IN THE

Supreme Court of Pennsylvania

No. 17 MAP 2013
(Superior Court No. 1472 EDA 2011)

TERRENCE D. TINCHER and **JUDITH R. TINCHER**,

Plaintiffs-Respondents,

v.

OMEGA FLEX, INC.,

Defendant-Petitioner,

BRIEF OF DEFENDANT-PETITIONER OMEGA FLEX, INC.

Appeal from the Order of the Superior Court,
Entered September 25, 2012, at No. 1472 EDA 2011,
Affirming the Judgment of the Court of Common Pleas,
Chester County, entered June 1, 2011, at No. 08-00974

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INTRODUCTION

For the past generation, since *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), Pennsylvania has been outside the mainstream of American tort law in cases alleging strict liability based on defective product design. Every other jurisdiction requires the plaintiff in such cases, in order to establish a design "defect," to prove that the product is *unreasonably* dangerous. *Azzarello*, however, holds that it is reversible error to require a plaintiff to prove this point. According to *Azzarello*, the "unreasonably dangerous" requirement inherently implicates negligence concepts, such as the reasonableness of the defendant's conduct, and such concepts have no basis in the law of strict liability. Thus, under *Azzarello*, a plaintiff need only allege facts that, construed in the light most favorable to the plaintiff, would allow a court to conclude that a jury *could* find that the product is unreasonably dangerous. Thereafter, under *Azzarello*, the issue simply vanishes from the case; the plaintiff need not prove, either to the jury or to the court, that the product is *in fact* unreasonably dangerous.

That approach, which is unique to Pennsylvania, has no basis in law or logic, and has been widely criticized by courts and commentators

(including Members of this Court) for years. Contrary to *Azzarello*'s premise, there is no wall separating strict liability from negligence, and indeed it is impossible to determine whether a product *design* is defective without analyzing, among other things, the reasonableness of the manufacturer's conduct. By removing considerations of reasonableness from a jury's consideration of product defect, *Azzarello* effectively makes manufacturers the insurers for any and all injuries caused by their products, which is precisely what *Azzarello* purported not to do. This case underscores the danger: the jury here was allowed to consider the conduct of defendant-petitioner Omega Flex *only* with respect to the negligence claim, not the strict-liability claim, and found Omega Flex not liable in negligence but liable in strict liability. The time has come to jettison the discredited and unworkable *Azzarello* approach, which purports to apply the *Restatement (Second) of Torts*, and to adopt the alternative approach to strict-liability design-defect cases set forth in the more recent *Restatement (Third) of Torts*.

If this Court agrees and overrules *Azzarello*, such overruling should apply to this case and other pending cases in which the issue was preserved. The very essence of the judicial enterprise is to apply

the law to pending cases. This Court has recognized a narrow exception to that rule, where a case overrules prior precedent in a way that was not foreshadowed and that upsets reasonable reliance interests. This case does not remotely fall within that narrow exception. *Azzarello* has been subject to scathing criticism for years, and this Court has repeatedly signaled that it would revisit that decision, and the broader issue whether to adopt the Third Restatement approach, in an appropriate case. Indeed, the U.S. Court of Appeals for the Third Circuit predicted more than four years ago that this Court would adopt the Third Restatement, and that approach has since been followed in cases litigated in federal court. If ever there were an issue on which a change in the law has been amply foreshadowed, it is this one.

Nor can there be any claim of reasonable reliance. It is simply not credible to suggest that the *Azzarello*/Second Restatement approach has had any effect on the primary conduct of putative tortfeasors, or that putative plaintiffs have any legally vested interest that would be compromised by a move from that approach to the Third Restatement approach. Just as *Webb v. Zern*, which adopted the Second Restatement approach in 1966, was applied to all cases pending at the

time it was decided, a decision here should be applied to all cases pending at the time it is decided in which the Third Restatement issue has been preserved, including most notably this case. It would be entirely unfair to defendant-petitioner Omega Flex, Inc., which has dutifully preserved this issue for presentation to this Court at every stage of this litigation, not to provide any relief in the event this Court were to agree with Omega Flex that the time has come to replace *Azzarello* with the Third Restatement. Were this Court to deny Omega Flex the fruits of its labor, it would provide no incentive for future litigants to preserve and present challenges to outmoded legal doctrines, and thus retard the development of the law.

