IN THE SUPREME COURT OF PENNSYLVANIA

NO.: 5 EAP 2016

THOMAS AMATO AND JEAN AMATO, his wife

Plaintiffs/Appellees

v.

CRANE CO.

Defendant/Appellant.

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Appeal from the Order of the Court of the Superior Court of Pennsylvania at No. 2344 EDA 2013 on April 17, 2015, which affirmed the order of the Court of Common Pleas of Philadelphia County, entered July 18, 2013, denying Crane Co.'s motion for post-trial relief in the case docketed at No. 3373, August Term 2011, and the judgment entered pursuant to that order.

Matthew R. Shindell (Pa. Bar 88379)
GOLDBERG SEGALLA LLP
1700 Market Street, Suite 1418
Philadelphia, PA 19103
(267) 519-6800 (Telephone)
(267) 519-6801 (Facsimile)

Counsel for Amicus Curiae

(Additional Of Counsel Listed on Next Page)

Of Counsel

Linda E. Kelly
Quentin Riegel
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

PENNSYLVANIA RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Amicus adopts Defendant-Appellant's Statement of Subject Matter and Jurisdiction.

STATEMENT OF THE ORDER IN QUESTION

Amicus adopts Defendant-Appellant's Statement of the Order in Question as relevant to the issues in this appeal.

STATEMENT OF THE SCOPE AND STANDARD REVIEW

Amicus adopts Defendant-Appellant's Statement of the Standard of Review.

STATEMENT OF QUESTION INVOLVED

The following question was stated in this Court's Order of February 1, 2016:

Whether, under the Court's recent decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), a defendant in a strict liability claim based on a failure-to-warn theory has the right to have a jury determine whether its product was "unreasonably dangerous?"

This question was answered in the negative by the Superior Court.

STATEMENT OF THE CASE AND FACTS

Amicus adopts Defendant-Appellant's Statement of the Case and Facts.

STATEMENT OF INTEREST

The National Association of Manufacturers (NAM or Amicus) is the largest manufacturing association in the United States, representing small and large

manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM's members include companies that manufacture or sell products in Pennsylvania. For decades, the NAM has successfully litigated on behalf of manufacturers in the United States that seek to contribute to the improvement and reform of the law governing the liability of manufacturers and sellers of products.

Since this Court's decision in *Azzarello v. Black Brothers Co., Inc.*, 391 A.2d 1020 (1978), Pennsylvania courts experienced difficulty separating negligence and strict liability concepts. The NAM agrees with those Justices of this Court who have observed "the core problem in the application of prevailing Pennsylvania law lies in the insistence on maintaining a doctrinal assertion that there is no negligence in strict liability, when, functionally, the law of 'strict' products liability is infused with negligence concepts." *Bugosh v. I.U. North America, Inc.*, 971 A.2d 1228, 1233 (Pa. 2009) (Saylor, J., dissenting, joined by

Castille, C.J.); *see also Philips v. Cricket Lighters*, 841 A.2d 1007, 1018-23 (2003) (Saylor, J, joined by Castille and Eakin, JJ., concurring.).

This Court's recent decision in *Tincher* overruled *Azzarello* and permits a jury in design defect cases to consider whether a product was "unreasonably dangerous." Furthermore, this Court agreed that negligence and strict liability principles overlap. However, this Court did not clarify how its ruling affects failure-to-warn claims.

This Court now has the opportunity to create a clear, uniform approach to strict liability failure-to-warn claims. This Court should abandon the jury charge taken substantially from *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) and its progeny, which prohibit consideration of the seller's knowledge of a particular danger. Instead, Pennsylvania should adopt the majority approach and hold a seller is only required to give warnings if it knew or should have known about a particular danger.

SUMMARY OF ARGUMENT

After *Azzarello*, courts struggled for decades with the requirement that negligence principles be completely divorced from strict liability claims. Pennsylvania courts detached the term "unreasonably dangerous" from the Restatement (Second) of Torts § 402A's definition of whether a product was

defective, which led to confusing and contradictory results. Furthermore, product liability defendants were forced to become the insurer of the products they sold.

In *Tincher,* this Court overruled *Azzarello*. Consequently, juries may now consider whether a product is "unreasonably dangerous" in design defect claims. Furthermore, Pennsylvania courts may incorporate negligence concepts in design defect cases.

