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

give that instruction.").) Instead, the trial court provided a standard instruction under the *Restatement (Second) of Torts*. (RR. 513-14.)

During deliberations, the jury asked the trial court for further guidance and instructions on no fewer than six occasions. (RR. 518-28.) On one of those occasions, the jury asked the court to define "defective." The Court stated:

> The manufacturer of a product is a guarantor of its safety. The product must 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 defendants' 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 the defect.

(RR. 525); *see generally Azzarello*, 480 Pa. at 559 n.12, 391 A.2d at 1027 n.12 (approving materially identical instruction).

After deliberating, the jury returned a verdict in Omega Flex's favor on the negligent-design claim, but in USAA's favor on the strict-liability claim. (RR. 532-33.) The jury awarded USAA $958,895.85 in compensatory damages (RR. 533), to which the trial court subsequently added $69,336.05 in delay damages (App. 5a).

Omega Flex timely moved for post-trial relief, arguing—among other things—that the trial court erred by refusing to instruct the jury under the Third Restatement. (RR. 539.) The trial court, however, denied the motion. (App. 1-4a.) As relevant here, the court held that Omega Flex's "argument that the trial court erred in failing to instruct the jury according to the law reflected in the Restatement (Third) with respect to the definition of design defect and risk-utility analysis ... is ... without merit." (App. 1-2a n.1.) The court also noted that there was "evidence from which the jury *could* have concluded the CSST pipe was not adequately designed and grounded to withstand an indirect lightening [*sic*] strike" and "sufficient evidence of a reasonable alternative design, that being the black iron pipe." (App. 3a n.1.; emphasis added.) The trial court entered final judgment on June 2, 2011. (RR. 676.)

After Omega Flex appealed, the trial court entered an order recommending denial of the appeal. (App. 6-30a.) Again, the court held that it had properly denied Omega Flex's motion to try the case under the Third Restatement standard. (App. 16a.) "While [Omega Flex] may have the right to advance on appeal to our Supreme Court that it

should adopt the Restatement (Third) of Torts governing product liability, under current law [USAA] bore no burden to prove a safer alternate design existed in accordance with the latter standard." (*Id.*) In addition, the court declared that USAA had presented sufficient evidence that the product's risks outweighed its benefits to warrant submission "to the jury for determination of the issue of strict liability." (App. 25a.)

The Superior Court affirmed. (*See* App. 31-45a.) As relevant here, the court held that "the trial court did not err in refusing to adopt the [Third Restatement] to the claim in this case" because this Court has not yet adopted that approach. (App. 44a.)

Omega Flex subsequently filed a petition for allocatur. This Court granted that petition on March 26, 2013, limited to (1) "[w]hether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement," and (2) "whether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively." (App. 46a.)

SUMMARY OF ARGUMENT

For the past decade, Pennsylvania strict-liability design-defect law has been in a "continuing state of disrepair." *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 833 (Pa. 2012). *Azzarello*, the seminal case in this area, has proven unsound in theory and unworkable in practice. Until now, however, this Court has not yet had an appropriate vehicle to reconsider *Azzarello*. This case is that vehicle.

Azzarello is based on the premise that negligence and strict liability are rigidly distinct. But *Azzarello* itself disproves that premise by recognizing that it is impossible to determine whether a product design is defective without analyzing whether the product is "unreasonably" dangerous—an analysis that necessarily entails a negligence-like inquiry into reasonableness. *Azzarello* assigns that inquiry to the trial court, which, because it is not the factfinder, considers the facts in the light most favorable to the plaintiff. Thereafter, however, the factfinder never resolves that issue. The specific holding of *Azzarello* is that it is reversible error for trial courts to instruct juries that strict liability for product design is warranted only if the product is unreasonably dangerous. As a result, juries in

such cases fail to receive meaningful guidance on how to decide whether a particular product design is "defective."

Azzarello's premise that negligence concepts have no place in strict liability is manifestly incorrect. To the contrary, courts in Pennsylvania and elsewhere routinely look to negligence concepts, including the reasonableness of the manufacturer's conduct, in deciding strict-liability design-defect cases. By insisting on a rigid but illusory dichotomy between strict liability and negligence, *Azzarello* has spawned a contradictory and unworkable jurisprudence. That jurisprudence not only fails to produce predictable outcomes, but also effectively makes manufacturers the insurers of their products—a result that *Azzarello* itself specifically disavowed. Pennsylvania now stands alone in the Nation in divorcing the question whether a product is unreasonably dangerous from the question whether a product is defective.

The time has come to overrule *Azzarello*, which purports to apply the Second Restatement, and in its place adopt the Third Restatement, which sets forth a theoretically sound and practically workable approach to adjudicating strict-liability design-defect cases. Several

Justices have already urged the Court to take this step, and the Third Circuit has predicted that it will do so. It is time to return Pennsylvania law in this area to the mainstream.

This Court should not only take that step, but also follow its general rule of applying the law retroactively in the case before it and other pending cases in which the legal issue was preserved. There is no basis for applying a decision overruling *Azzarello* prospectively only. Such an extraordinary remedy is justified, if at all, only where a decision breaks with past law in a way that was not foreshadowed and that upsets reasonable reliance interests. For the past decade, it has been clear that *Azzarello*'s ongoing vitality was very much in doubt, and for the past four years the Third Circuit has directed federal courts not to follow *Azzarello*. Neither defendants nor plaintiffs can claim any vested right to the continuing application of *Azzarello* to pending cases: that decision did not affect defendants' primary conduct in any way, and overruling it would not deprive plaintiffs of their claims. For this Court to deny a successful litigant the fruits of its victory would be to destroy the incentive for such litigants to challenge outmoded legal doctrines, and thus retard the development of the law.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *AZZARELLO* AND ADOPT THE THIRD RESTATEMENT APPROACH TO CLAIMS ALLEGING STRICT LIABILITY BASED ON DEFECTIVE PRODUCT DESIGN.

"The doctrine of stare decisis," as this Court has observed, "is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish." *Cooper v. Schoffstall*, 588 Pa. 505, 523, 905 A.2d 482, 493-94 (2006) (internal quotation omitted). Since its 1978 ruling in *Azzarello*, this Court has clung to the proposition that negligence concepts have no place in the law of strict liability, and thereby has forced juries to decide whether a product is "defective" without considering whether it is *unreasonably* dangerous. That proposition is untenable, and has led the courts of this Commonwealth into a legal, logical, and practical quagmire. Accordingly, the time has come to overrule *Azzarello*, and to adopt the Third Restatement approach to establishing strict liability in cases alleging design defect.

A. *Azzarello* And Current Pennsylvania Law Involving Strict Liability For Design Defects.

This Court adopted Section 402A of the Second Restatement in 1966, just one year after its promulgation, over a "very emphatic[] dissent" that accused the majority of effecting a "revolutionary" and "drastic" change in tort law by permitting the imposition of "[l]iability without fault." *Webb v. Zern*, 422 Pa. 424, 428-32, 220 A.2d 853, 855-57 (1966) (Bell, C.J., dissenting). In full, Section 402A states:

> (1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer ... is subject to liability for physical harm thereby caused to the ultimate 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.

Restatement (Second) of Torts § 402A (1965) ("Rest. 2d") (emphasis added).

At the time of its adoption, Section 402A represented the "modern attitude" with respect to product liability, *see* 422 Pa. at 427, 220 A.2d at 854, extending liability without fault to the manufacturer of a

defective product, regardless of whether there was privity between the parties or the manufacturer exercised due care. The primary rationale for this approach was to alleviate the burden on the plaintiff, were his claim brought in negligence, to prove that the manufacturer had failed to exercise due care in the production process.

Although arguably "modern" in the 1960s, Section 402A is decidedly outmoded today. That provision's drafters were focused on claims alleging *manufacturing*, not *design*, defects. *See, e.g.*, *Schmidt v. Boardman Co.*, 608 Pa. 327, 352 n.14, 11 A.3d 924, 939 n.14 (2011); *Bugosh v. I.U. N. Am., Inc.*, 601 Pa. 277, 288-89, 971 A.2d 1228, 1234-35 (2009) (Saylor, J., joined by Castille, C.J., dissenting); *Phillips v. Cricket Lighters*, 576 Pa. 644, 665-66, 841 A.2d 1000, 1012 (2003) (Saylor, J., joined by Castille and Eakin, JJ., concurring). "The prototype case was that in which something went wrong in the manufacturing process, so that the product had a loose screw or a defective or missing part or a deleterious element, and was not the safe product it was intended to be." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 825 (1973); *see also* Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An*

Empirical Analysis, 77 N.Y.U. L. Rev. 874, 890 (2002) ("Most of the early cases did not entail claims of defectiveness that could, even in retrospect, be classified as design claims.").

Thus, "[t]he simple truth is that liability for defective design was in its nascent stages in the early 1960s and section 402A did not address it meaningfully, if at all." James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 880 (1998); *see also Restatement (Third) of Torts: Prod. Liab.* § 1 cmt. a (1998) ("Rest. 3d") ("Imposition of liability for design defects and for defects based on inadequate instructions or warnings was relatively infrequent until the late 1960s and early 1970s.").

In the context of manufacturing defects, the determination whether a product is defective is straightforward: one need only ask whether the product as sold deviated from the manufacturer's own standards. Such deviations tend to be "rare events," so that "the implications for imposing strict liability were not serious." Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence & Strict Liability in Design Defect Litigation*, 90 Marq. L. Rev. 7, 18 (2006).

Courts in Pennsylvania and elsewhere, however, soon extended Section 402A to claims alleging *design* defects. *See, e.g., MacDougall v. Ford Motor Co.*, 214 Pa. Super. 384, 387, 257 A.2d 676, 678 (1969); *Greco v. Bucciconi Eng'g Co.*, 283 F. Supp. 978, 981-84 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969) (applying Pennsylvania law). The Second Restatement provides no guidance with respect to such claims. "Section 402A provides no definition of the term 'defect,' and thus, of itself, does not afford an effective working guide as to what kinds of factual circumstances will result in the imposition of strict liability." *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 515 Pa. 334, 340, 528 A.2d 590, 592 (1987).

Because the Second Restatement provided no guidance on this score, courts began to analyze whether a product design is "unreasonably dangerous," and hence defective within the meaning of Section 402A, in one of two ways. Some courts asked whether the product's risks were in line with consumers' expectations. Consumer expectations, however, are difficult to measure, may vary by time and place, and often do not exist at all; as a result, jurisdictions employing this test properly remain a shrinking and "distinct minority." Rest. 3d

§ 2 cmt. d; *see also Phillips*, 576 Pa. at 671 n.7, 841 A.2d at 1016 n.7 (noting that "the consumer expectations test[] has come to be widely regarded as inadequate") (Saylor, J., joined by Castille and Eakin, JJ., concurring); James A. Henderson, Jr. & Aaron D. Twerski, *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 Brook. L. Rev. 1061, 1100-01 (2009).

Rather than trying to discern consumers' expectations, the great majority of jurisdictions, including Pennsylvania, look to the costs and benefits (or, alternately phrased, the risks and utilities) of a product's design to determine whether it is "unreasonably dangerous" and hence "defective." *See* John M. Thomas, *Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 Temp. L. Rev. 217, 222 (1998) ("There is widespread agreement among courts and scholars today that the cost-benefit balancing test is the appropriate test for design defect."); *id.* at 223 ("Pennsylvania appellate courts following *Azzarello* have concluded, almost uniformly, that a cost-benefit analysis must be used in determining whether a product is 'defective' or 'unreasonably dangerous.'"); *see also* Henderson & Twerski, *Manufacturers' Liability*,

74 Brook. L. Rev. at 1078-90; *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (S.C. 2010) ("Some form of a risk-utility test is employed by an overwhelming majority of the jurisdictions in this country."). Only where a particular design's risks outweigh its benefits may the design be deemed "unreasonably dangerous" and therefore "defective."

