

Pennsylvania's Supreme Court Clarifies Pennsylvania's Strict Liability Standard

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In *Tincher v. Omega Flex, Inc.*, – A.3d –, 2014 WL 6474923 (Pa. Nov. 19, 2014), the Supreme Court of Pennsylvania discussed the Commonwealth of Pennsylvania's products liability law and, overturning prior precedent, clarified the law. In particular, the Court, overturning *Azzarello v. Black Brothers Company*, 480 Pa. 547, 391 A.2d 1020 (1978), clarified the role of the judge and the jury in products liability cases and settled the question of whether Pennsylvania would adopt the Restatement (Third) of Torts: Products Liability § 1, et. seq. (Third Restatement) as the standard for deciding Pennsylvania products liability cases. The *Tincher* decision makes clear that Pennsylvania will continue to apply § 402A of the Restatement (Second) of Torts (Second Restatement) in products liability cases and that jurors, not the court, will decide the question of whether a product is in a defective condition. Plaintiffs may prove that a product is defective using either the consumer expectations test or the risk-utility test.

Background

The *Tincher* case arose out of a fire that occurred at the home of Terrance and Judith Tincher on June 20, 2007. The Tinchers alleged that the fire started when a lightning strike near their home caused a small puncture in corrugated steel tubing (CSST) carrying natural gas to a fireplace located in their home. The defendant, Omega Flex, Inc. (Omega Flex) manufactured the CSST.

In 2008, the Tinchers filed a complaint against Omega Flex that included a strict liability claim. The Tinchers based their strict liability claim on § 402A of the Second Restatement, as followed and construed in Pennsylvania. Among other things, the Tinchers alleged that the CSST was defective and unreasonably dangerous for intended users because its walls were too thin to withstand the effects of lightning.

Prior to trial, Omega Flex filed a Motion in Limine requesting that, rather than apply § 402A, the trial court apply the Third Restatement to the Tinchers' strict liability claim. The trial court did not resolve the Motion before trial. Omega Flex, assuming that the trial court denied its request to apply the Third Restatement, defended the case using the § 402A standard.

At the end of the trial, the jury found in favor of the Tinchers. In its post-trial motion and on appeal to the Superior Court, Omega Flex renewed its argument that the trial court should have applied the principles articulated in the Third Restatement. The Superior Court affirmed the judgment, holding, among other things, that the trial court did not err in declining to adopt the Third Restatement.

Subsequently, Omega Flex filed a petition for allowance of appeal to the Supreme Court of Pennsylvania, asking the Supreme Court to decide whether the analysis of the Third Restatement should replace the strict liability analysis of

§ 402A of the Second Restatement. The Supreme Court granted Omega Flex's petition for allowance of appeal.

The Old Standard

As noted in *Tincher*, Pennsylvania adopted § 402A of the Second Restatement in 1966 in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Pursuant to § 402A, "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or his property is subject to liability . . . if [the product] is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." Section 402 applies even if the seller has exercised all possible care.

In *Azzarello*, the Court held that, because the phrase "unreasonably dangerous" is per se misleading to lay jurors, the questions of whether a product is in a "defective condition" and "unreasonable dangerous" – questions that relate to the risks and utilities of a product – were questions for the Court. Thus, following *Azzarello*, juries were not instructed on the standard for determining whether a product was unreasonably dangerous. The jury's function was to determine whether the plaintiff proved the factual allegations in the Complaint. In cases alleging a design defect, the jury could find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that rendered it unsafe for its intended use.

Because the relevant inquiry at trial was the condition of the product rather than the reasonableness of the manufacturer's conduct, the case law after *Azzarello* reflected an increasing concern with segregating strict liability and negligence concepts. In *Tincher*, the Court acknowledged that having courts decide whether a product was unreasonably dangerous while juries were instructed that a product must be provided with every element necessary to make it safe for its intended use "led to puzzling trial directives that the bench and bar understandably have had difficulty following in practice". Thus, in *Tincher*, the Court overruled *Azzarello*.

The Revised Standard

Although the *Tincher* Court overruled the *Azzarello* decision, the Court did not abandon its adoption of § 402A of the Second Restatement. Similarly, it did not abandon the principles underlying Pennsylvania's strict liability law, principles which recognize that strict liability has its roots in both negligence and warranty law and seek to hold those who sell a product responsible for damage caused to a consumer by the reasonable use of the product. Consistent with these basic principles, the Court held that "a person or entity engaged in the business of selling a product has a duty to make and/or market the product – which 'is expected to and does reach the user or consumer without substantial change in the condition in which it is sold' – free from 'a defective condition unreasonably dangerous to the consumer or [the consumer's] property.'"