Based upon *Tincher's* decision to incorporate negligence principles in strict liability claims, it is impractical to hold a manufacturer liable for its failure-to-warn of a particular danger it had no reason to know about when its product was sold to the consumer. Instead, this Court should adopt the majority approach, which holds a manufacturer in a failure-to-warn case is not liable unless it had actual or constructive knowledge of a particular danger.

ARGUMENT

I. IN STRICT LIABILITY CLAIMS BASED UPON A FAILURE TO WARN, JURIES SHOULD BE PERMITTED TO CONSIDER WHAT THE SELLER KNEW OR SHOULD HAVE KNOWN ABOUT A PARTICULAR DANGER

A. The Evolution of Product Liability Law in Pennsylvania

1. The Restatement (Second) of Torts § 402A

In 1963, the modern concept of strict products liability was formally introduced in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963) by Justice Traynor of the California Supreme Court. The Court held, "A

manufacturer is strictly liable ... when an article he places on the market ... proves to have a defect that causes injury to a human being." *Id.* at 900. Strict liability was formulated to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 901.

Two years after *Greenman*, the American Law Institute ("ALI") enacted section 402A of the Restatement (Second) of Torts. It states that anyone who sells a product in a "defective condition unreasonably dangerous" to the user or consumer will be liable for any physical injury caused by that condition.[1] Section 402A applies irrespective of whether the seller used all possible care in the preparation and sale of the product.

---

[1] Section 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to this property is subject to liability for physical harm thereby caused to the user or consumer, or to his property, if

> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Section 402A is not an exclusive rule that precludes liability based upon negligence. Instead, it contains an additional ground for finding liability. Restatement (Second) of Torts § 402A, cmt a. Furthermore, the drafters of Section 402A provided the following definition of unreasonably dangerous: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts § 402A, cmt. i. Neither the text of Section 402A nor its comments indicate a judge instead of a jury should determine what is "contemplated by the ordinary consumer" or what knowledge is "common to the community."

In 1966, this Court in *Webb v. Zern*, 220 A.2d 853 (Pa. 1966) approved Section 402A. This Court accepted that a manufacturer[2] should be liable for the sale or distribution of a product "in a defective condition unreasonably dangerous" to the user or consumer. *Id.* at 854. However, this Court did not state Section 402A must be interpreted to avoid an overlap between negligence and strict liability claims. Initially, many courts, including those in Pennsylvania, sought to differentiate strict liability from negligence concepts. This distinction was justified because the standard strict liability case involved a manufacturing defect when "something went wrong in the manufacturing process, so that the product had a

[2] Section 402A applies equally to manufacturers and suppliers. Therefore, those terms will be used interchangeably throughout this brief.

loose screw or a defective or missing part or a deleterious element, and was not the safe product it was intended to be. *Bugosh v. I.U. North America, Inc.*, 971 A.2d 1228, 1234 (Pa. 2009) (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal), *citing* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L. J. 825, 831-32, 837 (1973). "[S]ocietal expectations are fairly well established with regard to such defects, and a ready gauge of acceptability exists by reference to like products that are non-defective." Jerry J. Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. Cin. L. Rev. 101, 104-05 (1977).

Strict liability claims then evolved into two additional categories of defects, design and failure-to-warn.[3] "A design defect conforms to the manufacturer's specifications but, nevertheless, imposes an unnecessary risk of injury ... [A] warning defect results from the manufacturer's failure to provide adequate warnings to the consumer of dangers inherent in the product or to provide adequate instructions for safe use of the product." Michael A. Pittenger, *Reformulating The Strict Liability Failure to Warn*, 49 Wash. & Lee L. Rev. 1509 (1992).

Products liability continued to develop but maintained the distinction between negligence and strict liability.

---

[3] It is generally accepted that product liability claims are split into three categories of claims: manufacturing, warning, and design defects. *See* James A. Henderson, Jr., and Aaron D. Twerski, *Achieving Consensus on Defective Product Designs*, 83 Cornel L. Rev. 867, 869 (1998).

> As the treatment of these broader categories evolved, most courts came to realize that application of strict liability in design and warning cases was far more problematic than in the manufacturing-defect paradigm. Particularly in light of the tort system's largely open-ended damages scheme, and the impossibility of designing products incapable of contributing to human injury, doctrinal limiting principles were necessary to contain the liability of product manufacturers and suppliers.

Bugosh, 971 A.2d at 1234 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal).

