July 7, 2016

Lee C. Swartz, Esq. Chair
Civil Instructions Subcommittee
Pennsylvania Supreme Court Committee for
Proposed Standard Jury Instructions
Tucker Arensberg, P.C.
2 Lemoyne Drive
Suite 200
Lemoyne, PA 17043

Dear Mr. Swartz:

As members of the product liability defense community, we write to express our serious concerns about the new post-Tincher Suggested Standard Jury Instructions ("SSJI") that have been released in the latest Pennsylvania Bar Institute update.

From our viewpoint, it seems that the Subcommittee has departed in significant ways from what the Pennsylvania Supreme Court held in its landmark 138-page decision in Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014). Beyond that, and contrary to the "modesty" repeatedly cautioned by the Court in Tincher, 104 A.3d at 397-98, 406, the Subcommittee has made what we consider to be questionable predictions about multiple issues that Tincher deliberately declined to decide. It also appears that the new instructions ignore the reasons why the Court emphatically overruled Azzarello v. Black Brothers Co., 391 A.2d 1020 (Pa. 1978),[1] and with it almost forty years of Pennsylvania product liability precedent that had been based on the now-repudiated strict separation of "negligence" and "strict liability" concepts espoused in Azzarello.

That Tincher intended there to be a radical departure from existing product liability jury instruction practices is clear. However, as to what would follow the demise of Azzarello, the Court adopted an "incrementalist" approach, recognizing that "judicial modesty counsels that we be content to permit the common law to develop incrementally." 104 A.3d at 406. Indeed, a primary reason for the Court's decision not to adopt the Third Restatement was its unwillingness to replace one all-encompassing approach with another. Id. at 399 ("[O]ur reticence respecting broad approval of the Third Restatement is separately explainable by looking no further than to the aftermath of Azzarello . . . ."). Thus, Tincher held that Azzarello's "'approval' of such jury instructions operated to discourage the

[1] 104 A.3d at 335, 376, 381, 399, 407, 409-10.

exercise of judicial discretion in charging the jury" and thereby "stunted the development of the common law. . . ." Tincher, 104 A.3d at 379.

The Subcommittee, however, has veered sharply from the course that the Court plotted in Tincher. With none of Tincher's reticence, it has prepared instructions not only on the issues that Tincher actually decided, but has also addressed topics that Tincher expressly reserved for future decision.[2] The Subcommittee enlarged upon Tincher without seeking comment from a broader range of interests and resolved these reserved issues almost entirely in a manner that would increase liability. Since they are not precedential, the SSJI have no authority beyond their persuasive power. They will lose that persuasiveness by inconsistency with Tincher and by making questionable predictions on issues that Tincher expressly reserved for another day.

The most glaring specific deficiency in the current SSJI draft is its failure to include any instruction – indeed, any mention whatsoever – of §402A's requirement that, to support strict liability, a product defect must be "unreasonably dangerous."[3] Azzarello had removed this aspect of §402A from jury consideration, but Tincher held that the "unsupported assumptions and conclusory statements upon which Azzarello's directives are built are problematic on their face[]":

> [I]n 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."**

104 A.3d at 380 (emphasis added). The "defect" and "unreasonably dangerous" aspects of product liability should never have been "divorce[d]" from one another. Id. "[T]he notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." Id. at 400.

Because "severing findings relating to the risk-utility calculus from findings related to the condition of the product is impracticable and inconsistent with the theory of strict liability," the Tincher Court expressly returned the "unreasonably dangerous" defect determination to the jury. 104 A.3d at 406-08 (discussing roles of judge and jury). By entirely omitting any jury charge on "unreasonably dangerous" defect, the Subcommittee's suggested instructions are inconsistent with Tincher's adoption of this "prevailing standard of proof," id. at 399, which is reflected in the jury instructions of the vast majority of states that follow §402A (or §402A-based statutes).[4] Almost every other state requires that

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[2] See 104 A.3d at 404-05 ("evidentiary issues"), 408-09 (burden of proof), 409-10 ("related legal issues" involving "manufacturing or warning claims," "negligence-derived defenses, bystander compensation," and "the intended use doctrine").

