IN THE SUPREME COURT OF PENNSYLVANIA

No. 17 MAP 2013

TERENCE D. TINCHER and JUDITH R. TINCHER

v.

OMEGA FLEX, INC.
Appellant

Appeal from the Order of the Superior Court of Pennsylvania dated September 25, 2012 affirming the Judgment of the Chester County Court of Common Pleas, Civil Division, dated June 1, 2011

BRIEF OF AMICI CURIAE PENNSYLVANIA DEFENSE INSTITUTE AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on behalf of the Pennsylvania Defense Institute (PDI) and the International Association of Defense Counsel (IADC) as *amici curiae.* PDI is a state-wide association of defense counsel and insurance company executives. Its attorney members represent manufacturers, contractors, property owners, and casualty insurance and workers compensation carriers in the defense of claims brought against them. PDI provides a forum for developing public policy initiatives and for exchanging ideas in the pursuit of the prompt, fair, and just disposition of claims, the preservation of the administration of justice, the enhancement of the legal profession's services to the public, the elimination of court congestion and delays in civil litigation, and the promotion of other related public activities. To these ends, PDI represents the interests of its members on various matters affecting their interests, including legislation and litigation.

The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The 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.

STATEMENT OF JURISDICTION

PDI and the IADC adopt by reference the Statement of Jurisdiction set forth in the Brief for Appellant.

ORDER IN QUESTION

The Superior Court affirmed the judgment in favor of the plaintiffs entered June 1, 2011 in the Court of Common Pleas of Chester County.

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

PDI and the IADC adopt by reference the Statement of the Standard and Scope of Review set forth in the Brief for Appellant.

STATEMENT OF THE QUESTION INVOLVED

Whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement.

Not addressed by the Superior Court.

STATEMENT OF THE CASE

PDI and the IADC adopt by reference the Statement of the Case set forth in the Brief for Appellant.

SUMMARY OF ARGUMENT

The Court has posed a simple question. Should the Court replace the strict liability analysis of §402A with the analysis of the Third Restatement? The question requires a simple answer. Of course it should.

The alternative is to leave in place an approach that has been called "confusing," "unfathomable," and "simply not well reasoned." It is all of those things and more. As currently applied, Pennsylvania law represents a departure from generally accepted principles of strict liability, relying on poorly instructed juries to solve the safe product puzzle without engaging in the risk/utility balancing at the heart of every design defect claim. No court should favor that alternative over even the slightest improvement.

The Third Restatement offers far more than the slightest improvement. Its reasoned approach recognizes that product design involves choices, tradeoffs between risk and utility, properly evaluated only by resort to negligence terminology. A product design should give rise to liability not when it fails to meet some undefined level of safety. A product design should give rise to liability when the design choices made were not reasonable.

Thirty-five years of unfathomable confusion is enough. The Court has an opportunity to correct what has long needed correcting. There is no reason to allow that opportunity to pass.

Nor is there any reason to apply the corrective measure only prospectively. The demise of the current approach to design claims was recommended by three members of this Court ten years ago, and since predicted, twice, by the Court of Appeals.

There can be no rational settled expectations to the contrary. There will be no elimination of meritorious claims. Those that had merit under the current approach will have merit under the Third Restatement. The evidence supporting them will be the same. Only the manner in which the jury is instructed will be different. Retroactive application is appropriate.

ARGUMENT

Illogical, and inconsistently applied, Pennsylvania product liability law has strayed far from its original purpose: to allow recovery for injuries caused by unsafe products without requiring proof of negligence on the part of the products' suppliers. Fault for the departure lies not in the original purpose, but in the fundamental impossibility of segregating a manufacturer's conduct in designing a product from the design itself.

This and other Pennsylvania courts have made numerous attempts to remedy the fundamental disconnect. For the most part, those efforts have imposed negligence-type burdens on manufacturers while depriving them of negligence-type defenses. *Compare Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186 (1997) (strict liability imposed for "foreseeable" alterations), *with, Kimco Development Corp. v. Michael D's Carpet Outlet,* 536 Pa. 1, 671 A.2d 603 (1993) (rejecting comparative negligence as a defense). In so doing, the courts have not only imposed unfair burdens, but have also revealed *Azzarello*'s[1] fundamental departure from sound jurisprudence.