Many courts determined that comment j to Section 402A introduced an important limitation on strict liability for failure-to-warn. According to comment j, the seller is liable for the failure to provide an adequate warning only if the seller knows or should know of the product-related risk. Restatement (Second) of Torts § 402A cmt. j; *see also* Michael A. Pittenger, *Reformulating The Strict Liability Failure to Warn*, 49 Wash. & Lee L. Rev. 1509, 1515 (1992). Furthermore, the majority of courts adopted the position of comment j and determined a manufacturer is not strictly liable under a failure-to-warn theory unless it had actual or constructive knowledge of the product's dangers. *Id.*, *citing* Charles C. Marvel, *Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger*, 33 A.L.R. 4th 368, 370-377 (1984).

Many courts also recognized that strict liability failure-to-warn differs little, if at all, from the negligent failure-to-warn doctrine. *Russell v. G.A.F.*, 422 A.2d 989, 991 (D.C. 1980) (concluding that both strict liability and negligent failure-to-

warn impose duty of ordinary care); *Bernier v. Raymark Ind., Inc.*, 516 A.2d 534, 540 (Me. 1986) (explaining that strict liability failure-to-warn resembles negligence because reasonableness of manufacturer's conduct is critical issue of each); *Smith v. E.R. Squibb & Sons., Inc.*, 273 N.W.2d 476, 480 (Mich. 1979) (holding that when liability turns on adequacy of warning, issue is one of reasonable care regardless of theory pleaded). However, Pennsylvania product liability law went in a different direction and placed the manufacturer in the position of virtually insuring against any injury occurring during the use of a product. *See Savlador v. Atl. Stell Boiler Co.*, 319 A.2d 903, 907-08 (Pa. 1974).

2. Pennsylvania Courts Struggled to Differentiate Negligence Principles from Strict Liability Claims.

In 1975, this Court's plurality decision in *Berkebile* v. *Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975)[4] detached the "unreasonably dangerous" language from the definition of defect. *Id.* at 900. The Court disregarded comment i to Section 402A, and determined if a plaintiff can prove the product was defective and the defect caused the injury, "he will have proved that as to him the product was unreasonably dangerous." *Berkebile*, 337 A.2d. at 898. Consequently, the inquiry of whether a product was defective was an issue of law. Hence, a jury

[4] *Berkebile* was abrogated by the Pennsylvania Supreme Court in *Reott v. Asia Trend*, 55 A.3d 1088 (Pa. 2012). The Court emphasized *Berkebile* was only a plurality decision. Furthermore, the Court rejected the proposition that a jury may not consider a plaintiff's "highly reckless" conduct as a bar to his claim for relief in a strict liability case. A plaintiff's highly reckless conduct could be affirmatively plead in the alternative by a defendant. *Id.* at 1100-1102, *citing* Pa.R.Civ.P. 1020(c).

could find a product defective because it somehow caused an injury without considering its risks, utility, or other factors bearing on its danger.

This Court in *Berkebile* also determined that the test for warnings or instructions in the strict liability context is not based upon what the "'reasonable consumer' could be expected to know, or what the 'reasonable manufacturer' could be expected to foresee about the consumers who use the product." *Id.* at 902. Thus, Pennsylvania's trial judges were left "in the unenviable position of 'social philosopher' and 'risk-utility economic analyst.'" *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 836 (Pa. 2012).[5]

In *Azzarello,* this Court attempted to draw a bright line between negligence and strict liability concepts. *Azzarello* determined "that the words 'unreasonably dangerous' explain the term 'defective' but have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier." *Tincher*, 104 A.3d at 367, *quoting Azzarello*, 391 A.2d at 1025. Furthermore, this Court found the term "unreasonably dangerous" infers that the consumer must prove an element of negligence. In accordance with *Berkebile,* this Court determined the trial judge instead of the jury must decide whether a product is unreasonably dangerous. In addition, this Court

[5] The majority of states never had a similar approach to Pennsylvania by removing factual inquiries from the issue of whether a product was defective. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 897 (1998).

held that a seller's liability is limited "by the necessity of proving that there was a defect in the manufacture or design of the product, and that such defect was a cause of the injuries." *Tincher*, 104 A.3d at 367, *quoting Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1161-62 (Cal. 1972); *see also Berkebile*, 337 A.2d at 899-900.

