

# COUNTERPOINT

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## THE FUTURE OF IMPLIED WARRANTY OF MERCHANTABILITY CLAIMS IN PRODUCT LIABILITY CASES AFTER *PHILLIPS II*

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In the last issue of *Counterpoint*<sup>®</sup>, we analyzed the future of negligence claims in product liability cases following the Pennsylvania Supreme Court's decision in *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003) ("*Phillips I*"). In this second part of the article, we turn our attention to the future of implied warranty of merchantability claims in product liability cases. The *Phillips* case referenced is the Superior Court's decision on remand that attempted to separate standards under Section 402(A) of the Restatement (Second) of Torts from the concept of merchantability under the Uniform Commercial Code. The case holds that, although a product may be safe for its intended users for purposes of strict liability, it may be nevertheless unmerchantable under the U.C.C. if it was not safe for all foreseeable users. *Phillips v. Cricket Lighters*, 852 A.2d 365, 372-73 (Pa. Super.), ("*Phillips II*"), *appeal granted*, No. 35 WAP 2004 (Pa. Oct. 26, 2004). In an extraordinary exercise of jurisdiction, the Pennsylvania Supreme Court granted *allocatur* in *Phillips* for a second time and will now squarely address the implied warranty claim. In the meantime, however, the Superior Court's decision in *Phillips II* is authoritative and an understanding of its practical application is necessary.

### I. THE SUPERIOR COURT'S DECISION IN *PHILLIPS II*

As discussed in the last issue, *Phillips* arises from a child playing with a disposable cigarette lighter that lacked child-resistant features. The child retrieved the lighter from his mother's purse atop the refrigerator and apparent-

ly lit some linens. The fire spread and ultimately engulfed the house. Sadly, three family members perished.

#### A. PROCEDURAL HISTORY LEADING UP TO *PHILLIPS II*

This ten-year-old case is an experienced traveler in the Pennsylvania appellate courts. Initially, the Mercer County Court of Common Pleas granted summary judgment to the manufacturer on claims of strict liability, negligence, negligent infliction of emotional distress, breach of the implied warranty of merchantability, and punitive damages, reasoning that the lighter was safe for its adult intended users. The Superior Court reversed and rejected the notion that a product need only be safe for its intended user. *Phillips v. Cricket Lighters*, 773 A.2d 802, 815 (Pa. Super. 2001), *aff'd in part, rev'd in part*, 576 Pa. 644, 841 A.2d 1000 (2003). The Supreme Court then affirmed in part, reversed in part, and remanded to the Superior Court. The negligence-based and punitive damages claims were permitted to survive based upon a perceived issue of fact. The Court held, however, that the strict liability claim could not survive because the lighter was safe for its adult intended users. The Supreme Court remanded the case to the Superior Court for an opinion on the implied warranty and punitive damages claims. *Phillips I*, 841 A.2d at 1011.

#### B. THE SUPERIOR COURT RESURRECTS THE IMPLIED WARRANTY OF MERCHANTABILITY CLAIM IN *PHILLIPS II*

In *Phillips II*, the Superior Court on remand resurrected the implied warranty of merchantability and punitive damages claims. As to the implied warranty claim, the Superior Court first analyzed the nature of "merchantability" as developed in caselaw. It noted that the concept of merchantability requires that the goods have an inherent soundness and that they are: (1) suitable for the purpose for which they are designed; (2) free from significant defect; (3) performing in a way that like goods should perform; (4) of reasonable quality within expected variations; and (5) fit for the ordinary purpose for which they are used. *Phillips II*, 852 A.2d at 370 (quoting *Gall v. Allegheny County Health Dept.*, 521 Pa. 68, 76, 555 A.2d 786, 789-90 (1989)). These inquiries, reasoned the Superior Court, look to the product's qualities and not its intended users. It noted that an implied warranty claim could be maintained by anyone in the family or household of the buyer if it is reasonable to expect that such a person may use or be affected by the product. *Phillips II* at 371 (quoting 13 Pa. C.S.A. § 2318).

