Received 7/18/2022 3:43:23 PM Supreme Court Eastern District

Filed 7/18/2022 3:43:00 PM Supreme Court Eastern District
18 EAP 2022

In The

Supreme Court of Pennsylvania

No. 18 EAP 2022

MICHAEL and **MELISSA SULLIVAN**, H/W,
Appellees,

v.

WERNER COMPANY and **LOWE'S COMPANIES, INC.**,
Appellants,

and

MIDDLETOWN TOWNSHIP LOWE'S STORE #1572,
Defendant.

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

Appeal from the Order of the Superior Court of Pennsylvania Entered June 23, 2021, at No. 3086 EDA 2019, Denying Reargument of Decision of April 15, 2021, Affirming the November 19, 2019 Judgment of the Court of Common Pleas of Philadelphia County, at No. 161003086

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STATEMENT OF INTEREST OF AMICUS CURIAE

The International Association of Defense Counsel ("IADC") is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. IADC is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. IADC agrees with, and does not repeat, the appellants' brief of defendants Werner Company and Lowe's Companies.

INTRODUCTION AND SUMMARY OF ARGUMENT

IADC submits this *amicus curiae* brief to amplify three points related to how the rule of admissibility adopted in the Court's opinion might affect other cases:

First, evidence that a similar design is in widespread use, or the design complies with applicable safety standards, can be relevant to several of the risk/utility factors laid down in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), and to credibility of expert-witness opinions. When relevant, the evidence is presumptively admissible under Pennsylvania Rule of Evidence 402 subject to ordinary rules of evidence. There should not be a separate admissibility rule for industry customs and government safety standards.

Second, speculation that a whole industry might be lax, or that governmental standards may be too low, does not justify a categorical rule precluding admissibility.

Parties are free to argue in an individual case that an industry or government safety standard should be higher or have not kept up with technology. In the vast majority of cases, this presents a fact question specific to the case and the jurors can be trusted to determine how these factors impact their design defect determinations. In contrast, appellate courts are ill-equipped for the kind of fact-finding needed to decide as a general rule that industry or governmental standards are too lax, too stringent, or about right. That is the responsibility of the jury to decide in each case on the facts of that case. The lower court's rule, therefore, impedes a jury's ability to properly determine liability in a case.

Third, the Court need not adopt a one-size-fits-all rule today that industry and government standards are categorically admissible or inadmissible. This Court emphasized in *Tincher* that judges and lawyers cannot foresee every way that an issue will come up in future cases. Questions about admissibility of industry or governmental standards arise in a variety of factual settings. The Court should define the guiding principles for how Pennsylvania's existing rules of evidence should be applied to safety standards and widespread use.

Given all this, we submit that the Rules of Evidence and *Tincher* lead to these conclusions: Evidence of safety standards, or a design's widespread use, is relevant when it has any tendency to make more or less probable any fact of consequence in determining the action, including any of the risk/utility factors set forth in *Tincher*. Pa.R.E. 401. Being relevant, such evidence is admissible subject to ordinary rules of

evidence. Pa.R.E. 402. As always, trial courts have discretion to exclude such evidence in the rare circumstance where its probative value is outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, or the other dangers set forth in Pa.R.E. 403.

ARGUMENT

1. Evidence That A Similar Design Is In Widespread Use, Or The Design Complies With Industry Or Government Standards, Can Be Relevant To Several Risk/Utility Factors And To Credibility Of Expert-Witness Opinions.

Evidence that a design is in widespread use, or complies with industry or government standards, can be relevant to several issues under *Tincher*. When it is relevant, it is presumptively admissible under Pennsylvania's rules of evidence.[1]

In a risk-utility case such as this one, *Tincher* identified several non-exclusive factors for the factfinder to balance when determining whether a product is defective:

> (1) the usefulness and desirability of the product - its utility to the user and the public as a whole;

[1] "Evidence is relevant if it has 'any tendency to make a fact more or less probable than it would be without the evidence" and that fact is of consequence to the determination of the action. *Brady v. Urbas,* 113 A.3d 1155, 1161 (Pa. 2015) (quoting Pa.R.E. 401). "[T]he threshold for relevance is low due to the liberal '*any* tendency' prerequisite." *Brady,* 113 A.3d at 1162. Evidence is also relevant if it "supports a reasonable inference … regarding the existence of a material fact," "even where the inference to be drawn stems only from human experience." *Commonwealth v. Hawk,* 709 A.2d 373, 376 (Pa. 1998). To be relevant, evidence need not be conclusive. *Id.*

(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 the existence of suitable warnings or instructions; and