In an attempt to resolve *Azzarello's* almost unfathomable approach to product liability litigation, this Court was asked on several occasions to adopt the Restatement (Third) of Torts, which was published by the ALI in 1988. It states in relevant part:

> § 2 Categories of Product Defect
>
> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> > (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
> >
> > (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
> >
> > (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a

> predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

The question before a six-Justice panel in *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003), was whether a supplier was responsible in strict liability to a consumer other than the intended user of the product. Chief Justice Cappy delivered the Opinion Announcing Judgment of the Court ("OAJC"). He concluded that a product is not defective if it is safe for its intended user. Furthermore, this Court stated foreseeability concepts have no application in strict liability cases, and this Court determined a manufacturer cannot be responsible for harm to a foreseeable but unintended user.

Justice Saylor wrote a concurring opinion in *Phillips* arguing section 2 of the Third Restatement is the "clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme." *Id.* at 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring). Justice Saylor noted application of the Second Restatement was limited to defective products unreasonably dangerous to the consumer. It therefore contained an "internal tension: the strict liability rule 'was tempered by a negligence-based concept of defect.' In application to design defect claims, the concurrence further observed, courts in Pennsylvania recognized an 'integral role for risk-utility (or cost-benefit) balancing, derived from negligence theory.'" *Tincher*, 104 A.3d at

371, *quoting Phillips*, 841 A.2d at 1013 (Saylor, J., joined by Castille and Eakin, JJ., concurring).

The concurrence in *Phillips* also showed how Pennsylvania's strict liability law already imported negligence concepts in several circumstances, such as post-sale alterations and in the risk-utility balancing performed by trial courts under *Azzarello*. Moreover, the concurrence stated, "[I]n design cases the character of the product and the conduct of the manufacturer are largely inseparable." *Phillips*, 841 A.2d at 1013-14, *cited in Tincher*, 104 A.3d at 371.

The concurrence in *Phillips* further critiqued *Azzarello* because it "(1) assign[ed] the risk-utility balancing to trial courts on the facts most favorable to the plaintiff; and (2) provid[ed] juries with minimalistic instructions, in an effort to insulate the jury from negligence terminology ...." *Tincher*, 104 A.3d at 371, *citing Phillips*, 841 A.2d at 1016-18. In addition, "by omitting the critical 'unreasonably dangerous' limitation on liability or cost-benefit instructions, the *Azzarello*-approved charge fails to define the term 'defect' clearly, and consequently fails to guide the jury in distinguishing products safe and unsafe for their intended use." *Tincher*, 104 A.3d at 371, *citing Phillips*, 841 A.2d at 1016-18.

In 2009, this Court in *Bugosh* dismissed an appeal related to the application of the strict liability doctrine in Pennsylvania, as improvidently granted. Justice

Saylor authored a dissenting opinion, which was joined by Justice Castille. They echoed Justice Saylor's concurrence in *Phillips* and stated, "The reality is that *Azzarello* simply was not well reasoned in its own time, and it certainly has not withstood the test of time ... This Court has lagged for too long in this essential recognition, and unfortunately, the ritualistic adherence to *Azzarello* has substantially impeded the progress of [Pennsylvania's] product liability jurisprudence." *Bugosh*, 971 A.2d at 1239 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal). The dissent further stated, "the Court should no longer say negligence concepts have no place in 'strict-liability' doctrine in Pennsylvania, when this simply is not accurate in [Pennsylvania's] tort scheme, or in any scheme purporting to recognize that manufacturers and distributors are not outright insurers for all harm involving their products." *Id.* at 1240.

In Justice Saylor's 2012 concurrence in *Reott*, he continued to express his disdain for the state of Pennsylvania product liability law. He stated, "strict products liability was originally fashioned with manufacturing defects in mind, and its uncritical extension to other areas, including the design-defect arena, has resulted in tremendous uncertainty, controversy, and instability, which continue to require the Court's attention to remediate beginning at a foundational level. *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1102 (Pa. 2012) (Saylor, J. concurring).

3. This Court Overruled *Azzarello* in *Tincher* and Created New Standards for Design Defect Cases.

Pennsylvania courts continued to follow *Azzarello* and its departure from Section 402A until this Court's 2014 decision in *Tincher*. The issue on appeal was whether the strict liability analysis in Section 402A should be replaced with the analysis of the Third Restatement. *Tincher* overruled *Azzarello* but declined to fully adopt the Third Restatement.

