

[Products Liability Law Daily Wrap Up, DESIGN AND MANUFACTURING DEFECTS—INDUSTRIAL AND COMMERCIAL EQUIPMENT—Pa. Sup. Ct.: Pennsylvania High Court upholds Restatement \(Second\) as governing law in strict products liability cases, \(Nov. 21, 2014\)](#)

Products Liability Law Daily Wrap Up

[Click to open document in a browser](#)

By Susan Lasser, J.D.

In a much anticipated ruling, the Pennsylvania Supreme Court has declined to adopt the Restatement (Third) of Torts: Products Liability and will continue to follow the Restatement (Second) of Torts. In doing so, however, the state high court has overruled its decision in *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), which had required that Pennsylvania juries be instructed that in cases of a supplier's strict liability in tort, "the product must ... be provided with every element necessary to make it safe for its intended use"; and that while a manufacturer of a product is not an insurer of a product's safety, it may be a guarantor of the product's safety. *Azzarello* had created a strict separation between negligence and strict liability theories under Pennsylvania law (*Tincher v. Omega Flex, Inc.*, November 19, 2014, Castille, R.).

Background. The case stemmed from a house fire in 2007 at the Tinchers' home in Downingtown, Pennsylvania. The residence was the central unit of a two-story triplex built in 1998-99, and purchased by the Tinchers in 2005. Investigators concluded that a lightning strike near the Tinchers' home caused a small puncture in the corrugated stainless steel tubing (CSST) that transported natural gas to a fireplace located on the first floor of the residence. The CSST installed in the Tinchers' home was manufactured and sold by Omega Flex, Inc. as part of a gas transportation system marketed as the TracPipe System. The heat that melted the CSST caused by the lightning strike ignited the natural gas, fueling the fire. The Tinchers' insurer compensated them for their loss up to their policy limit and received an assignment of liability claims. The Tinchers also had out-of-pocket losses because their claimed loss exceeded their insurance policy limit. In January 2008, the Tinchers filed a complaint against Omega Flex in the Chester County Court of Common Pleas. The insurer prosecuted the claims in the name of the Tinchers to obtain reimbursement of the insurance proceeds payout, but the Tinchers retained an interest in the litigation to recover the losses exceeding their insurance coverage. The family's asserted claims were premised on theories of strict liability, negligence, and breach of warranty.

Their complaint relied on the theory of strict liability articulated in Section 402A of the Second Restatement of Torts, but as followed and construed in Pennsylvania. The Tinchers alleged that Omega Flex was liable for damages to their home caused by the placement on the market and sale of the TracPipe System. According to the Tinchers, the CSST incorporated into the piping system was defective, and unreasonably dangerous to intended users, because its walls were too thin to withstand the effects of lightning. The Tinchers requested compensatory damages, interest, fees, and costs of litigation.

In September 2010, in anticipation of trial, Omega Flex requested that Sections 1 and 2 of the Third Restatement of Torts apply to the Tinchers' strict liability claim. Omega Flex also proposed jury instructions and findings of fact consistent with the provisions of the Third Restatement. The Tinchers opposed the request and offered proposed jury instructions and findings of fact consistent with the Second Restatement and *Azzarello*. A month later, the case was tried by a jury. The parties generally agreed that lightning had caused the fire, although they disagreed as to the sequence of events or the cause of ignition in the area of the fireplace. The Tinchers offered evidence that lightning transferred an electrical charge to parts of the home, including the TracPipe System; and the electrical current created different electrical charges in the various metal components of the structure. Their expert witnesses testified that a flow of energy between a differently charged TracPipe and another metal

component of the home caused an electrical arc, and the accompanying heat punctured the CSST, igniting the natural gas transported by the CSST. The Tinchers offered expert testimony, relevant to their strict liability theory, that the CSST was inherently defective because of the thin wall and that there was an alternative natural gas conduit made of black iron pipe that was ten times thicker for a half-inch diameter pipe similar to the CSST present in the Tincher home.

Omega Flex's witnesses testified that lightning measured near the Tinchers' home on the night of the fire did not carry sufficient energy to puncture the CSST. The manufacturer asserted that lightning that entered the home broke down the insulation on electrical wires and, if the circuit breakers did not interrupt the current, the electrical current caused the fire.

Instructions. The jurors were instructed regarding the Tinchers' strict liability claim. As to the defective design claim, the jurors were told that the manufacturer of a product "is really a guarantor of its safety" and that "the product must be provided with every element necessary to make it safe for its intended use." They were also instructed that if they found that the TracPipe when it left the manufacturer's control "lacked any elements necessary to make it safe for its intended use, or contained any condition that made it unsafe for its intended use, and there was an alternative more practical design, more safer [sic] design, then the product is considered defective and the defendant is liable for the harm, if you find that defect caused the harm[,] was the proximate cause of the harm to the plaintiffs." The jurors also were informed that: "The imposition of strict liability is not meant to transform manufacturers into insurers of all injuries that are potentially possible and [sic] at the hands of a product. A manufacturer of a product may be a guarantor of the product['s] safety, but under no circumstances is the manufacturer an insurer of the safety of the product."