Up until *Azzarello*, Pennsylvania was squarely in the mainstream of American tort law in cases alleging strict liability based on defective product design. In that case, however, this Court veered off onto the lonely path on which it remains to this day. The issue presented there was whether a jury should be instructed that, in order to impose strict liability for a design defect, it must find that the product was "unreasonably dangerous." 480 Pa. at 554, 391 A.2d at 1024. Although *Azzarello* recognized that the determination "whether the product is 'unreasonably dangerous'" is "the critical factor" in assessing whether the product is "defective" under Section 402A, *id.* at 555, 391 A.2d at 1024, the court held that it is reversible error to instruct the jury to make that determination. Because the term "'unreasonably dangerous' tends to suggest considerations which are usually identified with the

law of negligence," the Court asserted, "[i]t is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified." *Id.* at 555, 558, 391 A.2d at 1025, 1026.

Under *Azzarello*, in other words, the trial court must make a threshold determination whether, construing the facts in the light most favorable to the plaintiff, a jury *could* find the challenged product "unreasonably dangerous."[1] If so, the case then proceeds to a jury, which is neither requested nor permitted to determine whether the product is *in fact* "unreasonably dangerous." *See id.* at 559, 391 A.2d at 1027 ("It is clear that the term 'unreasonably dangerous' has no place in

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[1] In making that determination, the court must engage in "threshold risk-utility balancing ... with reference to a series of factors set out in the works of Dean John Wade." *Beard*, 41 A.3d at 833; *see also Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 450, 467 A.2d 615, 618 (1983) (trial court must "balanc[e] ... the utility of the product against the seriousness and likelihood of the injury and the availability of precautions that, though not foolproof, might prevent the injury." These factors include: (1) the usefulness and desirability of the product; (2) the availability of other and safer products to meet the same need; (3) the likelihood of injury and its probable seriousness; (4) the obviousness of the danger; (5) common knowledge and normal public expectation of the danger (particularly for established products); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. *See, e.g.*, *Dambacher v. Mallis*, 336 Pa. Super. 22, 50 n.5, 485 A.2d 408, 423 n.5 (1984) (citing Wade, *On the Nature*, 44 Miss. L.J. at 837-38).

the instructions to a jury as to the question of 'defect' in this type of case."). Rather, the jury may determine only "whether the product is safe for its intended use." *Id.* at 558, 391 A.2d at 1026.[2]

Thus, under *Azzarello*, *no one*—neither court nor jury—ever determines whether a product is "unreasonably dangerous" in deciding whether its design is "defective" under the Second Restatement. *See, e.g.*, *Moyer v. United Dominion Indus., Inc.* 473 F.3d 532, 538-39 (3d Cir. 2007) (applying Pennsylvania law) (noting that, in light of *Azzarello*, "the jury does not balance the risk-utility factors, even though the judge has only done so as a threshold matter"); *see also id.* at 538 ("[T]he judge makes the [*Azzarello*] determination under a weighted view of the evidence, considering the facts in the light most favorable to

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[2] *Azzarello* specifically endorsed the following jury instruction for use in strict-liability design-defect cases:

> 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.

480 Pa. at 559 n.12, 391 A.2d at 1027 n.12 (brackets and internal quotations omitted).

the plaintiff."). In the years following *Azzarello*, this Court has duly repeated the mantra that "negligence concepts have no place in strict liability law." *Phillips*, 576 Pa. at 656, 841 A.2d at 1007 (lead opinion); *see also Schmidt*, 608 Pa. at 352, 11 A.3d at 939; *General Servs.*, 587 Pa. at 256, 898 A.2d at 602; *Kimco Dev. Corp. v. Michael D's Carpet Outlets*, 536 Pa. 1, 7-8, 637 A.2d 603, 606 (1993).

B. *Azzarello* Is Unsound In Theory And Unworkable In Practice.

Azzarello is both unsound in theory and unworkable in practice, and has brought the law of this Commonwealth into disrepute. Commentators have described the *Azzarello* regime as not only "confused and unworkable," James A. Henderson, Jr., *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 Minn. L. Rev. 773, 801 (1979), but also "unique and, at times, almost unfathomable," Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 897, and "difficult to decipher," Rest. 3d § 2 cmt. d. Courts have been equally critical. *See, e.g., Lynn v. Yamaha Golf-Car Co.*, 894 F. Supp. 2d 606, 624 (W.D. Pa. 2012) ("Pennsylvania products liability law may be fairly seen as being in a state of profound uncertainty. The current state of the law in this

area provides little clarity to consumers or manufacturers, or their counsel, as to their obligations and rights under the products liability law of this Commonwealth.") (internal citation omitted); *Sansom v. Crown Equip. Corp.*, 880 F. Supp. 2d 648, 653 (W.D. Pa. 2012) ("Unfortunately, the current state of Pennsylvania products liability law can be described as, at best, unsettled, and, at worst, a maze of uncertainty, providing little guidance to manufacturers as to whether a product's design risks liability under Pennsylvania law or, for the injured, whether the circumstances of an individual case will support a legal remedy for harm caused by a manufacturer's product."). Nor has the point been lost on this Court. *See, e.g.*, *Beard*, 41 A.3d at 836 ("[W]e again recognize the continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law."); *Schmidt*, 608 Pa. at 352-53, 11 A.3d at 939-40 (noting "prevailing difficulties with a reasoned application of Pennsylvania law in the strict products liability context," and "material ambiguities and inconsistencies in Pennsylvania's procedure" in this area). Because *Azzarello* is unsound in theory and unworkable in practice, the time has come to overrule it.

1. *Azzarello* Is Unsound In Theory.

The central premise of *Azzarello*—that negligence concepts have no basis in a strict-liability regime—is untenable. To the contrary, as this Court has recognized, "functionally, the law of 'strict' products liability is infused with negligence concepts." *Schmidt*, 608 Pa. at 352, 11 A.3d at 939; *see also id.* at 353, 11 A.3d at 940; *see also Duchess v Langston Corp.*, 564 Pa. 529, 546, 769 A.2d 1131, 1141 (2001) (noting that the "differences between negligence and strict liability at both the theoretical and practical levels are marginal"). A strict-liability regime, as *Azzarello* itself acknowledged, was never intended to make a manufacturer an "insurer" for any and all injuries that might be caused by its product. 480 Pa. at 553, 391 A.2d at 1024; *see also Schmidt*, 608 Pa. at 352 n.14, 11 A.3d at 939 n.14; *Davis v. Berwind Corp.*, 547 Pa. 260, 267, 690 A.2d 186, 190 (1997). That is why the Second Restatement specifies that a product is "defective" only when it is "*unreasonably* dangerous." Rest. 2d § 402A (emphasis added). Accordingly, "reasonableness"—which, as *Azzarello* recognized, is inherently a negligence concept, *see* 480 Pa. at 555, 391 A.2d at 1025—has always been embedded in the law of strict liability. *See generally*

Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994) ("[W]e believe any posited distinction between strict liability and negligence principles is illusory."); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965) ("It may be argued that [the 'unreasonably dangerous' analysis of Section 402A] is simply a test of negligence. Exactly.").

That point is particularly compelling in the context of design-defect claims. It is impossible to determine whether a particular design is "defective" in the abstract, without considering the costs and benefits (or, put differently, the risks and utilities) of that design. *See, e.g.*, *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1051 (Fla. 1981); *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 456 (Cal. 1978); *Volkswagen of Am., Inc. v. Young*, 321 A.2d 737, 747 (Md. 1974); William L. Prosser & W. Page Keeton, *Prosser & Keeton on Torts* § 96 at 681, 689 (5th ed. 1984) (because design defects necessarily depend upon a "depart[ure] from proper and reasonable standards of care," such "liability is essentially a matter of negligence"). A design may not be deemed "defective" merely because it is capable of causing injury; virtually any product, after all, is capable of causing injury, and many products—*e.g.*, knives and lighters—are

inherently dangerous. *See, e.g.*, *Schmidt*, 608 Pa. at 352 n.14, 11 A.3d at 939 n.14. Thus, "when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care." *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 69-70 (Ky. Ct. App. 1973).

Azzarello did not deny this point; to the contrary, *Azzarello* recognized that the terms "defective" and "unreasonably dangerous" in the Second Restatement were "'not intended as setting forth two requirements but only one, the notion being that the product was not defective for the purposes of shifting losses due to physically harmful events unless it was unreasonably dangerous.'" 480 Pa. at 555 n.7, 391 A.2d at 1024 n.7 (quoting W. Page Keeton, *Product Liability & the Meaning of Defect*, 5 St. Mary's L.J. 30, 32 (1973)). Nonetheless, as noted above, *Azzarello* held that a jury is required to determine whether a product is defective without determining whether it is "unreasonably dangerous." By thus divorcing the concept of "defect" from the concept

of "unreasonable" danger, *Azzarello* turned the Second Restatement on its head and put Pennsylvania law on the wrong path.

The assumption underlying *Azzarello* appears to be that juries can determine whether a product design is "defective" by simply focusing on the product itself, without considering a constellation of other factors, including most notably the manufacturer's conduct. *See, e.g.*, *Phillips*, 576 Pa. at 656, 841 A.2d at 1007 (lead opinion) ("Strict liability focuses solely on the product, and is divorced from the conduct of the manufacturer."); *Kimco*, 536 Pa. at 7, 637 A.2d at 605; *Lewis*, 515 Pa. at 341, 528 A.2d at 593. This ostensible distinction between the product and the manufacturer's conduct, however, is illusory in the context of an inquiry into design defect. Because "manufacturers consciously choose how to design their products[,] [a]sking whether the product is reasonable tends to circle back to asking whether the manufacturer used due care in designing it." Cupp & Polage, *The Rhetoric of Strict Products Liability*, 77 N.Y.U. L. Rev. at 893. Or, as Professors Henderson and Twerski (the Third Restatement Reporters) have put it:

> [T]o condemn a design for being unreasonably dangerous is inescapably to condemn the designer for having been negligent. To insist otherwise would be akin to a professor telling a law student that, while the brief the student wrote

> is awful, the professor is not passing judgment on the student's skill in writing it.

Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 919; *see also id.* (asserted distinction between "the reasonableness of the design and ... the reasonableness of the designer's conduct is purest sophistry"). In short, "in design cases the character of the product and the conduct of the manufacturer are largely inseparable." *Phillips*, 576 Pa. at 669, 841 A.2d at 1015 (Saylor, J., joined by Castille and Eakin, JJ., concurring); *see also Bugosh*, 601 Pa. at 282, 971 A.2d at 1230 (Saylor, J., joined by Castille, C.J., dissenting) (same).

Azzarello thus erred by divorcing the reasonableness inquiry from the defect inquiry. Because the court is not the factfinder in this context, its role under *Azzarello* is necessarily limited: it may only determine that, "under [the] plaintiff's averment of the facts," a factfinder *could* find that a product is unreasonably dangerous. 480 Pa. at 558, 391 A.2d at 1026; *see also Beard*, 41 A.3d at 835-36; *Schmidt*, 608 Pa. at 353, 11 A.3d at 940. But that determination is essentially an exercise in futility, because no factfinder is thereafter tasked with making such a finding. *See, e.g.*, *Moyer*, 473 F.3d at 538-39 ("[T]he jury

does not balance the risk-utility factors, even though the judge has only done so as a threshold matter.").

It is anomalous, to say the least, for the trial court to make such a threshold determination if *no one*—neither the court nor the jury—is ever asked to make the ultimate determination whether a product is "unreasonably dangerous." As one commentator has put it, "[t]hat result cannot be right":

> If ... *Azzarello* requires a cost-benefit analysis, then either the jury or the court must have the authority to decide the cost-benefit issue based on an independent evaluation of the evidence. Otherwise, the fundamental issue of whether the incremental societal benefits of the proposed alternative design outweigh the incremental societal costs remains forever in a sort of legal limbo; trial courts are permitted to decide only whether the evidence is sufficient to submit that issue to the jury, but they are prohibited from actually submitting it.