(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, 104 A.3d at 389-90 (quoting John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L. J. 825, 837-38 (1973)). *Tincher* also pointed to the "common sense idea that products are unacceptably dangerous if they contain dangers that might cost-effectively (and practicably) be removed." *Tincher,* 104 A.3d at 390 (quoting David G. Owen, *Products Liability Law* p. 315 (2d ed. 2008)). All of these factors speak to the broader question of whether the design is *unreasonably* dangerous. 104 A.3d at 400. The jury instructions here reflected the applicable *Tincher* factors. (Record 1181a-1182a)

Depending on the case, evidence that the challenged design is in widespread use, or that it complies with on-point safety standards, has a tendency to make these facts more or less probable – and can be relevant to several of these considerations. For example, factor (6) is the user's anticipated awareness of the danger, including because of knowledge of the product's condition. Evidence that the design is in widespread use tends to make more probable that a frequent user of such products would be familiar with the challenged design feature. As in this case, experienced commercial or industrial users, who use the product regularly for their livelihood, are particularly likely to be familiar with a widespread design feature. Here, plaintiff had 17 years of experience and had used "hundreds" of scaffolds before assembling the scaffold at issue. (Record 280a, 284a, 300a) The excluded evidence, that the challenged dual deck pin design was the most common design in the scaffold industry when the scaffold was sold, is highly relevant to the anticipated awareness of the dangers of the scaffolding. (*See* Record 145a-146a) A reasonable juror could infer that the anticipated user of a commercial scaffold would be aware of the most common design in the industry and how to use it safely. The commonness of the design directly tends to prove a fact of consequence to the outcome.

Factor (2) is the safety aspects of the product – the likelihood it will cause injury and the probable seriousness of the injury. Factor (5) is the user's ability to avoid the danger through ordinary care in using the product. Evidence that a design feature is in widespread use can be directly relevant to these factors. If the challenged design feature

is widely-used, but rarely causes injury, that tends to show the likelihood it will cause injury is low or that users are in fact avoiding injury through ordinary care. Likewise, if the feature is widely-used but has only caused minor injuries (for example, a scraped knee), that tends to show the probable seriousness of any injury is low – or again, that users' ordinary care is enough to avoid serious injury. Similarly, evidence that a product complies with an on-point government safety regulation has a tendency to show that the likelihood of serious injury has been deemed by the overseeing government agency as acceptably low, especially if the regulation is relatively recent and the agency studied injury rates and other potential designs. Although such government decisions may not preempt liability in certain circumstances, juries should be allowed to hear about them, assess their validity and determine how they apply to the case before them.

Evidence of whether the challenged design is or is not widely used in the industry is also relevant to *Tincher* factors (3) and (4). Factor (3) is the availability of a substitute product that would meet the same need and be safer. Factor (4) is the manufacturer's ability to eliminate the product's unsafe character without impairing its usefulness or making it too expensive. It may be that most manufacturers use plaintiff's proffered alternative design, and it may be reasonable for the jury to infer that the plaintiff's design is safer than the one the defendant used. But, if most manufacturers use the same design as defendant, the jury can reasonably infer that *plaintiff's* claims may not be reliable—particularly when most manufacturers have eschewed the plaintiff's proffered design: "If few manufacturers decided to adopt the alternative, one can infer that consumers

actually did consider the alternative ungainly or too expensive, and thus that the proposed alternative was not feasible." David A. Urban, *Custom's Proper Role in Strict Products Liability Actions Based on Design Defect,* 38 UCLA L. Rev. 439, 466 (1990).

Safety standards, for example those resulting from study of injury rates or of alternative designs, can also be particularly helpful to jurors in evaluating the credibility of each side's expert witnesses for all of these *Tincher* factors. *See Tincher,* 104 A.3d at 407 ("The credibility of witnesses and testimony offered [and] the weight of evidence relevant to the risk/utility calculus" are "issues for the finder of fact, whether that finder of fact is judge or jury.").

For these reasons, most other states have found that designs of other manufacturers will often have a logical tendency to shed light on the overall risk/benefit balance. The Supreme Court of California, for example, recently held when addressing a similar question under its comparable product liability law, "competing manufacturers' independent design decisions may reflect their own research or experience in balancing safety, cost, and functionality, and thus shed some light on the appropriate balance of safety risks and benefits," as may "industry-wide technical standards." *Kim v. Toyota Motor Corporation,* 424 P.3d 290, 299 (Cal. 2018). Thus, just as a plaintiff may "legitimately seek to inform the jury that the defendant has not implemented a safety feature that is standard in the industry," a "defendant might point to the fact that a particular safety feature is not standard in the industry as some evidence of whether the challenged

design embodies excess preventable danger ...." *Id.* at 299.[2] This makes sense. Manufacturers have an interest in making their products as safe as practicable at a price consumers are willing to pay. A manufacturer offering significantly increased safety at an economical price would have a competitive advantage. In many industries, manufacturers compete on safety, and some consumers will pay more for better safety features.