This Court in *Tincher* determined *Azzarello* improperly "premised its broad holding on the assumption that the term 'unreasonably dangerous' is misleading to jurors because it 'tends to suggest considerations which are usually identified with the law of negligence.'" *Tincher*, 104 A.2d at 376, *citing Azzarello*, 391 A.2d at 1025. This Court further recognized *Azzarello's* approach was based upon its prior opinion in *Berkebile.* However, *Tincher* concluded this bright line approach perpetuated jury confusion and was impractical. *Id.* at 377-79.[6]

This Court in *Tincher* also noted *Azzarello* improperly relied upon *Cronin* and *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J.Super. 1973). After *Cronin* was decided, the California Supreme Court "held that strict liability products liability

[6] "The doctrine of *stare decisis* 'commands judicial respect for prior decisions of this Court ...'" *Tincher*, 104 A.3d at 352, *citing Stilp v. Commonwealth*, 905 A.2d 918, 954, n. 31 (Pa. 2006). "But the Court's general faithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle or 'which are unsuited to modern experience and which no longer adequately server the interests of justice ....'" *Tincher*, 104 A.3d at 352, *citing In re Carney*, 79 A.3d 490, 505 (Pa. 2013). "Common law permits adjustment and development in law, recognizing that precedent is not infallible ...." *Tincher*, 104 A.3d at 352.

law in California may incorporate negligence concepts without undermining the principles fundamental to a strict liability claim." *Johnson v. American Standard, Inc.*, 179 P.3d 905, 916 (Cal. 2008), *cited in Bugosh*, 971 A.2d at 1236. Furthermore, *Glass* had already been disapproved, in relevant part, by the New Jersey Supreme Court in *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816 (N.J. 1978). Consequently, the New Jersey Supreme Court approved a jury instruction requiring a determination that a product is in a "defective condition unreasonably dangerous." *Id.* at 827-829 (disapproving *Glass* to the extent it was contrary to the restatement criterion of unreasonably dangerous, which remains soundly applicable to design defect claims).[7] Hence, Pennsylvania failed to "adjust its jurisprudence in light of these developments that eroded *Azzarello's* underpinnings." *Tincher*, 104 A.3d at 378.

Two new standards emerged from *Tincher*. "[I]n Pennsylvania, the cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." *Tincher*, 104 A.3d at 401. Under the consumer expectations test, a plaintiff must prove "the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer." *Id.* at 387. Furthermore, "[T]he product is not

[7] After *Azzarello*, the New Jersey Supreme Court in *Suter v. San Angelo Foundry & Machine Co.*, 406 A.2d 148 (N.J. 1979), stated a "jury should be charged in terms of whether the product was reasonably fit, suitable and safe for its intended or foreseeable purposes ...." *Id.* at 153.

defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains." *Id.*

Under the risk-utility standard, "a product is in a defective condition if a 'reasonable person' would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Id.* at 389. In other words, "a seller's precautions to advert the danger should anticipate and reflect the type and magnitude of the risk posed by the sale and use of the product." *Id.* This test provides courts with an opportunity to analyze, *post hoc*, whether a manufacturer's conduct was reasonable. This "obviously reflects the negligence roots of strict liability." *Id., citing Blue v. Envt'l Eng'g, Inc.*, 828 N.E.2d 1128, 1140-41 (Ill. 2005) ("[I]t has been observed that the kind of hindsight analysis inherent in the risk-utility test, which requires juries to weight the risk inherent in the product's design, has all the earmarks of determining negligence.").

This Court declined to outright adopt the Third Restatement because it is too broad. "Although '[b]right lines and broad rules always offer a superficially enticing option,' they also risk elevating the full simplicity to doctrine." *Tincher*, 104 A.3d at 399, *citing Scampone v. Highland Park Care Ctr., LLC*, 57 A.3d 582, 598 (Pa. 2012). Nonetheless, this Court declared, "the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty

[from which it evolved]." *Tincher*, 104 A.3d at 401. From an evidentiary standpoint,

> [A] strict liability cause of action theoretically permits compensation where harm results from risks that are known or foreseeable (although proof of either may be unavailable) – a circumstance similar to cases in which traditional negligence theory is implicated – and also where harm results from risks unknowable at the time of manufacture or sale ....

Id. at 404-405.

While *Tincher* did not adopt the Third Restatement, some of its principles are incorporated into the new risk-utility standard. Courts should now consider the following factors:

> (1) The usefulness and desirability of the product – its utility to the user and to the public as a whole.
> (2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Tincher, A.3d at 389-90; *see also* Restatement (Third) of Torts, cmt f.