Thomas, *Defining "Design Defect,"* 71 Temp. L. Rev. at 232; *see also id.* ("[I]f the court is required to view the evidence on the cost-benefit factors in the light most favorable to the plaintiff, and if ... the *Azzarello* instruction does not permit the jury to consider cost-benefit factors at all, then neither the court nor the jury has the authority to actually decide whether the true benefits of the proposed alternative design outweigh the true costs .... [N]either the court nor the jury determines

whether the product is in fact unreasonably dangerous or defective."). Not surprisingly, Pennsylvania law is unique in this regard. *See, e.g.*, *Moyer*, 473 F.3d at 540-41 ("[O]ur research fails to disclose any other jurisdiction that has adopted the two-step approach or denies the jury a chance to apply the risk-utility test."); Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 897 ("Pennsylvania stands alone in its view that risk-utility balancing is never properly a jury function.").

Indeed, the authorities on which *Azzarello* relied for its holding that a jury may not decide whether a product is "unreasonably dangerous" actually undermine that holding. *See* 480 Pa. at 555-56, 391 A.2d at 1025 (citing *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1161, 1162 (Cal. 1972), and *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J. 1973)). To the extent that either of those cases suggested that, to preserve the distinction between strict liability and negligence, juries were not to be instructed regarding "unreasonable" danger, any such suggestion had been repudiated even before *Azzarello* was decided. *See, e.g.*, *Barker*, 573 P.2d at 456; *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816, 826 (N.J. 1978), *overruled on other grounds by Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979). Both California and

New Jersey not only allow but require juries in strict-liability design-defect cases to determine whether a product was "unreasonably" dangerous. *See, e.g.*, *Johnson v. American Standard, Inc.*, 179 P.3d 905, 916 (Cal. 2008); *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 628 (N.J. 1996); *Feldman v. Lederle Labs.*, 479 A.2d 374, 385 (N.J. 1984); *see generally Bugosh*, 601 Pa. at 290-94, 971 A.2d at 1236-38 (Saylor, J., joined by Castille, C.J., dissenting) ("*Azzarello* was remiss in its failure to discuss such reasoned, developing counter-positions, particularly as they pertained to the very lines of authority upon which it was relying."); *id.* at 295-96, 971 A.2d at 1239 ("[T]he very same jurisdictions upon which *Azzarello* relied very quickly had recognized that the interests of justice required necessary and substantial adjustments to the experiment with strict liability across the categories of manufacturing, design, and warning defects.").

Similarly, *Azzarello*'s reliance on snippets from the writings of Dean John Wade and Dean W. Page Keeton, *see* 480 Pa. at 555-56 & nn.7, 8, 391 A.2d at 1025 & nn.7, 8, was misplaced, as both of those scholars consistently and forcefully maintained that the strict-liability analysis under Section 402A of the Second Restatement is infused with

negligence concepts, and thus a product design cannot be deemed defective unless it is *unreasonably* dangerous. *See, e.g.*, Wade, *Strict Tort Liability*, 19 Sw. L.J. at 15; Wade, *On the Nature,* 44 Miss. L.J. at 833, 837-38; Keeton, *Product Liability*, 5 St. Mary's L.J. at 37-38; *see generally* David. G. Owen, *Design Defects*, 73 Mo. L. Rev. 291, 353-60 (2008) (summarizing the works of Deans Keeton and Wade before and after *Azzarello*); *Bugosh*, 601 Pa. at 294-95, 971 A.2d at 1238 (Saylor, J., joined by Castille, C.J., dissenting) (same). *Azzarello*, in short, is not supported by any reasoned authority.

2. *Azzarello* Is Unworkable In Practice.

As might be expected, the manifest shortcomings in *Azzarello*'s reasoning have also made that decision unworkable in practice. In particular, its directive to keep all negligence concepts from the jury in a strict-liability case has the effect of leaving the jury at sea in determining whether a particular product design is "defective." Courts following *Azzarello* thus provide jurors with only the most "minimalistic" and circular of instructions, which "lack essential guidance concerning the key conception of product defect." *Schmidt*, 608 Pa. at 353, 11 A.3d at 940.

This case is a prime example. After the case was submitted to the jury, the jurors asked the trial court to clarify what it means for a product to be "defective." (RR. 525.) In response, the court merely repeated the standard instruction approved in *Azzarello*, which specifies that "[t]he manufacturer of a product is a guarantor of its safety," and that a product is "defective" if, "at the time it left the defendants' control, [it] lacked any element necessary to make it safe for its intended use, or contained any condition that made it unsafe for its intended use," but does not ask the jury to find that the product was "unreasonably dangerous." *Id.*; *see generally Azzarello*, 480 Pa. at 559 n.12, 391 A.2d at 1027 n.12.

Without the ability to determine whether a particular risk is "unreasonable," the jury may well find that *any* risk of injury (even if justified under a risk-utility analysis) renders a product "defective." The *Azzarello* instruction says that a product must be "safe for its intended use," but gives the jury no guidance on what that means. John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 Hastings L.J. 529, 544-45 (1983); *see also* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to*

Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 637-639 (1980) ("Is there any product that cannot be made safer in some way? This instruction calls forth fantastic cartoon images of products, both simple and complex, laden with fail-safe mechanism atop fail-safe mechanism...."). As one commentator has summed up the problem:

> To be sure, the *Azzarello* instruction successfully avoids negligence terminology. It does not, however, clearly and concisely express the concept of "defect," because it fails to instruct the jury how to determine whether a product is "safe" or "unsafe" for its intended use. Obviously, the court could not have meant "safe" to mean incapable of causing injury, both because every product is capable of causing injury under some circumstances, and because such a meaning would create exactly the type of automatic liability that the court said the law must preclude. Yet, the instruction contains no language that effectively serves the same critical function as the unreasonably dangerous requirement under section 402A ....

Thomas, *Defining "Design Defect,"* 71 Temp. L. Rev. at 225 (internal quotations omitted).

If anything, the cryptic *Azzarello* instruction affirmatively misleads the jury by stating that a manufacturer is the "guarantor" of its product's safety. Although *Azzarello* uses the word "guarantor" in a specialized sense (as the provider of an implied warranty that the product is safe for its intended use), *see* 480 Pa. at 559, 391 A.2d at

1027; *Salvador v. Atlantic Steel Boiler Co.,* 457 Pa. 24, 32, 319 A.2d 903, 907 (1974), that subtlety is surely lost on a lay jury, which is likely to interpret the word "guarantor" as a synonym for "insurer." *See, e.g.*, Thomas, *Defining "Design Defect,"* 71 Temp. L. Rev. at 225.

Thus, *Azzarello* tends to promote precisely the result that *Azzarello* itself specifically foreswore: making a manufacturer the insurer of the safety of its product. *See, e.g., McKay v. Sandmold Sys., Inc.*, 333 Pa. Super. 235, 244, 482 A.2d 260, 265 (1984) ("The jury instructions ... required by *Azzarello* will have the effect of rendering [the defendant] absolutely liable for the injuries sustained by [the plaintiff]."); Thomas, *Defining "Design Defect,"* 71 Temp. L. Rev. at 225 ("[N]othing in the [*Azzarello*] instruction explicitly ensures that the manufacturer will not be held liable as an insurer and therefore will not automatically be liable for all injuries resulting from the product's use."); Henderson, *Renewed Judicial Controversy*, 63 Minn. L. Rev. at 801 ("[T]he new test announced in *Azzarello* encourages juries to impose liability merely because plaintiffs have somehow been injured while using defendant's products."). This very case underscores that danger, as the jury ruled in Omega Flex's favor on the negligence claim, but

against Omega Flex on the strict-liability claim. (*See* RR. 532-33.) And that result is particularly ironic in this case because, in sharp contrast to Omega Flex, USAA—the party pursuing this action as the Tinchers' subrogee—actually *is* the Tinchers' insurer.

Azzarello, in short, has profoundly unfair consequences for the conduct of a jury trial. Because the focus of the jury's inquiry is supposed to be limited only to the product itself, litigants are precluded from addressing, among other things, the foreseeability of an injury. *See, e.g.*, *General Servs.*, 587 Pa. at 253-59, 898 A.2d at 600-04; *Phillips*, 576 Pa. at 655, 841 A.2d at 1006 (lead opinion). Needless to say, a jury cannot meaningfully assess a product's "intended" use without any consideration of foreseeability. *See, e.g.*, *General Servs.*, 587 Pa. at 257, 898 A.2d at 603; *see also id.* at 279-80 & n.3, 898 A.2d at 616-17 & n.3 (Newman, J., joined by Baer, J., concurring in part and dissenting in part). But this Court, applying *Azzarello*, has held that a particular use cannot be deemed "intended" merely because it is foreseeable. *See, e.g.*, *General Servs.*, 587 Pa. at 253-54, 898 A.2d at 600-01.

By the same token, current law unfairly requires a jury to determine whether a particular product design is "defective" in a

vacuum, without considering, among other things, relevant laws, regulations, and industry standards. *See, e.g.*, *Lewis*, 515 Pa. at 341-44, 528 A.2d at 593-94. That approach—which stems from *Azzarello*'s assignment of the risk-utility inquiry to the court and the defect inquiry to the jury—is simply anomalous, rather than systemically pro-plaintiff or pro-defendant. Thus, a plaintiff may have an interest in trying to prove that a particular product design *is* defective because it foreseeably leads to injury, or does not comply with relevant laws, regulations, or industry standards, while a defendant may have an interest in trying to prove that a particular design is *not* defective because it does not foreseeably lead to injury, or complies with relevant laws, regulations, or industry standards. The defect inquiry, in short, cannot be divorced from the risk-utility inquiry.

In addition, Pennsylvania courts have failed consistently to apply *Azzarello*'s central premise that negligence concepts have no basis in a strict liability action. For example, courts allow plaintiffs to recover from automobile manufacturers in "crashworthiness" cases, even though automobiles are obviously not intended to crash. *See, e.g.*, *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 531-34 (Pa. Super. Ct. 2009);

Colville v. Crown Equip. Corp., 809 A.2d 916, 924 (Pa. Super. Ct. 2002); *cf. General Servs.*, 587 Pa. at 254-55 & n.10, 898 A.2d at 601-02 & n.10 (recognizing crashworthiness exception to general strict-liability principles). Similarly, courts allow plaintiffs to recover from manufacturers as a result of foreseeable alterations to an otherwise safe product. *See Davis*, 547 Pa. at 267, 690 A.2d at 190; *cf. General Servs.*, 587 Pa. at 254 n.10, 898 A.2d at 601 n.10 (recognizing this "limited, targeted exception" to general strict-liability principles); *Phillips*, 576 Pa. at 656, 841 A.2d at 1007 (lead opinion) (acknowledging that *Davis* "is in tension with our firm and repeated pronouncements that negligence concepts have no place in strict liability law").

Again, this case only highlights the futility of trying to maintain a wall separating negligence from strict liability. In light of post-*Azzarello* cases holding that the negligence concept of foreseeability has no role in a strict liability case, the dispute between the parties on the strict-liability claim focused on whether exposure to lightning is an "intended" condition of use of Omega Flex's TracPipe CSST. *See generally General Servs.*, 587 Pa. at 259, 898 A.2d at 604 (holding that exposure to fire is not an "intended" condition of use of ceiling tiles).