America's widely recognized tort scholars agree. A leading product-liability treatise concludes that, "to prove a design defect, a plaintiff may introduce that the defendant manufacturer failed to comply with an applicable industry standard .... By the same token, a manufacturer seeking to establish that its product's *design* is reasonably safe, that it is not defective for failing to meet the safety standard of some alternative design, may show that its product complied with applicable industry standards ...." 1 David G. Owen and Mary J. Davis, *Owen & Davis on Products Liability* § 6:9 (4th ed. 2022). *Accord,* Page Keeton, *Annual Survey of Texas Law – Torts,* 35 Sw. L. J. 1, 11 (1982) (custom is relevant, including to strict liability, "because it can be inferred that the industry has made some effort to weigh reasonably foreseeable dangers against utility, including the feasibility of safer alternatives"); *see also* Urban, 38 UCLA L. Rev. at 466 & n.147 ("[A]n industry's common practice represents a valuable opinion regarding the

[2] This Court in *Tincher* referred to dangers that might cost-effectively and practicably be removed, *Tincher,* 104 A.3d at 399 (quoting Owen, *Products Liability Law* p. 315), while California courts refer to excess preventable danger. The concepts are similar.

proper balance of all the risk-benefit factors."). Thus, when the American Law Institute issued its Restatement Third on product liability principles, it explained, "[h]ow the defendant's design compares with other, competing designs in actual use is relevant to the issue of whether the defendant's design is defective." Restatement (Third) of Torts: Products Liability, § 2, cmt. d (1998).

In fact, *Owen & Davis* called out the Superior Court's opinion in this case as ripe for overruling. "A great majority of courts allow applicable evidence of industry custom … Notwithstanding the widespread admissibility of such evidence on the issue of product defect, … a few courts refuse altogether to allow evidence of industry custom in actions based on strict liability in tort …." Owen & Davis § 6:9 & n.28 (citing Superior Court's *Sullivan v. Werner Company* opinion as first example of such cases). The treatise continues: "As an outmoded holdover from early, misguided efforts to distinguish strict liability from negligence, it may be expected that the few courts still clinging to the minority view will in time swing over to the more logical majority perspective." *Id.* § 6.9.

2. Argument That A Particular Standard May Be Outdated Or Lax Is A Matter For Trial-Court Discretion Under Rule 403; It Does Not Justify A Categorical Rule Excluding All Standards From Evidence In All Cases.

The Superior Court in *Webb v. Volvo Cards of North America, LLC,* 148 A.3d 473 (Pa. Super. 2016), suggested that even though *Tincher* had eliminated the firm division between strict liability and negligence, a second rationale might support inadmissibility of industry standards. *Webb* observed that *Lewis v. Coffin Hoist division, Duff-North*

Company, Inc., 528 A.2d 590, 594 (Pa. 1987), had "noted that a defective design could be widespread in an industry." *Webb,* 148 A.3d at 483. *Webb* suggested that "the *Tincher* opinion does not undermine that rationale for excluding governmental or industry standards evidence." *Id.* This abstract concern about a widespread defective design cannot support a categorical rule that compliance with industry or government standards is inadmissible in all cases.

A concern that *some* standards should be more stringent or *some* widespread designs may be defective does not justify a categorical rule that *all* standards and *all* evidence of widespread design are inadmissible. Trial courts have discretion to exclude relevant evidence if the probative value is outweighed by a danger of unfair prejudice, confusing the issues, or misleading the jury, among other dangers. Pa.R.E. 403. So a trial court has discretion to exclude a given standard if it is so clearly old, self-serving, or otherwise unreliable that its probative value is outweighed by its danger of confusing or misleading the jury. These situations should be rare; jurors can be trusted to assess the applicable industry customs and standards based on the parties' expert evidence over how reliable they are in determining whether the product is defective in design.

Further, excluding an entire category of evidence because some *instances* of it might be unreliable conflicts with the Pennsylvania Rules of Evidence. Evidence is relevant if it tends to make any fact of consequence more or less probable than it would be without the evidence. Pa.R.E. 401. That includes via inference: evidence is relevant if it logically tends to support a reasonable inference regarding existence of a material

fact. *Commonwealth v. Johnson,* 160 A.3d 127, 146 (Pa. 2017). And if the evidence is relevant, it is presumptively admissible: again, "[a]ll relevant evidence is admissible" except as otherwise provided by law. Pa.R.E. 402. As discussed above, evidence of widespread use, industry standards and government standards are often relevant and admissible under these standards and may speak directly to several *Tincher* factors.

This evidence should not become inadmissible just because of the abstract possibility that some such evidence might be an unreliable guide. Virtually any category of evidence is *potentially* unreliable. Eyewitnesses might have been too distant to see clearly; parties might give biased and self-serving testimony. Absent convincing reason to believe that the evidence actually proffered in the case is unreliable, such objections are normally thought to be material for cross-examination, not a basis for excluding it.