Tincher addressed design defect claims.[8] However, this Court stated, "We recognize ... that the decision to overrule *Azzarello* and articulate a standard of proof premised upon alternative tests in relation to claims of a product defective in design may have an impact on other foundational issues regarding manufacturing or warning claims .... These considerations ... are outside the scope of the facts of this dispute ...." *Id.* at 409-10.

B. A Jury Should Be Permitted in Failure-to-Warn Cases to Consider Whether the Foreseeable Risks of Harm Posed by a Product Could Have Been Avoided By Reasonable Warnings.

The present appeal arises out of the jury instructions[9] Appellant requested for a failure-to-warn claim.[10] The trial court rejected the following:

> A product is defective because of inadequate instructions or warnings when, at the time of sale or distribution, the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller and the omission of the instructions or warnings renders the product not reasonably safe.[11]

---

[8] This Court stated, "Our decision is limited to the context of a 'design defect' claim by the facts of this matter, albeit the foundational principles upon which we touch may ultimately have broader implications by analogy." *Tincher*, 104 A.3d at 385, n. 21.

[9] "On appeal, [the Supreme Court] examines jury instructions to determine whether the trial court abused its discretion or offered an inaccurate statement of law controlling the outcome of the case." *Id.* at 351.

[10] The Superior Court consolidated *Vinciguerra v. Bayer Cropscience, Inc.* and *Amato v. Bell & Gossett, sua sponte* for purposes of this appeal.

[11] This instruction mirrors section c of the Third Restatement.

Instead, the jury heard the following instructions, which were taken substantially from *Berkebile*:[12]

> Even a perfectly made and designed product may be defective if not accompanied by proper warnings and instructions concerning its use. A supplier must give the user or consumer any warnings and instructions of the possible risks of using the product that may be required or that are created and necessitated by the inherent limitations in the safety of the use of that product. If you find that necessary warnings or instructions were not given, then the defendant is liable for all harm caused by the failure to warn. And in this case the claim is these suppliers failed to warn of the dangers of using asbestos.

Amato v. Bell & Gossett, 116 A.3d 607, 621 (Pa.Super. 2015).

Pennsylvania is one of the few jurisdictions that hold a seller liable for failing-to-warn of dangers unknown to science and industry at the time of a product's sale. *See Carrecter v. Colson Equip.*, 499 A.2d 326, 331 (Pa.Super. 1985), *citing Pegg v. Gen. Motors Corp.*, 391 A.2d 1074, 1083 n. 10 (Pa.Super. 1978). However, products often enter the marketplace without a particular warning only to have a hazard become apparent after widespread use. Under the "state of the art" defense,[13] a seller can only be liable for its failure-to-warn if the hazard was known or knowable at the time of sale.

---

[12] *See* Subcommittee Note to Pa.SSJI 16.30.

[13] This Court in *Tincher* acknowledged the state of the art defense when it cited *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973). The Fifth Circuit stated, "If the defendant-manufacturer had actual or constructive knowledge of the condition of the product, it would be unreasonable for him to sell it." *Id.* at 253, *cited in Tincher*, 104 A.3d at 389 and 391.

Most states permit a seller in a strict liability failure-to-warn case to introduce evidence related to the state of the art defense. Exclusion of related evidence would make the manufacturer the virtual insurer of its product's safe use. This result is inconsistent with established principles underlying strict liability. *See Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991). Plaintiffs can introduce expert testimony or published research to satisfy this burden.[14]

A manufacturer should not be held responsible for its failure-to-warn of an unknown danger, if the "state of the art" was such that science had not discovered the problem. For instance, "California courts, either expressly or by implication, have to date required knowledge, actual or constructive, of potential risk or danger before imposing strict liability for a failure-to-warn. The state of the art may be relevant to the question of knowability and, for that reason, should be admissible in that context." *Id.* at 550.

Colorado permits a seller to introduce state of the art evidence in all strict liability cases. *See Fibreboard Corp. v. Fenton*, 845 P.2d 1168 (Col. 1993). Moreover, the Colorado Supreme Court stated, "We do not believe a court should shy away from using appropriate 'negligence terms' that are necessary to properly

[14] 63 AM.Jur. 2d Products Liability § 1040 (2012).

define defect and unreasonably dangerous in the context of either design-defect or failure-to-warn claims." *Id.* at 1174.