The Superior Court, however, elided the "intended use" issue and ruled against Omega Flex on the theory that the Tinchers' injury was caused by forces "beyond the[ir] control" and thus not "avoidable" by them. (App. 42a.) By focusing on the plaintiffs' conduct—*i.e.*, whether the Tinchers could have avoided the harm—the Superior Court failed to focus solely on the product itself, and necessarily injected negligence concepts into the strict-liability inquiry. This case thus underscores that, as a practical as well as a theoretical matter, strict liability and negligence overlap. *See generally Phillips*, 576 Pa. at 665, 841 A.2d at 1012 (Saylor, J., joined by Castille and Eakin, JJ., concurring) ("Pennsylvania trial and appellate courts, and federal courts applying Pennsylvania law, have been employing ... aspects of negligence theory as central principles controlling design defect litigation for more than twenty years.").

C. This Court Should Overrule *Azzarello* And Adopt The Third Restatement.

1. This Court Should Overrule *Azzarello*.

Because *Azzarello* is unsound in theory and unworkable in practice, it should be overruled. *Stare decisis* "is not an ironclad rule" or an end in itself, *Fadgen v. Lenkner*, 469 Pa. 272, 282, 365 A.2d 147, 152

(1976); rather, it is a prudential doctrine meant to promote "certainty and stability in the law," *Stilp v. Commonwealth*, 588 Pa. 539, 620, 905 A.2d 918, 966-67 (2006). Because decisions that are unsound in theory and unworkable in practice undermine, rather than promote, those goals, the doctrine does not justify continued adherence to such decisions. *See, e.g.*, *Hack v. Hack*, 495 Pa. 300, 316, 433 A.2d 859, 867 (1981); *Soffer v. Beech*, 487 Pa. 255, 265, 409 A.2d 337, 342 (1979); *Mayhugh v. Coon*, 460 Pa. 128, 135-36, 331 A.2d 452, 456 (1975); *see generally Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991).

From its inception, *Azzarello* has been controversial. *See, e.g.*, *Moyer*, 473 F.3d at 539 ("Soon after the case was decided, one commentator noted that *Azzarello*'s limitation of the jury's role was 'a matter of concern since the jury has traditionally played an important role in the expansion of the law of products liability.'") (quoting Aaron D. Twerski, *From Risk-Utility to Consumer Expectation: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 Hofstra L. Rev. 861, 926 (1983)). Indeed, "'*Azzarello* remains to this day one of the most controversial opinions ever issued on the subject of strict products liability for alleged design defects.'" *Id.* (quoting Thomas, *Defining*

"Design Defect," 71 Temp. L. Rev. at 217). As noted above, no other state follows the *Azzarello* approach of assigning the risk-utility analysis to the court but the determination of product defect to the jury. *See, e.g., Phillips*, 576 Pa. at 671, 841 A.2d at 1016 (Saylor, J., joined by Castille & Eakin, JJ., concurring) (noting that *Azzarello* has rendered Pennsylvania strict-liability law "idiosyncratic"); *Moyer*, 473 F.3d at 539-41 & n.4.

There is no good reason in principle or precedent for this Court to reaffirm *Azzarello*. Indeed, to do so would be to perpetuate doctrinal incoherence, given that *Azzarello*'s rhetoric about the wall between strict liability and negligence is honored only in the breach. "No one has advised the Court how it is that we can go forward, in resolving the numerous unsettled issues of product liability law, predicating a just and sensible jurisprudence on rhetoric so disharmonious with actual practice." *Bugosh*, 601 Pa. at 287, 971 A.2d at 1234 (Saylor, J., joined by Castille, C.J., dissenting). Platitudes about the theoretical distinction between strict liability and negligence "offer little ... to explain how this notion can be rationally squared with a strict-liability regime which, in material respects, overlaps with negligence theory."

Id. at 287 n.7, 971 A.2d at 1234 n.7; *see also id.* at 287-88, 971 A.2d at 1234 (noting "a serious misalignment between the descriptions of our strict liability doctrine and its actual operation"); *id.* at 296, 971 A.2d at 1239 ("[R]itualistic adherence to *Azzarello* has substantially impeded the progress of our product liability jurisprudence.").

It is no surprise, thus, that individual Justices have already called for this Court to overrule *Azzarello*. *See, e.g., id.* at 299, 971 A.2d at 1241; *Berrier v. Simplicity Mfg., Inc.*, 598 Pa. 594, 595-96, 959 A.2d 900, 901-02 (2008) (Saylor, J., joined by Castille, C.J., concurring); *Phillips*, 576 Pa. at 664-79, 841 A.2d at 1012-21 (Saylor, J., joined by Castille and Eakin, JJ., concurring). Moreover, the Third Circuit has predicted that this Court will do so, *see Berrier v. Simplicity Mfg, Inc.*, 563 F.3d 38, 52-60 (3d Cir. 2009), and has continued to adhere to that prediction even after this Court explained that it was premature, *see Covell v. Bell Sports, Inc.*, 651 F.3d 357, 361-62 (3d Cir. 2011) (decided after *Schmidt*, 608 Pa. at 354, 11 A.3d at 941).

2. This Court Should Adopt The Third Restatement.

As a replacement for *Azzarello*, this Court should adopt the approach of the Third Restatement, which sets forth specific standards

governing strict liability for design defects, and represents the mainstream view on this topic. In particular, Section 2 of the Third Restatement provides that a product "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." Rest. 3d § 2(b). (Separate provisions of the Third Restatement govern strict liability for manufacturing defects and inadequate warnings, *see id.* § 2(a), (c), and yet other provisions govern strict liability in specific settings, such as *res ipsa loquitur*, *see id.* § 3, and noncompliance with product safety statutes or regulations, *see id.* § 4).[3]

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[3] Professors James Henderson and Aaron Twerski, two prominent product-liability scholars, served as the Reporters for the Third Restatement. They were supported by an Advisory Committee consisting of "prominent state and federal judges, three former ATLA presidents, consumer-oriented professors, and three defense lawyers." Victor E. Schwartz, *The Restatement, Third, Torts: Products Liability: A Model of Fairness and Balance*, 10 Kan. J. L. & Pub. Pol'y 41, 42 (Fall 2000). The Third Restatement was then further reviewed by a consultative group of ALI members, the ALI Governing Counsel, and the ALI membership at large. *See id.* at 42-43.

Like *Azzarello*, the Third Restatement recognizes that in design-defect cases, "[s]ome sort of independent assessment of advantages and disadvantages, to which some attach the label 'risk-utility balancing,' is necessary." Rest. 3d § 2(b) cmt. a. Unlike *Azzarello*, however, such an assessment is undertaken by the finder of fact, and requires the consideration of a "broad range of factors," including "the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing." *Id.* cmt. f. In other words, a jury would be allowed to consider the factors that, under *Azzarello*, are now considered only by the trial court in the light most favorable to the plaintiff. Needless to say, consideration of such factors would give the jury meaningful guidance in the overall endeavor of determining whether a particular product design is "defective," and thus solve a central problem created by *Azzarello*. *See Beard*, 41 A.3d at 838 n.18 ("It may be cogently argued that risk-utility balancing is more legitimately assigned to a jury, acting in its role as a voice for the community and with the power to decide facts, rather than to a trial

judge acting on a summary record. Indeed, such is the approach of the Restatement Third."). And the plaintiff could not simply criticize the existing design; instead, the plaintiff would be required to prove that the manufacturer could and should have adopted a reasonable alternative design. *See* Rest. 3d § 2(b) cmt. d.

Notably, Pennsylvania courts *already* require that plaintiffs show that there is a reasonable alternative design in "crashworthiness" cases, which represent one of the accepted exceptions to both *Azzarello* and the notion that negligence and strict liability can and must be kept separate. *See Gaudio*, 976 A.2d at 548; *Martinez v. Triad Controls, Inc.*, 593 F. Supp. 2d 741, 756 n.12 (E.D. Pa. 2009). This requirement is neither insurmountable nor unduly onerous, which is why the doctrine is widely accepted and why plaintiffs regularly prevail in such cases, *see, e.g.*, *Harsh v. Petroll*, 584 Pa. 606, 610, 887 A.2d 209, 211 (2005).

Because the Third Restatement reflects a synthesis of the prevailing approach to strict-liability design-defect claims, it is not surprising that it has been widely embraced elsewhere. *See, e.g.*, *Branham*, 701 S.E.2d at 16 (South Carolina); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002) ("[W]e now adopt Restatement

(Third) of Torts: Product Liability sections 1 and 2 for product defect cases."); *Williams v. Bennett*, 921 So.2d 1269, 1275 (Miss. 2006) (relying on the Third Restatement for the principle that the plaintiff must prove a reasonable alternative design); *Jones v. NordicTrack, Inc.*, 550 S.E.2d 101, 103 (Ga. 2001) (citing section 2 of the Third Restatement and noting that "[t]he 'heart' of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safest feasible one"); *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 800 (Wash. 2000) (citing section 2 of the Third Restatement as "[p]ersuasive authority"); *cf. Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923 (Mass. 1998) (adopting the Third Restatement in failure-to-warn cases in light of "the clear judicial trend" in such cases).

Similarly, Members of this Court have recognized that "adoption of the Restatement's 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, 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., joined by Castille & Eakin, JJ., concurring); *see also Bugosh*, 601 Pa. at 282-83, 971 A.2d at 1231 (Saylor, J., joined by Castille, C.J., dissenting) (same); *General Servs.*, 587 Pa. at 279 n.2, 898 A.2d at 616 n.2 (Newman, J., joined by Baer, J., concurring in part and dissenting in part) (recognizing "the apparent and possible appeal in the more progressive approach adopted by the Third Restatement"); *but cf. Beard*, 41 A.3d at 839 (Baer, J., joined by Todd & McCaffery, JJ., concurring) ("Until such time as this Court is presented with a case to resolve this difficult issue, I express no opinion on the merits of the adoption of the Restatement Third ...."). This is, at long last, the appropriate case to return Pennsylvania to the mainstream of American tort law in strict-liability design-defect cases.

II. IF THIS COURT OVERRULES *AZZARELLO* AND ADOPTS THE THIRD RESTATEMENT, ITS HOLDING SHOULD APPLY TO THIS CASE AND ALL OTHER PENDING CASES IN WHICH THE ISSUE WAS PRESERVED.

If this Court agrees with Omega Flex, overrules *Azzarello*, and adopts the Third Restatement, the disposition of this case is clear: the judgment should be reversed and the case remanded with instructions for Omega Flex to receive a new trial on the strict-liability claim under the Third Restatement approach. Indeed, that is precisely what Omega

Flex has requested all along, and why, at every stage of these proceedings, Omega Flex preserved the Third Restatement issue for eventual presentation to this Court. To deny Omega Flex the benefits of a victory on that issue would be not only fundamentally unfair, but fundamentally inconsistent with the judicial function.

Since the earliest days of the Republic, it has been acknowledged that judges "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.). Although, particularly in the common-law context, "say[ing] what the law is" sometimes requires judges to "make" law in a real sense, that does not mean that the distinction between judges and legislators is illusory. To the contrary, judges "make" law in a very different way than legislators: "they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., joined by Marshall & Blackmun, JJ., concurring in judgment) (emphasis in original). That is why judicial decisionmaking is presumptively retroactive—judges "find" the law and apply it to pending cases—while legislative decisionmaking

is presumptively prospective—legislators forthrightly "make" new law. *See id.*; *see generally United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years."). For judges to declare that they are "making" new law of purely prospective application is effectively for them to declare that they are engaged in judicial legislation.

For centuries, this was the law in Pennsylvania. In the 1960s and 70s, however, the U.S. Supreme Court began denying retroactive effect to judicial decisions applying federal law in both criminal cases, *see, e.g.*, *Daniel v. Louisiana*, 420 U.S. 31, 32-33 (1975) (*per curiam*); *Mackey v. United States*, 401 U.S. 667, 671-75 (1971); *Desist v. United States*, 394 U.S. 244, 253-54 (1969); *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966), and civil cases, *see, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-08 (1971); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (*per curiam*). By 1977, based on these federal precedents, this Court appears to have accepted the premise that courts may deny their decisions retroactive effect in appropriate cases. *See Schreiber v.*

Republic Intermodal Corp., 473 Pa. 614, 621-22, 375 A.2d 1285, 1288-89 (1977); *see generally Gibson v. Commonwealth*, 490 Pa. 156, 163, 415 A.2d 80, 84 (1980) ("Only recently have courts limited the full effect of their decisions.").

