Potential Clarity on Pennsylvania's Murky Products Liability Landscape

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The Pennsylvania Supreme Court, in its thorough, 2014 decision in *Tincher v. OmegaFlex*, sought to clarify products liability law in Pennsylvania, but instead, has left attorneys on both sides of the bar in the dark, specifically on the admissibility of government and industry standards. Recently granting allocator, Pennsylvania's Supreme Court heard oral argument on March 8 on *Sullivan v. Werner*, 253 A.2d 730 (Pa. Super. 2021), a case that may provide clarity to Pennsylvania's murky post-*Tincher* landscape on these key evidentiary issues.

Pennsylvania attorneys, no matter their practice area, have undoubtedly read or heard about *Tincher*. The countless articles attempting to analyze, resolve, and anticipate the directionality of the law in the post-*Tincher* landscape are evidence of the myriad issues it wrought on the products liability bar. *Tincher* expressly overturned the longstanding ruling in *Azzarello v. Black Brothers*, 391 A.2d 1020 (Pa. 1978). The *Azzarello* court was concerned that a jury could not make a determination as to whether a product was "unreasonably dangerous" and left all questions regarding the risk and utility of the product to the court, as a matter of law. *Azzarello* provided a bright line distinction and separation of negligence principles from strict liability principles.

The *Tincher* court, in overturning *Azzarello*, arguably also overturned Pennsylvania's longstanding separation of negligence and strict liability standards, which was the premise for the exclusion of evidence of compliance with industry and governmental standards. The *Tincher* court recognized that "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." In recognizing this, *Tincher* appeared to recognize the national trends in jurisprudence that negligence and strict products liability principles are inseparable.

Despite this, in the post-*Tincher* world, Pennsylvania trial courts have balked at the admission of government or industry standards and continually preclude the same, in many ways contradicting the direction in which the *Tincher* court was heading. To the various trial courts' credit, *Tincher* never expressly overturned *Azzarello* based jurisprudence such as *Lewis v. Coffing Hoist*

Division, 528 A.2d 590 (Pa.1987) and *Gaudio v. Ford Motor*, 976 A.2d 524 (Pa. Super. 2009) (both explicitly precluding government and industry standards in strict liability cases). This has left plaintiffs arguing that cases like *Lewis* and *Gaudio* are still good law, because they were never expressly overturned, and defendants arguing that if *Azzarello* was overturned, all of its progeny must be too.

Pennsylvania's Supreme Court, in its forthcoming opinion on *Sullivan v. Werner*, could and should resolve this discord. In *Sullivan*, plaintiffs Michael and Melissa Sullivan brought a strict products liability action after Michael Sullivan fell through a scaffold made by Werner Co. and sold by Lowe's. At trial, a jury determined that a design defect caused the accident and awarded the plaintiffs $2.5 million in damages. On appeal, Werner alleged that the trial court erred in precluding industry standards evidence, especially when the plaintiffs introduced evidence of other dissimilar designs in the industry. The Pennsylvania Superior Court affirmed the trial court's ruling precluding any evidence relating to compliance with industry or government standards. Werner appealed and oral argument before the Pennsylvania Supreme Court was held on March 8.

Although the Pennsylvania Supreme Court in *Tincher* refused to outright adopt the Restatement (Third) of Torts, it appeared the court indicated a willingness to follow national trends recognizing the complex inseparability of negligence and strict liability principles. The *Sullivan* case gives the court opportunity to continue to follow national trends, and build upon the framework provided by *Tincher*, or revert to the prior longstanding precedent of *Azzarello*. Whichever outcome, it will, at the least, provide clarity to both sides of the products liability bar.

It is likely that the *Sullivan* court, like the *Tincher* court, will consider jurisprudence from other states when ruling on the admissibility of industry standards. At present, Pennsylvania is in the minority of states which preclude evidence of industry standards. The prevailing view among other Restatement (Second) of Torts Section 402A jurisdictions continues to be that evidence of compliance with government regulations and other safety standards is admissible on the question of defect but is not conclusive on the issue.

Plaintiffs in *Sullivan* contend that industry standards should be inadmissible because the mere fact that a product meets or exceeds industry standards should not mean that the product itself is not defective. In other words, it is certainly possible that the industry standards themselves are defective. Plaintiffs in *Sullivan* also believe that there is a possibility that the entire industry may be defective and, thus evidence that the product in question complied with industry standards is not of import. The majority of jurisdictions disagree with the plaintiffs in *Sullivan*. Also, in a majority of jurisdictions, compliance with industry standards is admissible but not dispositive. It is merely an additional factor which jurors can evaluate in determining whether a product is defective or not. Jurors in these jurisdictions are often instructed of this same principle: just because a product meets or exceeds industry standards, does not mean that the product is not defective. This principle and the admissibility of industry standards, in the view of a majority of jurisdictions, are not mutually exclusive.

Sullivan plaintiffs also argue that only the product should be judged, and not the conduct of the manufacturer, and that any consideration of compliance with industry standards is evidence of the manufacturer's conduct and not of the product's defectiveness. The split view here is that the manufacturer in *Sullivan* (and many other manufacturers that do business in the Commonwealth of Pennsylvania) argue that it is indeed the product, its engineering and specifications, that meet the various industry and government standards, and not the the conduct of the manufacturer.

The Supreme Court in *Sullivan* has the opportunity to continue the *Tincher* court's mission to modernize Pennsylvania jurisprudence surrounding products liability and recognize that strict liability and negligence standards are irreversibly intertwined, or, on the other hand, revert back to the antiquated, minority-held view that strict liability and negligence must remain separate. Whether the Supreme Court affirms the Superior Court's ruling or reverses, the outcome should jolt the Pennsylvania products liability bar out of the murky gray depths in which it has floundered on this issue for the past decade, and into the "black and white" of the definite. Both plaintiffs and defendants will have clarity when prosecuting and defending their cases, and regardless of outcome, that is progress for lawyers who practice products liability litigation in the commonwealth.

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