Accordingly, this Court should overrule *Azzarello*, adopt the Third Restatement approach in strict-liability design-defect cases, and remand this case with instructions for Omega Flex to receive a new trial on the strict-liability claim under the Third Restatement approach.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Pa. R. App. P. 1114 and 42 Pa. Cons. Stat. § 724. On March 26, 2013, this Court entered an order granting Omega Flex's Petition for

Allowance of Appeal. The Petition was based on the final Order of the Superior Court of Pennsylvania, Eastern District, entered on September 25, 2012, in No. 1472 EDA 2011. That order in turn affirmed the judgment of the Court of Common Pleas of Chester County, entered on June 1, 2011, in No. 08-00974.

ORDERS IN QUESTION

The Superior Court's memorandum opinion and order is attached to this brief at App. 31a-45a. The Court of Common Pleas' order denying Omega Flex's motion for post-trial relief and for a remittitur is attached to this brief at App. 1a-4a. The Court of Common Pleas' order recommending denial of appeal is attached to this brief at App. 6a-30a.

STANDARD OF REVIEW

This appeal involves only questions of law, which are subject to *de novo* review. *See Pennsylvania Dep't of Gen. Servs. v. United States Mineral Prods. Co.*, 587 Pa. 236, 246, 898 A.2d 590, 596 (2006).

QUESTIONS PRESENTED

1. Whether this Court should overrule *Azzarello* and adopt the Third Restatement approach to claims alleging strict liability based on defective product design.

2. Whether, if this Court adopts the Third Restatement, its holding should apply to this case and all other pending cases in which the issue was preserved.

STATEMENT OF THE CASE AND THE FACTS

Omega Flex is a world-leading manufacturer of corrugated stainless steel tubing ("CSST") based in Exton, Pennsylvania. (RR. 384-85.) CSST was developed in Japan in the 1980s as an improvement over traditional black iron pipe. Due to its rigidity, black iron pipe is difficult to install, requires new segments to be connected at every turn, and breaks when exposed to physical impacts. (RR. 304-05, 331-32, 385-88, 416-17.) CSST, in contrast, is produced in long, flexible segments that can be bent by hand as necessary. Because of this unique attribute, CSST is less likely to break when stressed or impacted, and is significantly easier to install. (RR. 331-35, 420.)

In 2005, the plaintiffs in this case, Terrence and Judith Tincher, purchased a townhouse in which CSST manufactured by Omega Flex under the brand name TracPipe had been installed. (RR. 24.) The pipe ran through parts of the interior of the residence, connecting an exterior gas main (made of black-iron pipe) to a natural-gas fireplace located on

the ground floor. (*Id.*) The TracPipe CSST installed in the Tinchers' house complied with all relevant government and industry safety standards in place when the pipe was installed. (RR. 339-42, 346-47.)

On June 20, 2007, a lightning strike occurred near the Tinchers' house and caused a fire inside. (RR. 24.) No one was injured, but the house was severely damaged. (In contrast, the adjoining townhouse, which was also outfitted with TracPipe CSST, suffered no damage. *See* Transcript pp. 143-44.) A subsequent investigation for USAA, the Tinchers' insurer, concluded that the fire had been caused when electrical current from the lightning strike energized the CSST in the Tinchers' house, creating an electrical "arc" that burned through a portion of the CSST and ignited the natural gas it was carrying. (RR. 24, 299-300, 318-19, 475-76.) USAA compensated the Tinchers for the fire under their insurance policy, and brought this action in their name to seek reimbursement from Omega Flex. (RR. 262.) The Tinchers have a minority interest in the case because a portion of their claimed losses exceeded the limits of their USAA policy. (*Id.*)

In its complaint, as amended, USAA brought negligent-design, negligent-testing, and negligent-warning causes of action, as well as a

strict-liability cause of action. (RR. 25-28.) With respect to the negligent-design and strict-liability theories, USAA alleged that Omega Flex's TracPipe CSST was defective because its walls were too thin to withstand the surge of electrical current that can be generated by a lightning strike. (RR. 475.) Omega Flex responded both that the pipe in the Tinchers' house had been improperly installed (it was not connected to the electrical ground), and that exposure to lightning, even if foreseeable, is not an intended condition of use. (*See, e.g.*, RR. 43-45.)

At trial, USAA voluntarily dismissed the negligent-warning claim and conceded that the negligent-testing claim was subsumed in the negligent-design claim, thereby narrowing the claims submitted to the jury to negligent design and strict liability. (R. 470.) Omega Flex requested a jury instruction under the *Restatement (Third) of Torts*, which in relevant part allows a plaintiff to recover in strict liability for certain foreseeable harms but also requires the plaintiff to prove that there is a feasible alternative design. The trial court, however, denied that request. (*See* RR. 514 ("My conclusion is that the Third Restatement has not been adopted by any appellate Courts in Pennsylvania, the Supreme Court especially, and therefore I decline[] to