This Court, however, declined to exercise any such authority in *Schreiber*, *see* 473 Pa. at 622, 375 A.2d at 1289, and has done so only very sparingly since then, *see, e.g.*, *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 595 Pa. 128, 139-47, 938 A.2d 274, 281-85 (2007); *Cleveland v. Johns-Manville Corp.*, 547 Pa. 402, 413-14, 690 A.2d 1146, 1151 (1997); *American Trucking Ass'ns, Inc. v. McNulty*, 528 Pa. 212, 220, 596 A.2d 784, 788 (1991); *Commonwealth v. Geschwendt*, 500 Pa. 120, 125-35, 454 A.2d 991, 994-99 (1982) (plurality opinion); *Commonwealth v. Miller*, 490 Pa. 457, 472, 417 A.2d 128, 136 (1980). More often, this Court has refused to deny a decision retroactive application to pending cases. *See, e.g.*, *Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.*, 610 Pa. 371, 390-91, 20 A.3d 468, 479-80 (2011); *Christy v. Cranberry Volunteer Ambulance Corps, Inc.*, 579 Pa. 404, 418-19, 856 A.2d 43, 51-52 (2004); *Commonwealth v. Grant*, 572 Pa. 48, 67-69, 813 A.2d 726, 738-39 (2002); *Annenberg v. Commonwealth*, 562 Pa. 581, 603, 757 A.2d

338, 351 (2000); *Kituskie v. Corbman*, 552 Pa. 275, 283 n.5, 714 A.2d 1027, 1030 n.5 (1998); *Blackwell v. Commonwealth State Ethics Comm'n*, 527 Pa. 172, 181-89, 589 A.2d 1094, 1098-1102 (1991); *McHugh v. Litvin, Blumberg, Matusow & Young*, 525 Pa. 1, 7-10, 574 A.2d 1040, 1043-44 (1990); *Dercoli v. Pennsylvania Nat'l Mut. Ins. Co.*, 520 Pa. 471, 480, 554 A.2d 906, 910 (1989); *Commonwealth v. Gray,* 509 Pa. 476, 486, 503 A.2d 921, 926 (1985); *August v. Stasak*, 492 Pa. 550, 554-57, 424 A.2d 1328, 1330-32 (1981); *Gibson*, 490 Pa. at 163-66, 415 A.2d at 84-85.

As these cases explain, applying a judicial decision to pending cases in which the disputed issue was preserved represents the "general rule" under Pennsylvania law. *See, e.g.*, *Walnut St.*, 610 Pa. at 390, 20 A.3d at 479; *Christy*, 579 Pa. at 418, 856 A.2d at 51; *Kituskie*, 552 Pa. at 283 n.5, 714 A.2d at 1030 n.5; *Blackwell*, 527 Pa. at 182, 589 A.2d at 1099; *McHugh*, 525 Pa. at 8, 574 A.2d at 1043; *August*, 492 Pa. at 554, 424 A.2d at 1330; *see also Leland v. J.T. Baker Chem. Co.,* 282 Pa. Super. 573, 578, 423 A.2d 393, 396 (1980) ("It is the settled common law tradition that judicial precedents normally have retroactive as well as prospective effect."). Accordingly, those who seek a departure from that

rule must provide a "compelling reason" to do so. *Blackwell*, 527 Pa. at 188, 589 A.2d at 1102.[4]

A. This Case Presents No "Compelling" Reason For This Court To Deny Its Decision Retroactive Effect.

In determining whether to depart from the general rule that judicial decisions apply retroactively to pending cases, this Court generally considers two distinct, albeit related, factors. *First*, this Court considers whether the new decision was "foreshadowed" by existing law, or whether it came out of the blue. *Walnut St.*, 610 Pa. at 390; 20 A.3d at 479; *Blackwell*, 527 Pa. at 184, 589 A.2d at 1100. And *second*, this Court considers whether retroactive application of the new decision would result in hardship or injustice by upsetting reasonable reliance on prior law. *See, e.g.*, *Walnut St.*, 610 Pa. at 391, 20 A.3d at 480;

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[4] This burden of justification has only become heavier in recent decades, as the possibility of denying a judicial decision retroactive effect has fallen decidedly out of favor in the U.S. Supreme Court. *See, e.g.*, *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94-97 (1993); *James B. Beam*, 501 U.S. at 540 (plurality); *see also id.* at 544 (White, J., concurring in judgment); *id.* at 548 (Blackmun, J., joined by Marshall & Scalia, JJ.); *id.* at 548-49 (Scalia, J., joined by Marshall and Blackmun, JJ., concurring in judgment); *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). Although the question whether to deny a state-law decision retroactive effect is a matter of state law, *see, e.g.*, *Grant*, 572 Pa. at 68 n.15, 813 A.2d at 738 n.15, this Court has consistently looked to the U.S. Supreme Court precedents for guidance in this area, *see, e.g.*, *Christy*, 579 Pa. at 418-19, 856 A.2d at 51-52.

Blackwell, 527 Pa. at 182, 589 A.2d at 1099; *August*, 492 Pa. at 554-55, 424 A.2d at 1330-31.[5] Both of these factors strongly support retroactive application of the Third Restatement approach to pending cases in which the issue was preserved.

1. A Decision Overruling *Azzarello* And Adopting The Third Restatement Was Clearly "Foreshadowed."

It is hard to imagine a judicial decision more clearly "foreshadowed" than a decision in this case to overrule *Azzarello* and adopt the Third Restatement approach for claims alleging strict liability for defective product design. The path to such a decision has been clearly marked for at least a decade, when three Members of this Court issued a lengthy concurrence in *Phillips* outlining the "foundational" problems with the Second Restatement as applied in *Azzarello*, and proposing to replace that approach with the Third Restatement. *See*

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[5] This Court has also articulated a third factor for consideration—whether retroactive application would "further or retard [the] operation" of the new decision. *Newman Dev. Grp. of Pottstown, LLC v. Genuardi's Family Mkts., Inc.*, 52 A.3d 1233, 1245 (Pa. 2012). This factor, which would virtually always appear to support retroactive application, does not appear to add anything to the analysis, or to have been determinative in any case. *See, e.g.*, *Blackwell*, 527 Pa. at 183, 589 A.2d at 1099 (applying new decision retroactively "serves the purposes of the new decision").

Phillips, 576 Pa. at 664-82, 841 A.2d at 1012-23 (Saylor, J., joined by Castille & Eakin, JJ., concurring). The Court's lead opinion in *Phillips* did not defend *Azzarello* on the merits, but simply noted that the issue whether to overrule it was not properly presented in that case. *See id.* at 657 n.6, 841 A.2d at 1008 n.6 (lead opinion).

Azzarello has remained squarely in the judicial crosshairs over the ensuing decade. In *General Services*, the Court acknowledged "the position of the three-Justice concurrence [in *Phillips*] that, given the conclusion of those Justices that there are substantial deficiencies in present strict liability doctrine, it should be closely limited pending an overhaul by the Court." 587 Pa. at 254, 898 A.2d at 601. In a separate opinion, two more Justices recognized "the difficulty and artificiality in parsing negligence concepts from those of strict liability" and "the apparent and possible appeal in the more progressive approach adopted by the Third Restatement." *Id.* at 279 & n.2, 898 A.2d at 616 & n.2 (Newman, J., joined by Baer, J., concurring in part and dissenting in part).

In 2008, this Court granted allocatur in *Bugosh* to decide whether to overrule *Azzarello* and adopt the Third Restatement. *See* 596 Pa.

265, 942 A.2d 897 (2008) (*per curiam*) (directing the parties to brief the question "Whether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts."). While that case was pending, the Court denied a petition for certification from the Third Circuit on a discrete issue of law under the *Azzarello* regime. *See Berrier*, 598 Pa. at 595, 959 A.2d at 901. In a concurring statement, two Justices explained that review of that narrow issue was unwarranted pending a decision on "the foundational matter of whether the strict liability doctrine appropriately applies in design defect cases." *Id.* (Saylor, J., joined by Castille, C.J., concurring); *see also id.* (noting that this Court's attention was "centered on the global issues"). The Third Circuit then proceeded to decide the issue, and predicted that this Court would adopt the Third Restatement approach to strict products liability. *See Berrier*, 563 F.3d at 45-61; *see also Covell*, 651 F.3d at 361-62 (reaffirming *Berrier* prediction).

Although that foundational issue was fully briefed in *Bugosh*, not only by the parties but by an array of *amici* on both sides, the Court ultimately dismissed the appeal as having been improvidently granted, thereby again delaying resolution of the issue. *See* 601 Pa. at 279, 971

A.2d at 1229 (*per curiam*). In a dissenting statement, two Justices specifically expressed the view that *Azzarello* should be overruled and replaced with the Third Restatement. *See id.* at 287-304, 971 A.2d at 1233-44 (Saylor, J., joined by Castille, C.J.).

Since *Bugosh*, this Court has revisited the issue twice more, and on both occasions underscored the tenuous nature of the *Azzarello* regime. In *Schmidt*, this Court noted that the "no-negligence-in-strict-liability rubric has resulted in material ambiguities and inconsistencies in Pennsylvania's procedure," and contributed to a "fundamental imbalance, dissymmetry, and injustice" in this area of the law. 608 Pa. at 353-54, 11 A.3d at 940; *see also id.* at 352, 11 A.3d at 939 ("[T]he central difficulty afflicting the present scheme under *Azzarello* ... lies in maintaining a central premise that negligence concepts have no place in Pennsylvania's strict liability law."). Nonetheless, the Court reiterated that "the present status quo in Pennsylvania entails the continued application of Section 402A of the Restatement Second." *Id.* at 354, 11 A.3d at 941. And most recently, in *Beard*, this Court "again recognize[d] the continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law." 41 A.3d at 836.

In short, no reasonable observer of Pennsylvania strict-liability law over the past decade could fail to appreciate that there was, at the very least, a strong possibility (if not probability) that *Azzarello* would be overruled and replaced with the Third Restatement. *See Bugosh*, 601 Pa. at 286, 971 A.2d at 1233 (Saylor, J., joined by Castille, C.J., dissenting) (noting that "[t]he legal community obviously has taken acute notice" of this issue). The only question was when "the perfect vehicle" would arrive. *See id.* at 300, 971 A.2d at 1241. That is why prudent litigants, like Omega Flex here, have for years been raising the Third Restatement issue for eventual presentation to this Court.

Under these circumstances, a decision in this case overruling *Azzarello* and adopting the Third Restatement could hardly come as a surprise to anyone. The flaws in *Azzarello* are by now at least as well known as that case itself. There is thus no reason to take the extraordinary step of denying such a decision normal retroactive application to pending cases, like this one, in which the issue was preserved. "'The outworn precedent may be so badly worn that whatever reliance it engendered would hardly be worthy of protection.'" *August*, 492 Pa. at 554-55, 424 A.2d at 1330 (quoting Roger Traynor, *La*

Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law, 29 U. Chi. L. Rev. 223, 231-32 (1962)).

To the extent that, years ago, there might have been an argument to overrule *Azzarello* prospectively only, *see Bugosh*, 601 Pa. at 301-04, 971 A.2d at 1242-44 (Saylor, J., joined by Castille, C.J., dissenting); *Phillips*, 576 Pa. at 665, 841 A.2d at 1012 (Saylor, J., joined by Castille and Eakin, JJ., concurring), that day has long since passed. As the *Bugosh* dissent noted, the justification for a departure from the normal rule of retroactivity weakens "as *Azzarello* continues to ripen, and more and more litigants are affected by its shortcomings." 601 Pa. at 303 n.28, 971 A.2d at 1243 n.28 (Saylor, J., joined by Castille, C.J., dissenting). There is simply no reason to continue applying *Azzarello* to litigants who had full knowledge of its tenuous status.