[3] A copy of the current SSJI draft is attached.

[4] See: Alabama − APJI Civ. 32.01; Arizona − RAJI (Civil) PLI 4; Arkansas − AMJI Civ. 1017; Colorado − CJI Civ. 14:3; Florida − FSJI (Civ.) 403.7(b); Illinois − IPJI-Civ. 400.06; Indiana − IN-JICIV 2117; Kansas − KS-PIKCIV 128.17; Louisiana − La. CJI §11:2; Maryland − MPJI-Cv 26:12; Massachusetts − CIVJI MA 11.3.1; Minnesota − 4A MPJI-Civ. 75.20; Mississippi − MMJI Civ. §16.2.7;

juries be instructed explicitly that a plaintiff must establish an "unreasonably dangerous" defect in the defendant's product in order to impose strict liability. In accordance with Tincher, the current draft of the Pennsylvania SSJI should be rewritten to include such an instruction. There are many models to choose from.

The second most significant inconsistency we would like to point out between the Subcommittee's suggested instructions and Tincher's holdings is the language of SSJI 16.10(1), which retains the Azzarello "every element" test for defect.[5] Tincher expressly rejected that "new standard of proof," created when Azzarello took a reference to **warning defects** "out of context" from the "one-justice lead opinion . . . in Berkebile" and thereby "significantly altered the import of the Berkebile passage." 104 A.3d at 382.[6] Tincher explicitly branded the "any element" standard "impractical" and abandoned it in favor of the "composite" design defect definition utilizing both risk-utility and consumer expectation tests. 104 A.3d at 384.[7] Including the "any element" test in SSJI 16.10 thus flies in the face of Tincher's express holdings.

Also troubling is the SSJI's approach to Tincher's elimination of the strict separation of negligence and strict liability concepts that had characterized the Azzarello era. Tincher pointed out that Azzarello had "extrapolate[d] that every lay jury would relate reasonableness and other negligence terminology" to a "heavier negligence-based burden of proof." 104 A.3d at 377. That "concern with across-the-board jury confusion," however, "[wa]s simply overstated." Id. Instead of solving problems, Azzarello's approach "essentially perpetuated jury confusion in future strict liability cases, rather than dissipating it." Id.

Missouri − MAJI (Civ.) 25.04; Nebraska − NJI2d Civ. 11.24; Oklahoma − OUJI-CIV 12.3; Oregon − UCJI No. 48.07; South Carolina − SCRC – Civ. §32-45; Tennessee − TPI-Civ. 10.01; Virginia − VPJI §39:15 (implied warranty). Compare: Georgia − GSPJI 62.640 ("reasonable care"); New Mexico − NMRA, Civ. UJI 13-1407 ("unreasonable risk"); New Jersey − NJ-JICIV 5.40D-2 ("reasonably safe"); New York − NYPJI 2:120 ("not reasonably safe").

[5] See 16.10.1 ("at the time the product left [name of defendant]'s control, it lacked any element necessary to make it safe for [its intended] use [or use in an unintended but reasonably foreseeable way], or contained any condition that made it unsafe for [its intended] use [or use in an unintended but reasonably foreseeable way]").

[6] As Tincher explained, the "any element" language in Berkebile was merely an observation that "any element" could include a warning. 104 A.3d at 379 ("Berkebile, 337 A.2d at 902 (Jones, C.J.) ('seller must **provide with the product every element** necessary to make it safe for use'; notion of defect includes claim for failure to warn, in addition to claims for manufacturing and design defects) (emphasis added)").

[7] The Tincher Court's reaction to the "any element" defect test is not new. Well over twenty years ago, the en banc Superior Court observed that this Azzarello-approved instruction could "call[] forth fantastic cartoon images of products, both simple and complex, laden with fail-safe mechanism atop fail-safe mechanism." Dambacher v. Mallis, 485 A.2d 408, 429 (Pa. Super. 1984) (en banc), appeal dismissed, 500 A.2d 428 (Pa. 1985) (citation and quotation marks omitted).