The lengths required to rationalize *Azzarello* have on occasion strained credulity. By definition, an accident is "(a)n *unintended* and unforeseen injurious occurrence, something that does not occur in the usual course of events or that

[1] *Azzarello v. Black Brothers Co.,* 480 Pa. 547, 391 A.2d 1020 (1978).

could not be reasonably anticipated." Bryan A. Garner, *Black's Law Dictionary* 15 (8th ed. 2004) (emphasis added). But a manufacturer of motor vehicles "must include accidents as *intended uses* of its product and design accordingly." *Gaudio v. Ford Motor Company*, 976 A.2d 524, 532 (Pa. Super. 2009), *appeal denied*, 989 A.2d 917 (Pa. 2010) (emphasis added). Simply stated, the fallacy of trying to divorce the design process from the design has led in the extreme to unacceptable gaps in elementary logic.

The absence of logic has been pervasive, infecting even the first judicial call for reform. A majority of this Court agreed that under existing law a product can be both safe and unsafe, safe when its design is evaluated by application of Restatement Second principles, unsafe when the identical design is evaluated by application of negligence principles. *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003).

And there can be no denying an inconsistency in approach. The Court has admitted to it. *Phillips*, 576 Pa. at 655-56, 841 A.2d at 1006-1007 ("we have muddied the waters at times with the careless use of negligence terms in the strict liability arena"). The law has suffered from it. "This Commonwealth's products liability jurisprudence is far too confusing for another opinion to be laid down that rhetorically eschews negligence concepts in the strict liability arena, while the Court nevertheless continues to abide and/or endorse their actual use in the liability

assessment." *Id.*, 576 Pa. at 670-71, 841 A.2d at 1016 (citation omitted) (Saylor, J., concurring).

Nearly ten years have passed since Justice Saylor offered that assessment, and all that can be said of Pennsylvania products law ten years later is that it is no less confusing now than it was then. Perhaps for want of opportunity, the reform called for in the *Phillips* concurrence remains a promise unfulfilled. This appeal presents the needed opportunity.

It also presents a limited set of options. In framing the issue the Court has left itself just two. The first is for the Court to adopt an entirely new approach, and the only new approach on the table is that of the Third Restatement. The second is for the Court to maintain the status quo, thereby announcing that in this Commonwealth a confusing state of affairs is an acceptable state of affairs. The choice should not be a difficult one.[2]

[2] The Court has expressed no interest in revisiting the Second Restatement, as even those members of the Court most critical of the no negligence concepts approach see no practical way to turn back the clock: "The powerful no-negligence-in-strict liability rubric has undergirded numerous Pennsylvania decisions in the product liability arena over the last 30 years. Thus, at the risk of understatement, a present disapproval of this premise would open a substantial void." *Bugosh v. I.U. North America, Inc.*, 601 Pa. 277, 299, 971 A.2d 1228, 1241 (2009) (Saylor, J., dissenting) (internal citation omitted).

The source of the confusion: *Azzarello v. Black Brothers*

A lengthy discussion of *Azzarello* is hardly necessary. It has been repeatedly criticized, and the Court knows it has been repeatedly criticized. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L.REV. 867, 897 (1998) (Pennsylvania has "developed a unique and, at times, almost unfathomable approach"), quoted in *Phillips,* 576 Pa. at 671, 841 A.2d at 1016 (Saylor, J. concurring); Comment, *Returning the "Balance" to Design Defect Litigation in Pennsylvania: A Critique of Azzarello v. Black Brothers Company,* 89 DICK. L.REV. 149, 172-73 (1984) (*Azzarello* created an "unacceptable and unnecessary level of confusion"); John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L.REV. 734, 744 (1983) (describing the *Azzarello* test as one "likely to confuse trial court and jury").

Commentators are not alone in their less than flattering assessment. *See, e.g,. Finn v. G.D. Searle & Co.*, 35 Cal.3d 691, 200 Cal. Rptr. 870, 677 P.2d 443, 456 (Cal. 1978) (characterizing the *Azzarello* formulation as "extremely vague and difficult to follow"). Members of this Court too have recognized that *Azzarello* does not represent the Court's finest work. In a statement joined by Chief Justice Castille, Justice Saylor needed just four words to express what every products liability practitioner had known for 30 very long years. *Azzarello,* Justice Saylor

said, "was not well reasoned." *Bugosh v. I.U. North America, Inc.,* 601 Pa. 277, 295, 971 A.2d 1228, 1239 (2009) (Saylor, J., dissenting).

That not well reasoned decision has had two major effects. Its holding, that terms characteristic of negligence could not be allowed to infect jury determinations, changed the way juries were instructed. Its underlying rationale, that concepts derived from negligence could not be allowed to infect strict liability claims, changed the way trials were conducted. Neither effect has been a positive one.