Indeed, this case underscores the point: the underlying injury at issue here (the fire in the Tinchers' house) occurred in 2007, four years *after* three Justices of this Court (half of the Justices participating in that case) declared in *Phillips* that the time had come to replace *Azzarello* with the Third Restatement, *see* 576 Pa. at 664-79, 841 A.2d at 1012-21 (Saylor, J., joined by Castille and Eakin, JJ., concurring),

and USAA filed an amended complaint in this case *after* this Court granted allocatur in *Bugosh* to resolve that issue. And given that the Third Circuit predicted more than four years ago that this Court would adopt the Third Restatement in an appropriate case, a decision fulfilling that prediction is hardly unexpected; if anything, it is overdue.

2. A Decision Overruling *Azzarello* And Adopting The Third Restatement Would Not Result In Hardship Or Injustice By Upsetting Reasonable Reliance On Prior Law.

In addition, normal retroactive application of the Third Restatement to pending cases in which the issue was preserved would not result in hardship or injustice by upsetting any reasonable reliance on prior law. Putting aside the fact that, as discussed above, the *Azzarello* regime has been in tatters for years, no one can claim any reasonable reliance on that regime.

The difference between the Second and Third Restatement is one of degree, not of kind. Moving from the Second to the Third Restatement would simply fine-tune the analysis; it would neither proscribe any conduct that was previously lawful nor extinguish any pending claims. *See, e.g.*, *Walnut St.*, 610 Pa. at 390, 20 A.3d at 479 (normal retroactive application warranted where a "holding does not

amount to an adoption of an entirely new rule of law"). Indeed, for just this reason, the Second Restatement was applied retroactively to pending cases when it was adopted, *see Webb*, 422 Pa. at 427, 220 A.2d at 854-55, as was *Azzarello*, *see Leland*, 282 Pa. Super. at 575-82, 423 A.2d at 394-98.

It is not credible to suggest that *Azzarello* influenced "primary conduct" (*i.e.*, the underlying conduct that eventually leads to litigation, and the primary focus of the retroactivity analysis, *see Walnut St.*, 610 Pa. at 391, 20 A.3d at 480) in any way. Simply put, putative tortfeasors do not base their conduct on whether a judge or a jury will conduct a risk-utility balancing analysis. *See, e.g.*, *Gibson*, 490 Pa. at 164, 415 A.2d at 84 ("It would be unrealistic to assume that the Commonwealth has committed torts in reliance upon case precedent granting it immunity."); *Leland*, 282 Pa. Super. at 581, 423 A.2d at 397 ("[A] supplier of products[] cannot seriously contend that it detrimentally relied upon the prior rule because ... parties do not alter their tortious conduct to conform to the most recent judicial pronouncements."); *id.* at 580 n.7, 423 A.2d at 397 n.7 ("[I]t is not necessary to use the prophylactic doctrine of prospective overruling in the tort area since

reliance is generally not a viable argument.") (internal quotation omitted).

Nor can the plaintiffs in this case or other pending cases assert any vested right to the continued application of the *Azzarello* regime. Application of the Third Restatement would neither extinguish nor limit any strict-liability claims. Thus, plaintiffs cannot argue that they "would not have gone to the expense of the lawsuit and trial if [they] had known" that this Court would adopt the Third Restatement approach. *Walnut St.*, 610 Pa. at 391, 20 A.3d at 480. Plaintiffs certainly had no vested right to a legal regime in which negligence concepts are deemed categorically incompatible with strict liability—as a practical matter, that was never the law in Pennsylvania (or elsewhere), notwithstanding *Azzarello*'s statement to the contrary. Given that one of the main reasons to overrule *Azzarello* is that it is incapable of producing predictable and principled results, plaintiffs can hardly claim reasonable reliance on the *Azzarello* regime. *See, e.g.*, *Schmdit*, 608 Pa. at 353, 11 A.3d at 940 (noting "material ambiguities and inconsistencies" flowing from *Azzarello*); *cf. Berrier*, 563 F.3d at 55 (noting the "confusion that has resulted from attempting to quarantine

negligence concepts and insulate them from strict liability claims"). Indeed, if this case were in federal court, there is no question that the Third Restatement standard would apply. *See, e.g., Covell*, 651 F.3d at 363; *Berrier*, 563 F.3d at 53.

The plaintiffs in this case, moreover, are in a uniquely poor position to argue that the jury in a strict-liability case must be shielded from negligence concepts, because they actually brought a negligence claim that was tried alongside the strict-liability claim. In addition, their own theory of strict liability was infused with negligence concepts: they argued that Omega Flex's TracPipe CSST was unsafe for its intended use (and hence defective) precisely because it was reasonably foreseeable that it would be struck by lightning. *See, e.g.*, RR. 478 (discussing, in USAA's closing argument, the product's alleged "inability to sustain *foreseeable* forces from weather....") (emphasis added); RR. 645 (arguing, in response to Omega Flex's JNOV motion, that "CSST was sold for the intention of piping gas through houses" and "[w]hile it's being used in that service, it's *foreseeable* the product is going to be exposed to certain elements" like lightning) (emphasis added).

This case thus stands in marked contrast to decisions in which this Court has refused to apply a decision retroactively to pending cases, all of which involved substantial reliance interests on prior law. In *Oz Gas* and *McNulty*, this Court refused to give retroactive effect to decisions invalidating the collection of certain taxes. In those cases, governmental entities had "collected and made use of the taxes at issue with the good faith belief that they were legally entitled to them," and "[r]equiring a refunding of the taxes would cause substantial financial hardship to the communities involved." *Oz Gas*, 595 Pa. at 143, 938 A.2d at 283; *see also id.* at 145-46, 938 A.2d at 285 ("To apply such a decision retroactively ... subjects the taxing entities to the potentially devastating repercussion of having to refund taxes paid, budgeted and spent by the entities for the benefit of all, including those who challenged the tax."); *cf. Chevron Oil*, 404 U.S. at 107-08 (declining to give retroactive effect to a decision shortening a limitations period from three years to one year). As noted above, no such "potentially devastating" consequences are involved here: if this Court were to overrule *Azzarello* and adopt the Third Restatement, the Tinchers (or, to be more precise, their subrogee USAA) would retain a strict-liability

claim, and would merely have to retry that claim under the proper legal standard—as happens whenever a case is reversed on appeal and remanded for a new trial.

At bottom, "applying the new rule to cases still in the judicial process promotes the interests of fairness and judicial administration ... [because] the court avoids the cumbersome task of deciding cases under the old law after the rejection of that law." *Leland*, 282 Pa. Super. at 580 n.7, 423 A.2d at 397 n.7 (internal quotation omitted); *see also August*, 492 Pa. at 557, 424 A.2d at 1332 (Roberts, J., joined by O'Brien, C.J., and Flaherty, J., concurring) ("Manifestly, it is unfair to litigants whose case is not yet final to subject them to a law that is now recognized as offensive."). Accordingly, if this Court overrules *Azzarello* and adopts the Third Restatement, it should apply that decision retroactively in this case and all other pending cases in which the Third Restatement issue has been "properly preserved at all stages of adjudication up to and including any direct appeal." *Commonwealth v. Cabeza*, 503 Pa. 228, 233, 469 A.2d 146, 148 (1983); *see also Blackwell*, 527 Pa. at 183, 589 A.2d at 1099 ("[O]ur decision ... is to be applied retroactively to the parties before the court and to all cases pending at

the time of that decision in which the issue ... was timely raised and preserved.").

B. At The Very Least, This Court Should Apply Its Decision In This Case.

Even if, notwithstanding all of the above, this Court were still inclined to deny general retroactive application to a decision overruling *Azzarello* and adopting the Third Restatement, at the very least it should not refuse to apply such a decision in this very case. While courts addressing retroactivity have noted the potential unfairness of applying a decision retroactively to the litigants in that case but not to others, *see, e.g.*, *James B. Beam*, 501 U.S. at 537-44 (lead opinion), courts have also noted the even starker unfairness of denying the successful litigant in a case the fruits of its own victory. As this Court has put it:

> There appears to be little support for a rule that would limit changes in state law only to future litigants and to deny its benefits to the party in the proceeding in which the change is first announced. The concern with such a position is that it would stifle the initiative which is essential to a progressive, dynamic development of a system of justice.

Geschwendt, 500 Pa. at 128, 545 A.2d at 995-96 (lead opinion). Indeed, to refuse to apply a new legal rule in the very case announcing it is to abdicate the judicial role of adjudicating particular cases.

Again, this case only highlights the point. Omega Flex has raised the Third Restatement issue at every step of the way in this litigation, from the trial court to the Superior Court to this Court. From the outset, everyone involved in this case knew that the Third Restatement issue was very much in play. Omega Flex has devoted tremendous effort and expense to this issue not because it seeks an abstract change in the law, but because it believes that it can and should prevail on the strict-liability claim in this case, just as it has already prevailed on the negligence claim. Needless to say, a victory in this Court on the Third Restatement issue would be pyrrhic if, at the very least, such a victory would not avail Omega Flex in this very case.

To deny a prevailing party the fruits of its labor would also deprive litigants of any incentive to challenge outmoded legal doctrines in the first place. *See, e.g.*, *Walnut St.*, 610 Pa. at 390, 20 A.3d at 479 ("[B]y applying the new rule to the case before the court, the policy of providing incentive for challenging outmoded legal doctrines is served.") (internal quotation omitted); *see also Leland*, 282 Pa. Super. at 580 n.7, 423 A.2d at 397 n.7 (same). Needless to say, such a result would materially retard the development of the law. Our legal system evolves

when parties take it upon themselves to challenge existing doctrine. Succeeding in such a challenge is generally an uphill battle. No rational litigant would undertake such a challenge if the battle were also pointless.

CONCLUSION

For the foregoing reasons, 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.

June 5, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2013, I caused to be served, via overnight delivery, two copies of the foregoing Brief and Reproduced Record of Defendant-Petitioner Omega Flex, Inc. on counsel of record at the following address:

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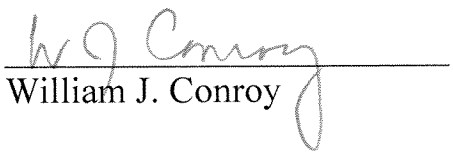

William J. Conroy

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VS.	:	NO. 2008-00974-CA
OMEGAFLEX, INC., et al. Defendants	:	CIVIL ACTION

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Kristen E. Dennison, Esquire, and William J. Conroy, Esquire – Attorneys for Defendants

ORDER OF COURT

AND NOW, this 17th day of May 2011, upon consideration of Defendant's Motion for Post Trial Relief and for a Remittitur, and the arguments of able counsel, it is hereby ORDERED and DECREED that the Motion is DENIED and relief by way of Remittitur is DENIED.[1]

BY THE COURT:

Ronald C. Nagle S.J.

[1] On June 20, 2007, a fire ignited at the Plaintiffs' home located at 570 Gramercy Lane in Downingtown, Chester County, PA. The fire's source was alleged to have been an indirect lightning strike that energized the corrugated stainless steel tubing ("CSST") line, marketed by Defendant as "TracPipe", connecting the main natural gas supply to a natural gas fireplace contained on the first floor of Plaintiffs' home. The energized tubing created an electrical arc that perforated the CSST and caused a hole through which natural gas was then ignited. The fire caused substantial damage to

Plaintiffs' home and personal property in an amount claimed in excess of $750,000.00. Plaintiffs sued Defendant, OmegaFlex, upon claims of negligence, strict liability, and beach of implied warranties. Following a multiple day trial, the jury awarded Plaintiffs damages in excess of $950,000. On November 1, 2010, Defendant timely filed its Motion for Post Trial Relief. I heard argument on March 11, 2011.

