative design.

Barker v. Lull Engineering Co., 573 P.2d 443 (Cal. 1978)

In *Sullivan*, a non-precedential opinion, the majority opinion of the Supreme Court of Pennsylvania held that evidence of compliance with industry standards is inadmissible under the risk-utility test, as the focus of a design defect case is limited to the characteristics of the product, not the conduct of the manufacturer or seller. *Sullivan*, 306 A.3d at 859, 861. While the concurring opinion of the Supreme Court agreed in precluding evidence of industry standards at trial, its finding was premised upon the "undeveloped evidentiary record" in the trial court. *Id.* at 864. The concurring opinion held that, accepting the defendants' argument that "producing a product that is designed pursuant to the industry or government standard makes evidence

of the standard relevant to the question of whether the product is defective” as “workable,” there were evidentiary deficits in the record that supported the conclusion that the standards were inadmissible. *Id.* The concurring opinion explained that the defendants did not establish the relevance of the standards to any of the factors used in the risk-utility test. *Id.* at 865. The concurring opinion reasoned that the record was “devoid of any information about what [the standards] are, how they are developed, or what their purpose, application or interpretation is.” *Id.* The concurring opinion held that “[a]ny decision on the admissibility of industry or governmental standards in a design defect products liability case requires a developed record containing evidence establishing the relevance of the standard to a factor or factors that a jury must consider in reaching its liability verdict.” *Id.* at 8.

In handling a products liability case post-*Sullivan*, it is imperative to have a strong expert report to support any liability defense, especially if that defense includes industry/government standards and/or regulations. As *Sullivan* only addressed an evidentiary issue related to a design defect claim using the risk-utility test, there is a compelling argument that compliance evidence is admissible as to other defect claims, such as design defects using the consumer-expectations test, manufacturing defects, and failure to warn defects. Additionally, compliance evidence is also relevant as to negligence product liability claims and, thus, is potentially admissible. However, considering the concurring opinion in

Sullivan, the evidentiary record must clearly support the relevancy of standard/regulation evidence. One such way to create the necessary supporting record is with an expert report.

In selecting an expert, qualifications are key. The expert must not only be familiar with the at-issue standard/regulation, but the expert should also have been involved in the development of the standard. In the report, the expert needs to highlight this background. The expert should include in the report the history and development of the standard, the committee or members involved in the developmental process of the standard, and approval and implantation of the standard. The expert should explain the unbiased developmental process used to create the standard. The expert should further include explanations as to the purpose of the standard and the interpretation and application of the standard.

The expert must clearly identify in the report the applicable standard and include text of the standard. The expert needs to take the additional step of showing and establishing that the standard is relevant to the factors a jury considers in determining whether the at-issue product was unreasonably dangerous. For example, the expert should include an explanation of the standard’s application to the *Wade* and *Barker* factors. The expert should also directly tie the standard to the applicable jury instructions. In the report, the expert should not only identify the factors/instructions but also clearly explain how the applicable standard relates to the factors/instructions.

The expert must further include in the report the reason(s) as to exactly why the standard is being used. The expert will need to explain that the purpose of the standard as it relates to safety. The expert should use the standard when analyzing the condition and safety of the at-issue product. The expert could also use the standard in support of a feasibility of design argument relative to an alternative design claim. Standards could also be used to support a causation argument. These expert explanations and opinions can then be used to argue that the standard/regulation evidence does not relate to conduct or due care of the defendant (i.e., the issue in *Sullivan*) and, thus, is admissible evidence. Such an argument provides an additional basis of relevancy and can be used in motions in limine, opposition responses, objections, offers of proof, and proposed jury instructions.

Taking the time to select the proper expert who will produce a strong expert report will help build the supporting relevancy record for key evidence necessary to support a products liability defense. Not having this expert report could very well break the case.

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