> As courts have struggled with the application of the deceptively simple Azzarello rule that a jury must be insulated from negligence concepts and rhetoric in strict liability cases, decisional law has lapsed into an arguably unprincipled formulaic application of rhetoric, threatening to render the strict liability cause of action hopelessly unmoored in modern circumstances.

Id. at 378. Thus, "the 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." 104 A.3d at 381.

Tincher thus abolished the elimination of negligence principles from strict liability, holding that the "broad" reading of Azzarello in previous decisions, "to the point of directing that negligence concepts have no place in Pennsylvania strict liability doctrine," was error. 104 A.3d at 376. "[T]hose decisions essentially led to puzzling trial directives that the bench and bar understandably have had difficulty following in practice." Id. However, the latest SSJI only follow Tincher's lead when doing so benefits plaintiffs. The Supreme Court has rejected such a one-way use of negligence concepts in strict liability:

> It would be incongruous to constrain manufacturer resort to use-related defenses based on the logic that negligence concepts have no place in strict liability cases, while at the same time expanding the scope of manufacturer liability without fault in a generalized fashion using the negligence-based foreseeability concept.

Pennsylvania Dept. of General Services v. U.S. Mineral Products Co., 898 A.2d 590, 603 (Pa. 2006).

Specifically, the Subcommittee Notes retain the discredited Azzarello/Berkebile[8] cordoning off of negligence concepts in the notes to SSJI 16.10, pages 3-5, to justify the improper elimination of §402A's "unreasonably dangerous" element from the jury charge. Likewise, the Notes to SSJI 16.70, pages 1-2, rely on Azzarello/Berkebile to restrict the defense case with respect to causation and misuse/abnormal use of the product.[9] Conversely, the SSJI include instructions on the negligence concepts of "reasonableness" and "foreseeability" where doing so operates to expand potential liability. See SSJI 16.10.1 ("unintended but reasonably foreseeable"); 16.20.2 (same); 16.100 ("foreseeable conduct"); 16.120 (substantial change "not reasonably foreseeable"); 16.121 (misuse "unforeseeable" "not reasonably foreseeable"). We agree that Tincher dissolved the prohibition against charging the jury on negligence concepts in strict liability; however, we believe that the Court intended to level the

[8] As discussed in Tincher, 104 A.3d at 364-65, 376, 379, much of Azzarello's erroneous approach to strict liability was foreshadowed by the problematic two-justice plurality opinion in Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975), abrogated, Reott v. Asia Trend, Inc., 55 A. 3d 1088 (Pa. 2012).

[9] Misuse and abnormal use, along with comparative fault (SSJI 16.122) are examples of "negligence-derived defenses" on which Tincher declined to rule. 104 A.3d at 409-10. The SSJI should not go beyond the rulings of the Tincher Court.

playing field, so that both sides can take equal advantage of such concepts. The current draft of the SSJI does not adequately or accurately reflect how negligence concepts affect strict liability after Tincher.

With regard to SSJI 16.30, we note that this instruction assumes that Tincher "does not affect the law concerning this charge." Subcommittee Note at 1. That assumption is highly questionable, since the issue of Tincher's impact on warning claims is currently pending before the Supreme Court in Amato/Vinciguerra v. Bell & Gossett, Clark-Reliance Corp., Nos. 4-5 EAP 2016 (Pa. Feb. 1, 2016), and the Superior Court's holding in Amato was the opposite of the Subcommittee's considered judgment. Rather, the Superior Court held that, in warning cases, "the Tincher Court nevertheless provided something of a road map for navigating the broader world of post-Azzarello strict liability law." Amato v. Bell & Gossett, 116 A.3d 607, 620 (Pa. Super. 2015). We think that the better approach would be to note the Superior Court holding in Amato and the fact that it is currently on appeal, but to wait until the Supreme Court rules before offering any judgment about Tincher's applicability, or not, to warning claims.