Defendant raises a number of issues that it contends requires a judgment *non obstante veredicto*, or alternatively, the grant of a new trial. In reviewing a motion for judgment NOV, we determine whether there was sufficient competent evidence to sustain the verdict. *Simon v. Wyeth Pharmaceuticals, Inc.*, 989 A.2d 356, 364-65 (Pa. Super. 2009) (citing *Birth Center v. St. Paul Companies, Inc.*, 787 A.2d 376 (Pa. 2001)). The evidence is viewed in a light most favorable to the verdict winner, who is entitled the benefit of reasonable inferences of fact. *Id.* Any conflict in evidence is resolved in the verdict winner's favor. *Id.* (citing *Eichman v. Mckeon*, 824 A.2d 305 (Pa. Super. 2003)).

Defendant argues we erred by failing to grant its Motion in Limine to apply the law reflected in the Restatement of Torts (Third) to Plaintiff's claims. This argument is without merit. Pennsylvania courts apply the Restatement (Second) of Torts § 402A, and not the Restatement (Third). *French v. Commonwealth Associates*, 980 A.2d 623, 632 (Pa. Super. 2009); *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 531-32 (Pa. Super. 2009); *Estate of Hicks v. Dana Companies, LLC*, 984 A.2d 943, 975-76 (Pa. Super. 2009). Section 402A provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate 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." In addition, the risk-utility balancing is within the province of the court and not the jury. *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978). Accordingly, Defendant's argument that the trial court erred in failing to instruct the jury according to the law reflected in Restatement (Third) with respect to the definition of design defect and risk-utility analysis, is also without merit.

Defendant contends it is entitled to a new trial because the trial court failed to instruct the jury in accordance with the applicable law. I disagree. Defendant also argues the trial court instructed the jury in such a way as to cause it confusion, as evidenced by the jury's question relative to the definition of design defect. Again, the record reveals otherwise.

Defendant contends the trial court erred in failing to instruct the jury regarding a plaintiff's burden in a "fireworthiness" case. The general rule is that there is no strict products liability where the harm is caused by unintended uses of the product, even where the use is foreseeable by the manufacturer. *Pennsylvania Dep't of General Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (citing *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003) (plurality opinion)). Thus, Defendant argued during the course of this litigation that the occurrence of a lightning strike causing an electrical arc to the pipe was not an intended use of the TracPipe and

could not form the basis for the imposition of strict liability. In a products liability action, the plaintiff can recover under strict liability by showing the product was sold in a defective condition that was unreasonably dangerous, and that defect was the proximate cause of Plaintiff's injuries. *French v. Commonwealth Associates*, 980 A.2d 623 (Pa. Super. 2009). "'[D]efect' is defined in terms of safety for intended use; that is, 'the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.'" *Estate of Hicks v. Dana Companies, LLC*, 984 A.2d 943, 967 (Pa. Super. 2009) (quoting *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978)). The product at issue was intended to transmit flammable natural gas in buildings, including residential homes. Plaintiffs' allegations involving Defendant's product relate not to how the product performed during the fire, *see Pennsylvania Dep't of General Services*, 898 A.2d at 601 n.11, but how the product actually caused the fire that destroyed their home because it was designed in a manner that the jury deemed to be unsafe. The *General Services* case stands for the proposition that incineration of building materials is not a use intended by the manufacturer; therefore damages in strict liability are unavailable where the harm flowing from the product was the contamination it causes upon its burning. Instantly, the important factual distinction between our case and *General Services* is that Plaintiffs based their strict liability claims against TracPipe, the product here involved, based upon the theory that its defective design caused it to rupture and ignite. Thus, the jury was confronted with the product's design that led to its combustion, rather than its design and reaction to combustion. This was not a "fireworthiness" case.

Defendant's further argument that Plaintiffs failed to meet their burden that a feasible alternative design existed that would have prevented the injury is also unsupported by the record. The evidence showed that CSST pipe originated in Japan, where earthquakes are prevalent, and was designed to adapt to bending pressures typical in building collapse. Instantly, Plaintiffs presented expert testimony from Dr. Eager, an expert in metallurgy, arc physics and materials science. N.T. 10/13/10, p. 356. Dr. Eager testified that, in comparison to black iron pipe CSST, marketed by Defendant as "TracPipe" is far more likely to perforate when an electrical arc current, such as may be caused by an indirect lightening strike occurring more typically in this part of the Country, contacts the CSST. N.T. 10/13/10, pp. 357-58. There was, as well, evidence from which the jury could have concluded the CSST pipe was not adequately designed and grounded to withstand an indirect lightening strike. Thus, there was sufficient evidence of a reasonable alternative design, that being the black iron pipe.

Defendant also argues its entitlement to a remittitur. The decision whether or not to grant remittitur lies within the discretion of a trial court. *Boteck v. Mine Safety Appliance Corporation*, 611 A.2d 1174, 1176 (Pa.1992); *Harding v. Consolidated Rail Corporation*, 620 A.2d 1185, 1193 (Pa. Super. 1993). A jury verdict, if supported by the evidence, will be permitted to stand when there is nothing to suggest that the jury was guided by partiality, prejudice, mistake or corruption, or that its verdict is plainly

excessive and exorbitant, in which case neither a new trial nor remittitur is appropriate. *Carminati v. Philadelphia Transportation Company*, 176 A.2d 440 (Pa.1962); *Bey v. Sacks*, 789 A.2d 232 (Pa. Super. 2001). The trial court is required to enforce the jury's verdict, and should not interfere unless the award is not warranted by the evidence. *Prather v. H-K Corporation*, 423 A.2d 385, 389 (Pa. Super. 1980). Instantly, the evidence established Plaintiffs' damages, both as to personalty and realty, and was not excessive.

TERRENCE D. TINCHER and JUDITH R. TINCHER Plaintiffs	:	IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA
VS.	:	NO. 2008-00974-CA
OMEGAFLEX, INC., et al. Defendants	:	CIVIL ACTION

Mark E. Utke, Esquire, Attorney for Plaintiffs
Kristen E. Dennison, Esquire, and William J. Conroy, Esquire – Attorneys for Defendants

ORDER OF COURT

AND NOW, this 17th day of May 2011, upon consideration of Plaintiffs' Motion for Delay Damages, it is hereby ORDERED and DECREED that the Motion is GRANTED. Plaintiffs are hereby awarded delay damages in the amount of $69,336.05.

BY THE COURT:

Ronald C. Nagle, S.J.

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CHESTER CO. PA.

TERRENCE D. TINCHER and JUDITH R. TINCHER Plaintiffs/Appellees	:	IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA
VS.	:	NO. 2008-00974-CA 1472 EDA 2011
OMEGAFLEX, INC., et al. Defendant/Appellant	:	CIVIL ACTION

Mark E. Utke, Esquire, Attorney for Plaintiffs
Kristen E. Dennison, Esquire, Katherine Wang, Esquire, William J. Conroy, Esquire,
Attorneys for Defendant/Appellant

OPINION

BY: NAGLE, S.J. August 5, 2011

Defendant, Omega Flex, Inc. ("Appellant") appeals from a verdict entered by a jury following trial in which it awarded the Plaintiffs, Terrence D. Tincher and Judith R. Tincher ("Appellees") $958,895.85 in damages they sustained in a fire. The damage award included recompense for $406,532.80 building damage, $988.83 additional property/structures loss, $503,945.58 contents loss, and $47,428.64 alternate living expenses. On May 17, 2011 we awarded Plaintiffs delay damages of $69,336.05. Appellant filed post-trial motions, which we denied by Order dated May 17, 2011.

On June 20, 2007, a fire ignited at the Appellees' home located at 570 Gramercy Lane, Downingtown, Chester County, PA. The source of

the fire was determined by the jury to be an indirect lightning strike[1] that energized the corrugated stainless steel tubing ("CSST") line[2], marketed by Appellant as "TracPipe" and installed in the house, connecting the main natural gas supply to a natural gas fireplace located on the first floor of Appellees' home. The fire caused substantial undisputed damage to Appellees' home and its contents. They were not at home at the time of the lightning strike and ensuing fire. Appellees sued Appellant, OmegaFlex for damages upon claims of negligence, strict liability, and beach of implied warranties.

The predominant issue in the case was whether the corrugated stainless steel tubing, manufactured and sold by Appellant under the brand name "TracPipe", was defective because of its inferior wall thickness (equal to the thickness of 4 sheets of paper), rendering it incapable of withstanding perforation by an electrical arc produced by

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[1] There are 3 types of lightning strike: direct, indirect via air, and indirect via ground. Instantly, there was no evidence of a direct lightning strike to the Appellees' house. Rather, it was determined that lightning traveled in the ground from a direct strike nearby to the Appellees' house, in turn energizing the CSST pipe.

[2] CSST is a flexible tubing used to carry natural gas in buildings. It originated in Japan, which is subject to substantial earthquake activity. There, experience having taught that black iron pipe, traditionally used in building construction in the United States to convey natural gas, was highly susceptible to rupturing during an earthquake, corrugated flexible tubing was devised and successfully employed as a substitute material because of its ability to bend without breaking during such occurrences. It subsequently achieved some acceptance in the United States for such purpose in commercial and residential construction.

lightning. The Appellees' expert testimony posited that a lightning strike energized the TracPipe, and in doing so created an electrical arc with other metal that perforated the TracPipe by burning a hole in the pipe through which natural gas was then ignited. The hole in the TracPipe was recovered from the area of the fire's origin near the fireplace, and was tested. A severed grounding wire, called a "bonding wire"[3], and its clamp were found hanging in the area of the fire's origin, and displayed signs of melting and "forced damage". It was determined to have been connected to the TracPipe's manifold. N.T. 10/12/2010, pp. 105 – 116.

Substantial expert testimony was educed during this trial in the disciplines of metallurgy, materials science, arc physics and both direct and indirect lightning strikes. Appellees produced evidence from which the jury could find that, in comparison to black iron pipe, TracPipe has substantially greater susceptibility to perforation by lightning-induced energy than does black iron pipe, rendering it defective and posing a substantially greater fire hazard. Appellees also produced uncontroverted

[3] Bonding refers to the fact that in a building with electric service it is normal for safety reasons to connect all metal objects, such as pipes, together to the alternating current (AC) electric power supply to form an equipotential zone. Equipotential bonding involves joining together metalwork to the Earth's conductive surface so that it is at the same potential (i.e., voltage) everywhere. Inadequate bonding renders metal objects susceptible to a hazardous conductive path. Examples of articles that require bonding include metallic water piping systems and gas piping.

scientific evidence which established the approximate melting temperature of TracPipe, which is a stainless steel material, to be 2,600 degrees, well over two-times higher than the temperatures reached in a house fire, thereby eliminating the possibility that the TracPipe's perforation was caused by the fire itself. The house was examined after the fire by both fire officials and experts in fire cause and origin, who determined through examination of the physical evidence that the area of the house exposed to the greatest intensity of combustible fire damage occurred in the area of the fireplace where the perforated TracPipe was found.

The fire was of such intensity that the fireplace and significant parts of the first floor collapsed into the basement. Fire cause and origin experts for both sides examined the house, David Smith for Appellant, N.T. 10/18/2010, pp. 529 – 589, and Michael J. Moyer, Reading Fire Department Fire Investigator for Appellees, N.T. 10/11/2010, pp. 68 – 76 and N.T. 10/12/2010, pp. 88 – 156. Smith opined that lightning had caused the fire at the TracPipe tubing near the fireplace. Moyer opined the cause of the fire was an indirect lightning strike which affected the TracPipe causing it to breach at a hole. N.T. 10/18/2010, p. 572; and N.T. 10/12/2010, p.108.