Approval of the *Azzarello* instruction meant juries would no longer hear a defective condition defined as one that rendered a product "unreasonably dangerous." They would hear instead what Justice Saylor has described, accurately, as a "minimalistic" instruction, lacking "essential guidance concerning the nature of the central conception of product defect." *Phillips*, 576 Pa. at 672, 841 A.2d at 1017 (Saylor, J. concurring).[3] As one commentator observed, the instruction fails to explain how the jury should "determine whether a product is

[3] Quoting from a draft of the Pennsylvania Supreme Court committee for proposed standard jury instructions, civil instruction subcommittee, the court offered the following as "an adequate" jury charge on product defect: "The [supplier] of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for [its intended] use, and without any condition that makes it unsafe for [its intended] use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for [its intended] use or contained any condition that made it unsafe for [its intended] use, then the product was defective, and the defendant is liable for all harm caused by such defect." *Azzarello*, 480 Pa. at 560 n.12, 391 A.2d at 1027 n. 12 (citation and internal quotations omitted).

'safe' or 'unsafe' for its intended use." John M. Thomas, Defining "Design Defect" in Pennsylvania, 71 TEMP. L.REV. 217, 225 (1998).

That failure leaves the jury unaware that when used as a predictor of product liability, safe is not an absolute. Thomas, 71 TEMP. L.REV. at 225 ("the court could not have meant 'safe' to mean incapable of causing injury"); *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.,* 515 Pa. 334, 345, 528 A.2d 590, 595 (1987) (Flaherty, J., dissenting) (products are not held to "Platonic ideals of perfection"). Liability is appropriate only when the risk posed by a product is an unreasonable one, a limitation built into § 402A.

The limitation was a necessary one, as virtually all products carry a risk of injury. Knives are sharp. Cars are driven at highway speed. Neither would, or should, be thought to pose an unreasonable level of risk, for a very simple reason. Knives are sharp and cars are powerful because those qualities make them useful, and their utility outweighs the attendant risk. Eliminating consideration of "unreasonable" danger prohibited juries from applying that kind of commonly held knowledge to their consideration of a product's alleged defects.

Removing negligence concepts altogether also divorced the jury's consideration of the product's design from the reality that governmental and industry safety standards form the starting point for modern product design. Federal Motor Vehicle Safety Standards, Consumer Product Safety Commission

regulations and numerous other governmental and industry safety standards rest on authoritative study and testing. *See, e.g.,* Consumer Product Safety Commission Safety Standard for Bicycle Helmets; Final Rule, 16 C.F.R. §1203(A)(1) *et seq.* (1998). While perhaps not dispositive of a product's safety in a specific case, ignoring the existence of safety standards or their impact on product design inevitably sets the jury adrift.

While the line between reasonable and unreasonable levels of risk is not always so easily drawn, it is hardly a line juries are incapable of drawing. They have made similar decisions for centuries. Conduct juries judge to have been unreasonable leads to a finding of negligence. Conduct juries judge to have been reasonable does not.

Failing to see the irony, the Court found justification for eliminating the words "unreasonably dangerous" in an analysis equating strict liability and negligence. John W. Wade, O*n the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 840 (1973), quoted in *Azzarello*, 480 Pa. at 557, 391 A.2d at 1026 (the problem "is similar to that in negligence"). Properly analyzed, negligence requires a balancing of risk and utility, but the jury deciding a negligence action is neither instructed in those terms, nor told of "the factors which go into determining the weight of both of these elements." *Id.* The jury is told instead "that negligence

depends upon what a reasonable prudent man would do under the same or similar circumstances." *Id.*

Precisely. The jury is told to consider a reasonable prudent man, words that are no less "a label" than are the words "unreasonably dangerous." *Azzarello*, 480 Pa. at 556, 391 A.2d at 1025. And those words, with one small substitution, present the very question the jury determines in a design defect case. Whether a product is defective in design depends upon what a reasonable prudent product designer would have done under the same or similar circumstances: "To condemn a design for being unreasonably dangerous is inescapably to condemn the designer for having been negligent." Henderson and Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L.REV. at 919, quoted in *Phillips,* 576 Pa. at 670, 841 A.2d at 1015.

This jury missed the inescapability. They condemned the design, and exonerated the designer. Though concluding that a reasonable prudent designer did not need to protect against lightning, they found the Omega Flex tubing carried an unreasonable level of risk because it failed to protect against lightning. The result is as understandable as it is illogical. With no standard against which to measure an acceptable level of risk, and the risk here was of the product being hit by lightning, juries are flying blind.

