

## litigation lawflash

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## Pennsylvania Supreme Court Redefines Strict Liability Design Defect Claims

*The court in Tincher recalibrates Pennsylvania strict liability law by declining to adopt the Restatement (Third) of Torts and by overruling Azzarello.*

On November 19, the Pennsylvania Supreme Court handed down its much-anticipated decision in *Tincher v. Omega Flex, Inc.*<sup>1</sup> The court overruled its 1978 decision in *Azzarello v. Black Brothers Co.*<sup>2</sup> but declined to adopt the Restatement (Third) of Torts. Instead, the court refused to dispose of Section 402A of the Restatement (Second) and redefined the legal contours of strict liability design defect claims by adopting the consumer expectation and risk-utility tests. Although *Tincher* attempted to clarify Pennsylvania's strict liability law, the decision's resetting of strict liability concepts will raise many new questions in future litigation.

The Pennsylvania Supreme Court granted allowance of appeal to address the question of “[w]hether the Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement.”<sup>3</sup> The four justice majority opinion, authored by Chief Justice Ronald D. Castille, answered that question in the negative. The court reasoned that the appropriate question is instead whether either Restatement (Second or Third) articulates the standard of proof for strict liability claims that is in harmony with Pennsylvania's common law.<sup>4</sup> The majority was critical of a Restatement's ability to substitute for Pennsylvania decisional law and cautioned that Restatements are intended to provide guidance and are not legislative enactments. Rather than adopt the construct for product liability claims set forth in the Restatement (Third), the court elected to retain Pennsylvania's formulation of strict liability under Section 402A of the Restatement (Second). The majority also made the significant step of overruling *Azzarello* and its progeny, finding that *Azzarello* created an unworkable bright-line rule that blindly separated strict liability and negligence concepts in ways that overlooked strict liability's common law roots in both negligence and contract law. Writing on a new slate under Section 402A, the majority, after canvassing law from other jurisdictions and academic commentary, crafted a framework that allows strict liability design defect claims to proceed under either consumer expectation or risk-utility tests. A similar approach has been used in other jurisdictions but not previously in Pennsylvania. In approaching strict liability claims, the majority stressed the jury's role as fact-finder under this new standard, especially given the many intricacies involved with product design. Notably, the court did not adopt a requirement of a reasonable or feasible alternative design.

Justice Thomas G. Saylor, joined by Justice J. Michael Eakin, filed a concurring and dissenting opinion in which the two justices joined in the overruling of *Azzarello* but would have instead adopted the framework for product liability claims provided by the Restatement (Third) of Torts.<sup>5</sup> The dissenting opinion also noted discomfort with adopting the consumer expectation test in the absence of any advocacy in favor of this position by the parties.<sup>6</sup>

1. No. 17 MAP 2013, Slip Op. (Pa. Nov. 19, 2014), available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-80-2013mo%20-%201020173292832303.pdf?cb=1>.

2. 391 A.2d 1020 (Pa. 1978).

3. *Id.* at 17.

4. *Id.* at 109.

5. No. 17 MAP 2013, Slip Op. (Pa. Nov. 18, 2014) (Saylor, J. dissenting and concurring)

6. *Id.* at 2 n.1.

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*Tincher* leaves many questions unanswered for plaintiffs, defendants, and lower courts. In particular, the majority declined to address whether strict liability permits compensation in circumstances where harm is from known and foreseeable risks or unknown risks.<sup>7</sup> The majority also left unaddressed how its decision would affect strict liability manufacturing defect claims and failure to warn claims, such as whether *Tincher*'s new formulation of strict liability concepts would allow use of negligence-derived defenses.<sup>8</sup> The court's approach in *Tincher* is consistent with continuing to exclude prescription drugs and medical devices from strict liability, as Pennsylvania has for many years, but because *Tincher* did not concern a prescription drug or medical device, that question will have to be addressed in future cases. These issues will be played out in state and federal courts alike. In sum, the court's refusal to adopt the Restatement (Third) of Torts and its recalculated view of strict liability paves the way for continued litigation under a product liability scheme that is increasingly unique to Pennsylvania.

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7. No. 17 MAP 2013, Slip Op. at 126–127 (Pa. Nov. 19, 2014).

8. *Id.* at 135.