The Superior Court then looked to conflicting decisions from the federal courts applying Pennsylvania law, and adopted the reasoning of one that permitted an implied warranty claim in this context. *Compare: Hittle v. Scripto-Tokai Corp.*, 166 F. Supp. 2d 142, 158 (M.D. Pa. 2001) (noting that implied warranty claim extended to persons injured as a result of a child playing with a lighter, where a "reasonable jury could conclude, based on the inference of a malfunction of the 'on/off' switch and the related factual issue of whether the

lighter could have been designed to be more child-resistant, that the [lighter] was 'defective' and not merchantable.") with *Shouey v. Duck Head Apparel Co.*, 49 F. Supp. 2d 413, 429 (M.D. Pa. 1999) (holding that the implied warranty of merchantability is not breached where there is no indication that the lighter did anything other than produce a flame).

The Superior Court then turned to Cricket Lighters' argument that the child was incapable of "using" the lighter. Cricket Lighters relied on the case of *Erie Insurance Exchange v. Transamerica Insurance Co.*, 516 Pa. 574, 533 A.2d 1363 (1987) to argue that a child cannot "use" a cigarette lighter. In that case, the Pennsylvania Supreme Court considered whether the actions of a three-year-old child who climbed into the family automobile and set it in motion could constitute a "use" of the automobile as that term was defined in the parents' homeowners and automobile insurance policy. The automobile policy covered risks arising out of the "use" of an automobile, while the homeowner's policy expressly excluded such risks. The Supreme Court reasoned that the three-year-old child was incapable of "using" an automobile in the rational, purposeful sense within the meaning of the relevant automobile and homeowners policy provisions. As a result, the act was not within the class of risks insured by the automobile policy, and was not excluded by the homeowner's policy. *Id.* at 1367-68. Despite this compelling argument, the Superior Court concluded in *Phillips II* that the *Erie* case had no applicability to *Phillips*. The Superior Court reasoned that it could not employ, apparently even by analogy, the rules of construction of insurance contracts to interpret a statutory provision governing implied warranty. In addition, the Superior Court believed it was arguable that the child in *Phillips* could have understood that the "use" of the lighter was to produce a flame. *Phillips II*, 852 A.2d at 372. Based on the factual issue of whether the lighter could have been designed to be safe for all foreseeable users (*i.e.*, more child-resistant), the Superior Court held that a reasonable jury could conclude that the lighter was "defective" and therefore not merchantable for purposes of warranty. *Id.*

In so ruling, the Superior Court created a dichotomy in Pennsylvania product li-

bility law that did not previously exist. Under the Supreme Court's decision in *Phillips I*, a manufacturer cannot be strictly liable in tort if a product is safe for its intended users. But under the Superior Court's decision in *Phillips II*, a manufacturer can be liable for breach of the implied warranty of merchantability even though the product is safe for its intended users. Under this latter decision, a product may be unmerchantable if it is unsafe for unintended, but foreseeable, users.

## II. CRITICISM OF THE SUPERIOR COURT'S ENLARGEMENT OF THE IMPLIED WARRANTY THEORY IN *PHILLIPS II*

Three distinct theories of product liability are recognized in Pennsylvania: (1) negligence; (2) strict liability; and (3) warranty. These theories address different societal wrongs associated with a product; that is, negligence looks to the conduct of the manufacturer; strict liability to the safety of the product; and warranty to the product's fitness for an ordinary use (*i.e.*, merchantability), a particular use (*i.e.*, fitness for a particular purpose), or for some express representation (*i.e.*, express warranty). *See: Phillips I*, 841 A.2d at 1007; 13 Pa. C.S.A. § 2313-15. The Superior Court's decision in *Phillips II* dealt only with the implied warranty of merchantability or the fitness for ordinary use.

In order to recover in the strict liability or the implied warranty of merchantability, one must first prove that the product was "defective." *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1105 (3d Cir. 1992); *Schlier v. Milwaukee Elec. Tool Corp.*, 835 F. Supp. 839, 843 (E.D. Pa. 1993). The principal problem with the Superior Court's decision in *Phillips II* is that it creates two definitions of "defect." In the strict liability context, "defect" means unsafe for an *intended* user. *Phillips I*, 841 A.2d at 1007-08. In the implied warranty context, "defect" now means unsafe for a *foreseeable* user. *Phillips II*, 852 A.2d at 371. In reaching this incongruous conclusion, the Superior Court departed from well-established law. In particular, the Superior Court failed to recognize that implied warranty claims have historically paralleled strict liability claims, that foreseeability is a negligence concept, and that merchantability is a trade standard based in contract.