Finally, appellate courts are not well-equipped to draw broad factual conclusions that cut across cases, such as "industry standards are too lax" or "government standards are too stringent." For example, this case concerns a scaffold and *Lewis* involved an electric hoist. In neither case did the record provide a basis for an appellate court to draw reasoned conclusions about designs of *all other* products or the validity of industry or government standards that apply to those other products. Admissibility of industry or government standards has arisen in cases about a wide variety of products and asserted safety features, about which the records here and *Lewis* likely reveal nothing: for example, pickup-truck electronic stability control (*Kim,* 424 P.3d 290); fuel tanks in motor homes (*Back v. Wickes Corp.,* 378 N.E.2d 964, 970 (Mass. 1978); car doors and

car seats (*Webb v. Volvo Cars of North America, LLC,* 148 A.3d 473, 480-83 (Pa. Super. 2016)); lawn mowers (*Thibault v. Sears, Roebuck & Co.,* 395 A.2d 843, 850 (N.H. 1978)); and ladders (*DiCarlo v. Keller Ladders, Inc.,* 211 F.3d 465, 468 (8th Cir. 2000)); *see also Delery v. Prudential Ins. Co. of America,* 643 So.2d 807, 813 (La. Ct. App. 4th Cir. 1994) (chairs: both sides' witnesses discussed ANSI standard); *Westfall v. Caterpillar, Inc.,* 821 P.2d 973, 976 (Idaho 1991) (log skidder: plaintiffs introduced industry standards); *Clarke v. LR Systems,* 219 F. Supp. 2d 323, 334 (E.D.N.Y. 2002) (grinder: compliance with industry standard not dispositive of defectiveness). The Court should exercise the same "judicial modesty" it did in *Tincher*, 104 A.3d at 406, and not broadly exclude factors that may assist the administration of justice.

Thus, *amicus* submits the California Supreme Court and Massachusetts Supreme Judicial Court got it exactly right:

> [S]uch evidence cannot be dispositive; perhaps the entire industry has "unduly lagged" in adopting feasible safety technologies. [Citation] But although counsel may argue that industry standards "can and should be more stringent," "[e]vidence that all product designers in the industry balance the competing factors in a particular way clearly is relevant to the issue before the jury."

Kim, 424 P.3d at 299-300 (quoting *Back,* 378 N.E.2d at 970).

3. The Court Need Not Adopt A One-Size-Fits-All Rule Of Admissibility Or Inadmissibility.

Last, the Court need not adopt a one-size-fits-all rule that evidence of widespread use, or compliance with industry or government standards, is either admissible or inadmissible. The California Supreme Court in *Kim* held that "while

industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case." 424 P.3d at 300-01.

Tincher "stressed repeatedly" that "courts do not try the 'typical' products case exclusively and a principle of the common law must permit just application to myriad factual circumstances that are beyond our power to conceive." 104 A.3d at 405. As the cases cited in this brief, the defendants' brief and likely other amicus briefs illustrate, questions about of admissibility of a design's widespread use and of industry and government standards can arise in a multitude of fact situations that may not all involve the same considerations. They may concern emerging cutting-edge technologies (electronic stability control in *Kim*), familiar products such as ladders (*DiCarlo*), or products familiar to their users but potentially unfamiliar to jurors (the scaffolds in this case). Different cases may involve widespread use, voluntary standards deliberately researched and adopted by industry, or mandatory standards imposed by governmental safety agencies – or all three, as in this case. The considerations governing admissibility will not necessarily be the same for different products, different safety features, or different types of standard. This context may be critical for the ability of jurors to understand the design questions in the case and decipher the truth when considering the competing experts' opinions in the case.

CONCLUSION

For the foregoing reasons, the Court should overrule *Lewis*. It should hold that: (1) Evidence of safety standards, or a design's widespread use, is relevant when it has any tendency to make more or less probable any fact of consequence in determining the action, including any of the risk/utility factors set forth in *Tincher*. Pa.R.E. 401. (2) Being relevant, such evidence is admissible subject to ordinary rules of evidence. Pa.R.E. 402. (3) Trial courts have discretion to exclude such evidence in the rare circumstance where its probative value is outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, or the other dangers set forth in Pa.R.E. 403.

Respectfully Submitted,

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Dated: July 18, 2022

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I hereby certify that the foregoing brief complies with the word limit of Pennsylvania Rule of Appellate Procedure 531(b)(3). Specifically, it contains 3,563 words based on the word count of Microsoft Word 365, the word processing system used to prepare the brief.

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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Received 7/18/2022 3:43:23 PM Supreme Court Eastern District

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Werner Company and Lowe's Companies, Inc., and Middletown Township Lowe's Store #1572	:	
Appeal of: Werner Company and Lowe's Companies, Inc.		

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