And if the jury's assigned task could be made any more difficult, telling them that a manufacturer is a "guarantor" does the trick. The guarantor label, and it is a label, can easily convey the very status *Azzarello* said was not to be imposed on a manufacturer, that of an insurer. *Pascale v. Hechinger Co. of Pennsylvania*, 627 A.2d 750, 753 (Pa. Super. 1993) (proposed instruction's reference to the defendant as a guarantor properly omitted "since use of the term 'guarantor' could cause confusion"). Mr. Thomas agreed: "nothing in the instruction explicitly ensures that the manufacturer will not be held liable as an insurer . . .. To the contrary, the *Azzarello* instruction affirmatively states that the manufacturer is the 'guarantor' of the product's safety, a term that to a lay jury will surely seem indistinguishable from 'insurer.'" Thomas, 71 TEMP. L.REV at 225.

Azzarello is no help to trial judges either. Offering little in the way of guidelines, *Azzarello* requires the court to conduct its own risk/utility analysis: "The case is given to the jury only after the court has initially considered the risk associated with the product weighed against its utility, an analysis characterized by the courts as implicating social policy considerations." Trial Court Opinion, 2011 WL 9527303 at *4. But the absence of guidelines is only part of the problem, because when conducting the required risk/utility analysis trial judges are ruling on motions for directed verdict, and so are not taking a balanced view of the evidence.

The Court of Appeals identified that as a problem, and suggested a solution, in *Surace v. Caterpillar, Inc.,* 111 F.3d 1039, 1047-48 n.9 (3d Cir. 1997) (the *Azzarello* social policy determination "is a *legal* determination which should probably not be predicated upon a weighted view of the evidence") (emphasis in original). This Court has never acted on that suggestion. Trial judges continue to weight their risk/utility determinations. Juries continue to be prohibited from engaging in risk/utility determinations.

The effect is a significant one. The question design defect claims pose to courts and juries alike "is whether the product ***should*** have been designed more safely." *Spino v. John S. Tilley Ladder Co.,* 548 Pa. 286, 293, 696 A.2d 1169, 1172 (1997) (citation omitted, emphasis supplied). If neither court nor jury is permitted to balance risk and utility in a party-neutral evaluation of the evidence, the question at the very heart of the claim is never fairly answered. That is where the Commonwealth's jurisprudence has been for 35 years. And that is where the Commonwealth's jurisprudence will stay if *Azzarello* is not abandoned.

The available solution: Restatement Third

Adoption of the Third Restatement will solve the problem. It will do so quickly and easily, eliminating the need to correct as they arise the many instances

where the misguided rationale that brought us *Azzarello* has led to illogical and inconsistent results, a process certain to be both time-consuming and laborious.

But the Third Restatement is more than just a quick and easy solution. The Third Restatement is the right solution. It offers a "closely reasoned and balanced approach, which synthesizes the body of products liability law into a readily accessible formulation based on the accumulated wisdom from thirty years of experience [and] represents the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme." *Phillips*, 576 Pa. at 679, 841 A.2d at 1021 (Saylor, J., concurring) (footnote omitted).

The Third Restatement definition of design defect requires a two step analysis. A product is defective if "the foreseeable risks" it poses "could have been reduced or avoided by the adoption of a reasonable alternative design," and if "the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts §2.(b) (1998). That same analysis is not foreign to Pennsylvania law. Proof of an alternative design is required in crashworthiness cases. *Kupetz v. John Deere & Co.*, 644 A.2d 1213 (Pa. Super.), *appeal denied*, 653 A.2d 1232 (Pa. 1994). Applying that requirement to all design defect claims simply makes sense.

That the Third Restatement's definition of design defect incorporates negligence concepts is not a negative. It is a return to the basics. The concepts *Azzarello* removed from jury consideration were concepts considered essential to the design defect calculus as originally contemplated. As Justice Saylor noted, the reporter for § 402A recognized "that any analysis of a design defect rests 'primarily upon a departure from proper standards of care,' and that 'the tort is essentially a matter of negligence' based upon a 'duty to use reasonable care to design a product that is reasonably safe for its intended use, and for other uses which are foreseeably probable.'" *Bugosh,* 601 Pa. at 293, 971 A.2d at 1238 (Saylor, J., dissenting), *quoting* W.L. Prosser, Handbook of the Law of Torts, § 96 at 641, 644-45 (4th ed. 1971).

The Third Restatement also recognizes that a plaintiff's assertion of multiple claims differing only in legal nomenclature can result in the very problem seen at this trial. Submitting a "strict liability" design claim and a "negligent" design claim "may well result in inconsistent verdicts." Restatement (Third) of Torts, § 2., Comment *n.* Eliminating nonsensical distinctions is the solution. "Regardless of the doctrinal label attached to a particular claim, design and warnings claims rest on a risk-utility assessment." *Id.* Adopting the Third Restatement, then, would return Pennsylvania products liability law to a rational, firm, jurisprudential foundation.