Particularly highly objectionable is SSJI 16.122. The first part of this three-pronged section, "knowledge of defect" would create a "presumed knowledge" standard for warning liability. It has nothing to do with Tincher, which, as just discussed, is not a warning case. Its sole support is a twenty-five-year-old law review article that has never been adopted in any Pennsylvania case. "Presumed knowledge" is simply not an accurate description of Pennsylvania law, and should be removed.

The second and third prongs of SSJI 16.122 are not proper instructions, but rather, comments on the supposed excludability of certain evidence – plaintiff fault and industry customs. Tincher specifically reserved these issues for future decision. 104 A.3d at 409-10. The Court expressly indicated that it did "not purport to either approve or disapprove prior decisional law" in these areas. 104 A.3d at 410. In derogation of the position taken by Tincher, however, the Subcommittee has treated all prior law predicated on the now-overruled Azzarello negligence/strict liability dichotomy as still valid – particularly Kimco Dev. Corp. v. Michael D's Carpet Outlets, 637 A.2d 603 (Pa. 1993),[10] Lewis v. Coffing Hoist Div., 528 A.2d 590 (Pa. 1987),[11] and Reott v. Asia Trend, Inc., 55 A. 3d 1088 (Pa. 2012).[12]

[10] Kimco "decline[d] to extend negligence concepts" because it was "adamant that negligence concepts have no place in a strict liability action." 637 A.2d at 606 (citing Azzarello). Following another Azzarello block quotation about the also-repudiated "manufacturer as guarantor" concept, the Court in Kimco "refused to countenance" consideration of a plaintiff's comparative fault. Id.

[11] Lewis held that "under our decision in Azzarello such a concept [industry standards] has no place in an action based on strict liability in tort." 528 A.2d at 594.

[12] The "highly reckless" and "sole cause" causation standards in Reott were formulated in reliance on Azzarello's erroneous preclusion of negligence concepts in strict liability. See Reott v. Asia Trend, Inc., 7 A.3d 830, 836 (Pa. Super. 2010) (relying on Azzarello), aff'd, 55 A.3d 1088 (Pa. 2012); Gaudio v. Ford Motor Co., 976 A.2d 524, 540-41 (Pa. Super. 2009) (same).

Those cases, however, are precisely the post-Azzarello decisions that, in the words of Tincher, "overstated" the "concern with across-the-board jury confusion" and "elevated the notion that negligence concepts create confusion . . . to a doctrinal imperative" without examining whether their "bright-line rule[s]" were "consistent with reason." 104 A.3d at 378, 381. These evidentiary issues, which do not even belong in jury instructions, are contrary to both Tincher and Lance v. Wyeth, 85 A.3d 434 (Pa. 2014). Compare 104 A.3d at 405 (in "typical" design defect case, "the character of the product and the conduct of the manufacturer are largely inseparable"), with 85 A.3d at 456 ("Pennsylvania courts permit[] defendants to adduce evidence of compliance with governmental regulation in their efforts to demonstrate due care (when conduct is in issue)"). Defect, in Tincher, involves consideration of a manufacturer's "conduct," which in turn, supports admissibility of state-of-the-art evidence. In SSJI 16.122, the Subcommittee's precipitate efforts to weigh in on non-instructional issues would also continue Pennsylvania's pre-Azzarello status as a nationwide outlier on these strict liability issues.[13] Because SSJI 16.122 has nothing to do with any issue decided in Tincher and does not accurately state post-Tincher law, it should be withdrawn in its entirety.

We know the Subcommittee has worked hard on these instructions, and do want to commend them in other respects. SSJI 16.20, describing the post-Tincher consumer expectation and risk-utility tests, is a good start, although for better comprehension we recommend that it be divided into two instructions – one for consumer expectation and the other for risk-utility. The consumer expectation language also should include, as an element, Tincher's requirement that "the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer." 104 A.3d at 387. This language is needed to make clear to the jury that consumer expectations, as in risk-utility, depend on what is knowable when the product is used. The risk-utility instruction should include all of the first six so-called "Wade factors" and not just paraphrase two of them.[14] Under Tincher these would certainly qualify as "other relevant factors(s)," provided they were addressed by the evidence in a given case. We also believe that the "alternative charge" on risk-utility, contained in the Subcommittee Notes to SSJI 16.20, pages 4-5 should be deleted as premature. Tincher did not alter the burden of proof in design defect cases, but rather, reiterated the plaintiff's burden of proving defect in a §402A case. 104 A.3d at 407. The Court's discussion of California law,[15] was pure *dictum*, and recognized as such by the