To demonstrate a breach of this duty, a plaintiff must prove that the seller, whether a manufacturer or a distributor, placed the product on the market in a "defective condition." To establish that a product was in a "defective condition" when it was placed on the market, a plaintiff can use either a consumer expectation test or a risk-utility test. According to the Court, this composite standard – allowing the use of either the consumer expectation test or the risk-utility test – allows the appropriate test to be applied based on the factual circumstances of each case. In addition, by balancing the interests inherent in either a negligence or breach of warranty standard, the composite strict liability standard

effectuates a further shift of the risk of harm onto the supplier than either a negligence or breach of warranty standard can achieve.

As stated in *Tincher*, when a plaintiff proceeds utilizing a risk-utility theory, in order to prove that the harm suffered was due to the defective condition of the product, the plaintiff has the burden of proving the risks and utilities of the product. However, how the burden of proof will operate in products liability cases remains an open question. Although the Court acknowledged that the California case upon which its alternative consumer expectations/risk-utility balancing test is based, *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), shifts the burden of production and persuasion to the defendant when the plaintiff is proceeding on a risk-utility theory, the Court noted that other jurisdictions also shift the burden of proof to the defendant. Ultimately, the Court left the question of which party has the burden of proof when the plaintiff is proceeding on a risk-utility theory for another day, to be decided in an appropriate case. In addition, the court left open the question of whether the standard it announced would, outside of the *Tincher* case, be applied retroactively or prospectively.

Analysis

In its discussion tracking the development of strict liability law in Pennsylvania, the Court acknowledged that, looking back, its case law “offered a series of missed opportunities to develop a vibrant and coherent body of common law on the issue.” As noted by the Court, although the *Webb* Court adopted § 402A, it did so without explaining how § 402A derived from or complimented existing common law. Similarly, the Court did not provide direction concerning how trial courts should instruct juries or apply § 402A.

Concerned that it would repeat the mistakes that the *Azzarello* Court made when it issued its broad holding, the *Tincher* Court stated that, because it is difficult for courts to determine the range of factual circumstances to which a particular rule should apply, the common law should develop “incrementally, within the confines of the cases as they come before the Court.” The Court supported its decision to apply an incremental approach by stating that, while general rules may apply to a “typical” case, courts must recognize that “circumstances like product diversity, general uncertainties inherent in the creative process, difficulties in recreating the design process, [and] difficulties in the discovery process . . . may contribute to whether cases other than the typical case will generate a dispute and resulting decisional precedent.”

Consistent with its goal of developing the law incrementally, as the facts of a particular case require, the Court acknowledged, but did not address, the argument that the risk-utility test should be used to limit liability exposure regardless of whether the claim relates to a known/foreseeable risk or an unknown risk. Rather, the Court held that it would wait to address this argument in an appropriate case. Similarly, rather than decide whether to adopt the burden of proof standard articulated in *Barker* when the plaintiff is proceeding on a risk-utility theory, the Court chose not to resolve the issue, finding that “[t]he ultimate answer to the question best awaits balancing in an appropriate case. . . .”

Although the *Tincher* decision leaves some questions unanswered, the decision makes clear that Pennsylvania will continue to apply § 402A of the Second Restatement in products liability cases and that jurors, not the court, will decide the question of whether a product is in a defective condition. Plaintiffs may prove their design defect claims using either the consumer expectations test or the risk-utility test. In other words, plaintiffs may prove a defective condition “by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a

reasonable person would conclude that the probability and seriousness of the harm caused by the product outweigh the burden or costs of taking precautions.”

To assist courts who will have to apply the law in the future, the *Tincher* Court provided a detailed discussion of the strict liability doctrine's background and the rationale for its decision, a discussion that the Court failed to provide when it first adopted § 402A in *Webb*. Thus, although the *Tincher* decision leaves some unanswered questions with respect to how Pennsylvania courts should apply § 402A going forward, Pennsylvania courts should be able to use Court's commentary to develop the common law without the confusion that followed the *Azzarello* decision.

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