The bottom line is this. Pennsylvania law has been governed for 35 years by a decision that "was not well reasoned." Not surprisingly, those 35 years have been a recurring nightmare. Judges are confused, juries are confused, even practitioners are confused.

An end to all that confusion is finally within reach. It comes in the form of a "reasoned and balanced approach" that draws on "accumulated wisdom," the very antithesis of *Azzarello.* The question this Court has asked is whether Pennsylvania is best served by that reasoned approach, or by a not well reasoned approach. Is there really any question?

Adoption of the Third Restatement position should have retroactive effect

Retroactive application of a change in the law represents the general rule. *See Bugosh*, 601 Pa. at 301, 971 A.2d at 1242 (Saylor, J., dissenting), citing *Blackwell v. Commonwealth, State Ethics Commission,* 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991). Prospective only application is the exception, a path the Court may take "to further the interests of justice." *Id.* As expressed by Justice Saylor, "a predominant consideration is the settled expectations of those with accrued causes of action . . .. *Azzarello* has been with us far too long, and too much settled jurisprudence has evolved around it, for it to be retroactively displaced without

profound impact on vested entitlements." *Bugosh*, 601 Pa. at 302-03, 971 A.3d at 1242-43 (citation omitted).

That concern is overstated by half. There is no question *Azzarello* has been with us far too long. But there should be no profound impact on vested entitlements, for two reasons, the first being that a move to adopt the Third Restatement approach will come as no great surprise.

The *Phillips* concurrence, in which three still sitting members of this Court advocated for that very change, was published in 2003. Whatever settled expectations may be attributable to *Azzarello,* they became very unsettled with *Phillips.* And they have remained unsettled for the past ten years, as the view expressed in *Phillips* has been reiterated in this Court twice since, once three years later in *Pennsylvania Department of General Services v. United States Mineral Products Co.,* 587 Pa. 236, 898 A.2d 590 (2006), and once another three years later in *Bugosh.*

The federal courts have added to the unsettled state of any *Azzarello*-based expectations. Shortly before the *Bugosh* appeal was dismissed, the Court of Appeals predicted that this Court would adopt the Third Restatement. *Berrier v. Simplicity Manufacturing, Inc.,* 563 F.3d 38 (3d Cir. 2009), *cert. denied,* 558 U.S. 1011, 130 S.Ct. 553, 175 L.Ed.2d 383 (2009). That prediction was reaffirmed just two years ago in *Covell v. Bell Sports, Inc.,* 651 F.3d 357 (3d Cir. 2011).

Against that background, those with accrued causes of action could not, and certainly should not, have any settled expectations concerning the continued validity of *Azzarello*. As long ago as December 2003, no capable plaintiffs' attorney would have failed to advise his or her clients of a possible change in the law, and of its potential impact on their design defect claim. So any settled expectations expressed by plaintiffs would be phantasmal.

The second reason there should be no profound impact is this. Adoption of the Third Restatement will have little effect on the merits of any design defect claim, or even on the proof presented in support of it. Plaintiffs will still come forward with evidence of a feasible alternative design, just as they would be required to do under *Fitzpatrick v. Madonna,* 623 A.2d 322 (Pa. Super. 1993). Their counsel will still argue that the designer should have foreseen the risk associated with the product, though perhaps not in those terms, and designed to protect against it.

There will of course be some changes. Evidence beneficial to the manufacturer will no longer be precluded solely as indicative of "conduct" on the part of any party. Juries will no longer have to evaluate the challenged design without the assistance of meaningful instructions. Those will be the principal effects of the Third Restatement. And it is difficult to conceive of, let alone articulate, anything at all unfair in the adoption of an approach that favors a

meaningful evaluation of all the available evidence over the *Azzarello*-imposed confusion that has reigned for the past 35 years.

Azzarello may have given rise to vested entitlements, but none are worthy of protection. A not well reasoned aberration, its demise was foreshadowed ten years ago. As nothing unfair will flow from its being displaced with retroactive effect, there is no reason for prospective only application. The general rule should apply.

CONCLUSION

Azzarello has had its hour upon the stage. Its exit is long overdue. It is therefore respectfully requested that this Court reverse the order of the Superior Court, announcing the adoption of the Third Restatement approach to design defect claims and giving its ruling full retroactive effect.

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The undersigned hereby certifies that two copies of the Brief of Amici Curiae Pennsylvania Defense Institute and International Association of Defense Counsel in Support of Appellant were served by U.S. First Class Mail, postage pre-paid to the following counsel of record on this 5th day of June, 2013.

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