[13] Again, Amato, the only post-Azzarello binding precedent, is to the contrary, recognizing that in a proper case, state-of-the-art evidence would be admissible under Tincher. 116 A.3d at 622. As discussed more fully in the *amicus curiae* brief filed by the Product Liability Advisory Council ("PLAC") in Amato, only one state (Montana) follows an exclusionary rule similar to Lewis, and the vast majority of states allow consideration of plaintiff fault (negligent or otherwise) in strict liability cases. Brief of Amicus Curiae Product Liability Advisory Council, Inc. in Support of Appellant, at pp. 27-48 (filed March 14, 2016, in Nos. Nos. 4-5 EAP 2016) (available in PDF via Supreme Court's electronic docket).

[14] See Tincher, 104 A.3d at 389-90. We agree with the Subcommittee that the seventh factor, concerning insurance, is improper 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) (violation of collateral source rule required new trial where jury told of plaintiff's government health care benefits).

[15] Id. at 408-09 (discussing Barker v. Lull Engineering Co., 573 P.2d 443 (Pa. 1978)).

Court itself. Tincher did not shift the burden of proof, or even opine that it might be proper to do so. Id. at 409 (noting that "we need not decide [the question of burden-shifting in risk-utility cases]" and "countervailing considerations may also be relevant"). Thus, inclusion of an "alternative charge" in SSJI 16.20, has no basis in Pennsylvania law and only validates the perception of many as to the Subcommittee's pro-plaintiff bias. It should be deleted.[16]

Finally, we believe that it would be helpful to the proper application of the heeding presumption instructions (SSJI 16.40, through 16.60) for the Subcommittee Notes to those sections to acknowledge the limitations that the appellate courts have placed on the plaintiff-side heeding presumption – specifically that it only applies to occupational settings.[17]

We would be pleased to discuss any and all of the points in this letter at greater length with the Subcommittee if you would allow us that opportunity. Tincher represents the most significant revision of product liability law in Pennsylvania history; thus, the Subcommittee's revisions to the product liability SSJI is of comparable importance. We appreciate everyone's efforts to ensure the availability to the Pennsylvania bench and bar of balanced, accurate, and complete suggested instructions in this area, and we are willing to take whatever steps are necessary and appropriate to help bring this about. Please let William Conroy, of Campbell, Campbell, Edwards & Conroy (a signer below) know if the Subcommittee would like to hear from one or more of us in person. Thank you for all of your efforts in this regard. We sincerely hope to be working with the Subcommittee to bring about a satisfactory result.

Very truly yours,

Pennsylvania Defense Institute:
- Robert D. Dodds, President
- Louis C. Long, President-Elect
- William Ricci, Co-Chair, Products Liability Committee
- C. Scott Toomey, Co-Chair, Products Liability Committee

Product Liability Advisory Council, Inc.:
- Hugh F. Young, President

American Tort Reform Association:
- Sherman Joyce, President

Alliance of Automobile Manufacturers
Association of Global Automakers, Inc.
National Federation of Independent Business

[16] We further note that, under Barker, state-of-the-art evidence is admissible in strict liability cases. 573 P.2d at 455 ("most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the 'risk-benefit' standard . . . are similar to issues typically presented in a negligent design case").

[17] Moroney v. General Motors Corp., 850 A.2d 629 (Pa. Super. 2004); Goldstein v. Phillip Morris, 854 A.2d 585, 587 (Pa. Super. 2004); Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 538 (Pa. Super. 2003), aff'd, 881 A.2d 1262 (Pa. 2005) (per curiam);

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cc: Civil Jury Instructions Subcommittee for the Fourth Edition
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