## A. IMPLIED WARRANTY CLAIMS HAVE HISTORICALLY PARALLELED STRICT LIABILITY CLAIMS

As to the two products theories that look solely to the product (*i.e.*, strict liability and warranty), standards have historically been the same. *See, e.g., Israel Phoenix Assur. Co., Ltd. v. SMS Sutton, Inc.*, 787 F. Supp. 102, 103 (W.D. Pa. 1992) (noting under Pennsylvania law that "[B]reach of warranty claims often parallel and, indeed, are used to recover the same damages as strict product liability claims, the development of this area of the law has reflected the development of strict product liability law."); *Greco v. Bucciconi Eng'g Co.*, 283 F. Supp. 978, 982 (W.D. Pa. 1967) (applying Pennsylvania law, and noting that "As the substance of strict liability in tort is akin to that of the law of warranty, the evidentiary requirements to establish breach of warranty rather than those to prove negligence should prevail in an action in strict liability in tort."), *aff'd*, 407 F.2d 87 (3d Cir. 1969); *Jones v. SEPTA*, 834 F. Supp. 766, 769 (E.D. Pa. 1993) ("Pennsylvania adopted the same scope for breach of warranty under the Uniform Commercial Code as for strict liability in the Restatement (Second) of Torts, section 402A"; "the reach of product liability and breach of warranty actions are 'co-extensive,' and . . . the policy considerations underlying them are 'precisely the same.'"); *McDougall v. Ford Motor Co.*, 214 Pa. Super. 384, 388, 257 A.2d 676, 679 (1969) ("the elements of breach of warranty and s. 402A are identical."); *Kassab v. Central Soya*, 432 Pa. 217, 231, 246 A.2d 848, 854 (1968) (arguing that there must be symmetry between implied warranty and strict liability claims), *overruled on other grounds*, *AM/PM Franchise Ass'n v. Atlantic Richfield Co.*, 526 Pa. 110, 130-31, 584 A.2d 915, 925-26 (1990).

Pennsylvania's similar treatment of strict liability and implied warranty claims is consistent with the national trend. *See: Dan B. Dobbs, Law of Torts* § 352 (1st ed. 2000). As Dobbs notes, the law of implied warranty has gradually merged with strict liability in American jurisprudence. *Id.* The authors of *American Jurisprudence* generally agree with this treatment, but they attempt to distinguish between the two theories by noting that strict liability inquires

*continued on page 3*

## The Future of Negligence

continued from page 2

whether the good was defective and unreasonably dangerous, whereas implied warranty inquires whether the good was defective and unfit for its ordinary, intended use. 63 *Am. Jr. 2d, Product liability* § 672 (May 2004). However, strict liability's inquiry of "unreasonably dangerous" includes whether the product was safe for its ordinary, intended use. *Phillips I*, 841 A.2d at 1007-08. Thus, the difference between the two theories is more theoretical than practical.

### B. FORESEEABILITY IS A NEGLIGENCE STANDARD THAT HAS NO PLACE IN WARRANTY CLAIMS

The Superior Court in *Phillips II* held that foreseeability is properly a part of a claim for breach of the implied warranty of merchantability. *Phillips II*, 852 A.2d at 371 (concluding that those reasonably "affected" by the product may bring a claim for breach of the implied warranty of merchantability). But in *Phillips I*, the Supreme Court re-affirmed the division between strict liability and negligence and held that the concept of foreseeability has no place in strict liability:

Such a firm division between the causes of action is not a senseless exercise in semantics; rather, it is dictated by the very underpinning of the strict liability cause of action. Strict liability focus on the product, and is divorced from the conduct of the manufacturer . . . With such a cause of action, it would be the height of illogic to introduce a test which examines whether the manufacturer acted with due care.

\* \* \*

[A] manufacturer will not be held strictly liable for failing to design a product that was safe for use by any reasonably foreseeable user as such a standard would improperly import negligence concepts into strict liability law.

*Phillips I*, 841 A.2d at 1007. If, indeed, the law of warranty closely parallels the law of strict liability, then foreseeability can have no place in warranty either because such a concept improperly imparts negligence concepts by looking

to the manufacturer's conduct rather than the product itself.