In Illinois, "[T]he imposition of a knowledge requirement is a proper limitation to place on manufacturer's strict liability in tort predicated upon a failure to warn of a danger inherent in a product." *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 198 (Ill. 1980). In addition, under Arizona law, "the adequacy of a manufacturer's warning must be based on a determination regarding what it knew or should have known." *Powers v. Taser*, 174 P.3d 777, 783 n. 23 (Ariz. App. 2007).

Numerous other state courts also permit manufacturers to raise the state of the art defense in failure-to-warn strict liability cases. *Campbell v. Robert Bosch Power Tool Corp.*, 795 F.Supp. 1093 (M.D. Ala. 1992); *Hughes v. Massey-Ferguson, Inc.*, 522 N.W.2d 294 (Iowa 1994); *Bernier v. Raymark Industries*, 516 A.2d 534 (Me. 1986); *Gourdine v. Crews*, 955 A.2d 769 (Md. App. 2008); *Tretter v. Johns-Manville Corp.*, 88 F.R.D. 329 (E.D. Mo); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978); *Becker v. Baron Bros.*, 649 A.2d 614 (N.J. 1994); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982); *Johnson v. General Motors Corp.*, 438 S.E. 2d 28 (W.Va. App. 1993).

Pennsylvania should abandon its antiquated approach to failure-to-warn cases and adopt the majority view. *Berkebile*, like *Azzarello*, is based upon the premise that a jury in strict liability actions should never consider the "reasonable man standard." *Berkebile*, 337 A.2d at 902. However, as mentioned above, *Tincher* disavows this concept. Furthermore, this approach contradicts the text and spirit of Section 402A.

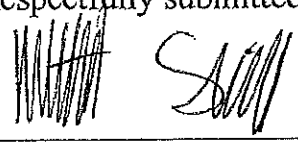
This Court stated, "[A] seller's precautions to advert the danger should anticipate and reflect the type and magnitude of the risk posed by the sale and use of the product." *Tincher*, 104 A.3d at 389. Therefore, while *Tincher* did not specifically address failure-to-warn claims, it implicitly permits a fact finder to evaluate whether a manufacturer knew or should have known whether a particular warning could have prevented foreseeable risks of harm. Hence, Pennsylvania courts should no longer utilize jury instructions regarding failure-to-warn cases based upon *Berkebile* or its progeny. Instead, Pennsylvania should follow the majority approach by providing a jury with instructions that are more consistent with section 2(c) of the Third Restatement and comment j to the Second Restatement.

CONCLUSION

For these reasons, this Court should reverse the ruling of the Superior Court and hold a defendant in a strict liability claim based on a failure-to-warn theory has the right to have a jury determine whether its product was "unreasonably dangerous." Furthermore, in the failure-to-warn context, Pennsylvania should adopt the majority approach and enable juries to determine whether a seller knew or should have known about a particular danger.

Date: March 14, 2016

Respectfully submitted,



Matthew R. Shindell (Pa. Bar No. 88379)
GOLDBERG SEGALLA LLP
1700 Market Street, Suite 1418
Philadelphia, PA 19103
(215) 519-6800
Attorney for Amicus Curiae

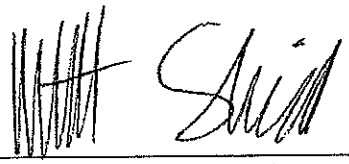
Of Counsel:

Linda E. Kelly
Quentin Riegel
Leland P. Frost
MANUFACTURER'S CENTER
FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

CERTIFICATE OF IDENTITY

I, hereby certify that the paper copy of the foregoing Brief is identical to the electronic copy that is being simultaneously submitted to the Court.



Matthew R. Shindell (Pa. Bar No. 88379)

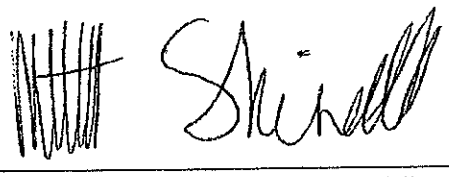
Date: March 14, 2016

CERTIFICATE OF SERVICE

I certify that I served two copies of the foregoing Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service this 14th day of March, 2016, addressed as follows:

Nicholas P. Vari, Esquire
Michael J. Ross, Esquire
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222

John P. Kopesky, Esquire
Shein Law Center, Ltd.
121 South Broad Street, 21st Floor
Philadelphia, PA 19107



Matthew R. Shindell (Pa. Bar No. 88379)