Omega Flex had requested that the jurors be instructed based on the Third Restatement with respect to the strict liability claim. The trial court rejected the request because the Pennsylvania Supreme Court had not adopted the Third Restatement.

Verdict. On October 20, 2010, the jury returned a verdict in favor of the Tinchers on the products liability claim, and awarded compensatory damages totaling \$958,895.85. The trial court added \$69,336.05 in delay damages, and entered judgment on the verdict. The following month, Omega Flex moved for post-trial relief requesting, among other things, a new trial premised on trial court errors, including the trial court's failing to instruct the jury on the law as articulated in the Third Restatement. Omega Flex sought judgment notwithstanding the verdict on the theory that the evidence introduced at trial was insufficient to prove a claim of strict liability under Third Restatement principles. In September 2012, the trial court affirmed its judgment, holding among other things that it did not err in declining to adopt the Third Restatement.

Question presented to the Pennsylvania Supreme Court. The manufacturer appealed to the state supreme court, which allowed the appeal on the following question: whether the Pennsylvania Supreme Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement.

Omega Flex argued against the conceptual wall between strict liability and negligence initially articulated in *Azzarello*. The manufacturer criticized the effect of the decision in products liability law in Pennsylvania which included directing the trial court rather than the jury to make the only determination, based on a lower burden of proof, relating to the defectiveness/dangerousness of the product at issue.

The Tinchers responded that the lower court decision should be affirmed, and that strict liability actions in Pennsylvania should continue to be governed by the Second Restatement. They also argued that the Third Restatement abandoned "a pure strict liability analysis in favor of negligence principles." According to the Tinchers, adopting the Third Restatement would be a "radical departure" from the more "modest" evolution of strict liability law in Pennsylvania established by nearly 50 years of Second Restatement precedent. In an alternative argument, the Tinchers suggested that the court could disapprove *Azzarello* but continue to apply the Second Restatement rather than the Third Restatement articulation of the law. They noted that this resolution would protect the social policies underlying products liability, but remove any difficulties caused by the *Azzarello* decision.

Pennsylvania Supreme Court's rulings. The state high court held that its prior decision in *Azzarello* was overruled. According to the court, the case illustrated that the assumption on which the *Azzarello* court assigned the task of determining whether a product was unreasonably dangerous was impractical. Moreover, the court said that in the alternative, a strict reading of *Azzarello* was unwanted because it would encourage trial courts to make either uninformed or unfounded decisions of social policy that then substantially determined the course and outcome of the trial.

In addition, the court concluded that a plaintiff pursuing a strict liability cause of action in tort must prove that the product is in a “defective condition.” The defective condition can be proved by showing either that (1) the danger was unknowable and unacceptable to the average or ordinary consumer (consumer expectations test), or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweighed the burden or costs of taking precautions (risk-utility test). Either way, the court stated that the burden of production and persuasion would be by a preponderance of the evidence.

The court also ruled that whether a product is in a defective condition is a question of fact ordinarily submitted for to the finder of fact for determination. Only in cases in which it is clear that reasonable minds could not differ on the issue is the question removed from the jury’s consideration. As such, the state supreme court stated that the trial court is “relegated to its traditional role of determining issues of law ... and articulating the law for the jury, premised upon the governing legal theory, the facts adduced at trial and relevant advocacy by the parties.”

Finally, the court stated that it would not adopt the Restatement (Third) of Torts: Products Liability §§ 1 et seq., but noted that its “appreciation of certain principles” in the Restatement Third had informed its decision making in rendering “the proper approach to strict liability in Pennsylvania in the post-*Azzarello* paradigm.”

Concurring and dissenting opinion. Justice Saylor filed [a concurring and dissenting opinion](#), joined by Justice Eakin, in which he joined the majority “in the long overdue overruling” of *Azzarello*. However, he would have adopted the Restatement Third, by “directing Pennsylvania substantive common law products liability theory into the framework delineated in the Products Liability segment of the Third Restatement of Torts.”

The case number is [J-80-2013](#).

Attorneys: William J. Conroy (Campbell Campbell Edwards & Conroy, PC), Christopher Landau, (Kirkland & Ellis, LLP), and Katherine Ann Wang (Campbell Campbell Edwards & Conroy) for Omega Flex, Inc. Mark Elliot Utke (Cozen O'Connor) for Terrence D. Tincher and Judith R. Tincher.

Companies: Omega Flex, Inc.

Cases: CourtDecisions DesignManufacturingNews IndustrialCommercialEquipNews PennsylvaniaNews