### C. MERCHANTABILITY IS A TRADE-BASED STANDARD THAT IS NOT A GUARANTY OF SAFETY

The Superior Court in *Phillips II* also ignored the standards for trade-based merchantability under the U.C.C. Instead, the Superior Court looked to the portion of the U.C.C. that conferred standing to third persons who may be "affected" by the product. *Id.* at 371 (citing 13 Pa. C.S.A. § 2318). The Superior Court reasoned that because the child was "affected" by the product, the child had standing to sue for implied warranty; and thus, the product was unmerchantable. *Phillips II*, 852 A.2d at 371-72.

The use of a standing analysis to define standards for merchantability is not supported by the language of the statute. Rather, in determining whether a product is merchantable under the U.C.C., reference must first be made to Title 13, Section 2314 of the Pennsylvania Statutes, that provides:

#### (b) Merchantability standards for goods.—Goods to be merchantable must be at least such as:

- (1) pass without objection in the trade under the contract description;
- (2) in the case of fungible goods, are of fair average quality within the description;
- (3) are fit for the ordinary purposes for which such goods are used;
- (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
- (5) are adequately contained, packaged, and labeled as the agreement may require; and
- (6) conform to the promises or affirmations of fact made on the container or label if any.

13 Pa. C.S.A. § 2314.

Curiously, although the Superior Court cited this provision, it failed to analyze

its factors. Had it done so, the Superior Court may have concluded that "merchantability" is not a guaranty of safety for all those who may be "affected" by the product. Instead, "merchantability" simply means suitability for the purpose for which it was designed. It is a commercial, trade-based standard that inquires whether the product is reasonably fit for its ordinary purpose. *See, e.g., Hornberger v. General Motors Corp.*, 929 F. Supp. 884, 888 (E.D. Pa. 1996) (noting that, since cars are designed to provide transportation, the implied warranty of merchantability under Pennsylvania law is simply a guarantee that they will operate in a safe condition and be substantially free of defects; thus, where a car can provide safe, reliable transportation, it is generally considered merchantable). Here, the ordinary purpose of the lighter was to produce a flame. There was no dispute that the lighter did that. Thus, it was "merchantable" under the U.C.C. *Accord: Shouey*, 49 F. Supp. 2d at 429.

The fact that the lighter caused harm in the hands of a child does not result in a contrary conclusion because the child's use of the lighter is not an "ordinary use" for which the lighter was designed. Rather, the lighter was intended to be used by responsible adults. It served its ordinary purpose in this respect, and was thus merchantable. The use of the lighter by a child is simply an *extraordinary* use for which the implied warranty of merchantability does not provide a remedy.

### III. ADVICE FOR THE DEFENSE PRACTITIONER IF PHILLIPS II REMAINS AUTHORITATIVE

If *Phillips II* remains authoritative, then implied warranty of merchantability claims suddenly take on increased importance in product liability actions. The defense of such a claim becomes, in part, a defense to a strict liability claim which focuses on the qualities of the product (*i.e.*, merchantability or fitness for a particular purpose). The defense also becomes, in part, a defense to a negligence claim which focuses on the reasonableness of the manufacturer's conduct (*i.e.*, whether a product is defective in the hands of a reasonably foreseeable user). Therefore, in defending a claim for breach of the implied warranty of merchantability, the defense practitioner should be prepared to build

a record that defends both the condition of the product and the conduct of the manufacturer.

#### IV. CONCLUSION

The Superior Court's decision in *Phillips II* is a novel use of the Uniform Commercial Code. The decision acknowledges one standard for defect in the strict liability context (*i.e.*, unsafe for intended users), but creates another standard in the implied warranty of

merchantability context (*i.e.*, unsafe for foreseeable users). In so doing, the Superior Court converts the implied warranty of merchantability into a guaranty of safety. The practical impact of such a rationale cannot be understated. Henceforth, all products, regardless of their intended use or user, will be required to be childproofed if it is somehow "foreseeable" that a child might come into contact with the product. If not child-proofed, the product is unmer-

chantable and its manufacturer is exposed to an implied warranty claim. Whether or not this approach will continue to be the law of Pennsylvania remains to be seen. The answer to this question must await the Supreme Court's decision in *Phillips III*.