Appellant's testimony, while not disagreeing with the location in which the fire had started or the TracPipe's perforation, opined that the fire was not caused by the indirect lightning strike, but instead caused by the electrical system which caused an electric arc, in turn causing the perforation in the TracPipe.

Appellants argued, that considering the risk-utility of TracPipe, Appellees had not proven it to be unreasonably dangerous, thereby requiring the court's analysis of same to resolve in Appellant's favor.

Secondly, Appellants moved for dismissal of Appellees' failure to warn claim. Appellees sued on a theory, among others, that Appellant should have provided warnings to use bonding wire of a greater diameter and with greater connection frequency than was used in the Appellees' house. Appellant argued that under the National Fire Protection Code a licensed electrician was not required to follow any such instruction and would not have done so. Conversely, Appellees argued, for reasons we discuss hereinafter, that the risk-utility standards predominated in their favor, and that the duty to warn related not to the electrician installing an electric system in a building, but to the Appellees as the end user's of the TracPipe product.

At the close of Appellees' case, Appellant moved for a nonsuit, which we declined to grant. N.T.10/18/10, pp. 514 – 526. A compulsory nonsuit can only be granted in cases where it is clear that a cause of action has not been established. A nonsuit should not be granted where, after viewing the evidence in the light most advantageous to the plaintiff, recovery is reasonably possible on the legal principles upon which plaintiff's case is dependent. *Braun v. Target Corp.*, 983 A.2d 752 (Pa.Super. 2009); *McMillan v. Mountain Laurel Racing Inc.*, 240 Pa.Super. 248, 367 A.2d 1106 (1976).

At the close of all the evidence, Appellant moved for a directed verdict on the risk-utility strict liability claim. Appellees withdrew their negligent duty to test claim, agreeing it was subsumed in their negligent design claim. Appellees also voluntarily dismissed their failure to warn claim. N.T. 10/19/10, pp. 743 – 744. A directed verdict may be granted only where the facts are clear and free from doubt. In deciding a motion for a directed verdict, the trial court must consider the facts in the light most favorable to the nonmoving party, accepting as true all evidence which supports that party's contention and reject all adverse testimony. *Lilley v. Johns-Manville Corp.*, 408 Pa.Super. 83, 596 A.2d 203 (1991); *Lear, Inc. v. Eddy*, 749 A.2d 971, 973 (Pa.Super. 2000) cited in *Fetherolf*

v. Torosian, 759 A.2d 391 (Pa.Super. 2000). With this standard in mind, we denied the motion for a directed verdict.

On the verdict slip returned by the jury, the jury found that Appellant's TracPipe was defective[4], that the defect existed when the TracPipe left the Appellant's hands, and that the defect was a proximate cause of Appellees' harm; however, the jury also found that Appellant was not negligent in designing the TracPipe.[5]

ERRORS CLAIMED ON APPEAL BY APPELLANT

On appeal, Appellant claims it was entitled to judgment notwithstanding the verdict on Plaintiffs' strict liability claim for the following reasons: (1) Plaintiffs failure to prove the TracPipe was defective for its intended use under the Restatement (Second) of Torts §402A; (2) their failure to prove a safer alternate design existed in accordance with (i)

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[4] Three types of defective conditions may give rise to strict liability, including manufacturing defect, a design defect, and a failure to warn defect. *French v. Commonwealth Associates, Inc.*, 980 A.2d 623 (Pa. Super 2009)(*citing Phillips v. A-Best Products Co.*, 542 Pa. 124, 131, 665 A.2d 1167, 1170 (1995).

[5] The jury's verdict was based upon strict liability, in which negligent design is not a proper consideration. "Thus, we conclude that in a strict liability design defect claim, the plaintiff must establish that the product was unsafe for its intended user. We also explicitly state that a manufacturer will not be held strictly liable for failing to design a product that was safe for use by any reasonably foreseeable user as such a standard would improperly import negligence concepts into strict liability law." *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003).

the Restatement (Third) of Torts governing product liability, §§1 and 2, or (ii) a "fireworthiness" theory derived from the crashworthiness exception to §402A; (3) Appellant's contention the jury should not have been permitted to consider Appellees' claim where Appellant allegedly proved that the utility of its TracPipe outweighed the isolated risk of lightning strikes; and (4) Plaintiffs' failure to prove that any alleged defect in the TracPipe caused the fire or the damages. Appellant also seeks a new trial because the court refused to instruct the jury on the applicability of (i) the Restatement (Third) of Torts governing product liability, §§1 and 2, (ii) the "fireworthiness" theory derived from the crashworthiness exception to §402A, and (iii) because the jury verdict slip did not ask the jury to determine whether Appellees had proven that a safer alternate design to TracPipe existed at the time it was designed.

In our view, this was a proper case for submission of the issue of strict liability to a jury, which heard extensive expert testimony, and made an informed decision that should not be disturbed.[6]

[6] See Footnotes 4 and 5 above.

DISCUSSION

New trial and Judgment N.O.V. Motions

The general rule requires that a timely and specific objection at trial is required to preserve an issue for review on appeal. *Harman v. Borah*, 562Pa. 455, 756 A.2d 1116, 1124 (2000). Pennsylvania Rules of Civil Procedure Rule 227.1, which governs post-trial relief, provides in relevant part that a ground may not serve as the basis for post-trial relief, including a judgment n.o.v., unless it was raised in pre-trial proceedings or at trial. The Rule further notes that error that could have been corrected by timely objection in the trial court may not constitute a ground for such a judgment. Pa.R.C.P. 227.1(b)(1); *Straub v. Cherne Industries and Dealers Service*, 583 Pa. 608, 880 A.2d 561 (2005). Because Appellant fairly raised the issues pertaining to its Motion during trial, we find no waiver.

Appellant moved for judgment n.o.v. in its post trial motion. A judgment n. o. v. (non obstante verdicto) should be entered only in a clear case, and any doubts should be resolved in favor of the verdict. *Steward v. Chernicky*, 439 Pa. 43, 266 A.2d 259 (1970); *Hutchison ex rel. Hutchison v. Luddy*, 560 Pa. 51, 742 A.2d 1052 (1999). In considering a motion for judgment n. o. v., the evidence, together with all reasonable

inferences arising from the evidence, is considered in the light most favorable to the verdict winner. *Miller v. Checker Cab Co., 465 Pa. 82, 348 A.2d 128 (1975).*

When considering whether to grant Appellant a new trial, as it has requested, the court must first determine whether there was legal or factual trial error or an abuse of discretion, and whether that error, if any, is sufficient basis for granting a new trial. The decision is a discretionary matter because it requires consideration of the particular circumstances of the case. *Morrison v. Com., Dept. of Public Welfare*, 538 Pa. 122, 646 A.2d 565, (1994); *Harman ex rel. Harman v. Borah,* 562 Pa. 455, 756 A.2d 1116 (2000). Instantly, the grounds advanced by Appellant relate to application of the law and abuse of discretion, as to which we find no error was committed for the reasons discussed in this Opinion.

Restatement (Third) of Torts.

At trial, we denied Appellant's Motion in Limine, which sought to apply the law stated in the Restatement of Torts (Third) to Appellees' claims. We ruled in this fashion because Appellants were unable to convince us that our Supreme Court has adopted this iteration of the Restatement. Our independent research at the time convinced us that Pennsylvania courts apply the Restatement (Second) of Torts § 402A, and

not the Restatement (Third). *Webb v. Zum*, 220 A.2d 853 (Pa.Super. 1966); *French v. Commonwealth Associates*, supra; *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 531-32 (Pa.Super. 2009); *Estate of Hicks v. Dana Companies, LLC*, 984 A.2d 943, 975-76 (Pa.Super. 2009) (in an asbestos related strict products liability case, the trial court properly rejected the defendant's pre-trial request to have the case proceed under Restatement (Third) of Torts, Products Liability, § 2 (1997), rather than § 402A of the Restatement (Second) of Torts. While Appellant may have the right to advance on appeal to our Supreme Court that it should adopt the Restatement (Third) of Torts governing product liability, under current law, Appellees bore no burden to prove a safer alternate design existed in accordance with the latter standard.[7]

Risk-Utility Analysis.

Appellants argue that we erred in submitting the strict liability claim to the jury because, as a matter of law, the utility of TracPipe outweighs the isolated risk of lightning. We denied Appellant's motion seeking

[7] See *Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468 (Pa. 2011); *French v. Commonwealth Associates, Inc.*, supra (The Restatement (Second) of Torts § 402A,3 adopted as the law of this Commonwealth ..., governs all claims of products liability and allows recovery where a product in "a defective condition unreasonably dangerous to the consumer or user" causes harm to the plaintiff.").

summary judgment[8] on several grounds after considering the parties' arguments.[9]

Under Pennsylvania law, the finding of a defect requires a balancing of the utility of the product against the seriousness and likelihood of the injury and the availability of precautions that, though not foolproof, might prevent the injury. *Burch v. Sears, Roebuck and Co.*, 320 Pa.Super. 444, 467 A.2d 615 (Pa.Super. 1983). 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. *Surace v. Caterpillar*, Inc.,111 F.3d 1039 C.A.3 (Pa. 1997); *Marshall v. Philadelphia Tramrail Co.,* 426 Pa.Super. 156, 626 A.2d 620, (1993); *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000, 1013 (2003)(Justice Thomas G. Saylor's Concurring Opinion). Once admitted at trial, the jury determines, as it did in this instance,

[8] In considering Appellant's motion for summary judgment, we were informed that Appellant is a named defendant in a class action lawsuit in which TracPipe is similarly targeted, and that it is defending some thirty-two lawsuits wherein its TracPipe is alleged to have been ruptured by lightning ignition, causing property damage. Appellees' expert, Mark Goodson, P.E. testified at trial that he was involved in over 80 incidents where corrugated steel pipe has failed when exposed to lightning effects. N.T. 10/13/10, pp. 269 – 337.

[9] We also direct the Court's attention to the plethora of pre-trial motions in limine, which we ruled upon by separate orders.

whether the product lacks any element necessary to make it safe for its intended use.

At trial, counsel argued the *Surace v. Caterpillar* factors[10] that are required to be considered in the court's risk-utility analysis before allowing the case to reach the jury for decision on the issue of strict liability. Weighing these factors, we allowed the matter to go to a jury on the strict liability claim.[11] In doing so, we considered the following factors.

The Appellees' case compared TracPipe to black iron pipe, positing that by comparison, TracPipe poses a significantly higher risk of lightening-induced perforation. While Appellant argued to us that black iron pipe can also break, by comparison it seldom does in this

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[10] These factors are: (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 avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instruction; and (7) The feasibility, on the part of the manufacturer, of spreading the loss of [sic] setting the price of the product or carrying liability insurance. See Surace, 111 F.3d at 1043 (1993)(citing Pennsylvania cases).

[11] While there is little doubt that corrugated steel tubing and its manifolds and fittings branded by Appellant as TracPipe are highly utilitarian, it is equally clear that safety cannot and should not become utility's stepchild. TracPipe is a product that is designed, intended and manufactured to convey a highly dangerous and explosive substance, hydrocarbon gas, capable of causing serious damage, injury and even death if allowed to escape, or if exposed to an uncontrolled ignition source.

environment, and certainly does not have susceptibility to lightning strikes, which are plentiful in the eastern United States.

Appellant also argued that Appellees' expert, Dr. Thomas W. Eager, ScD, P.E., who was qualified as an expert in metallurgy, arc physics and materials science, had tested only a piece of the TracPipe in determining its significantly greater risk of failure, whereas Appellees' comparison of black iron pipe to TracPipe required proof of a system-wide failure. (Black iron pipe is connected by a series of U-joints and other connections when installed, and can arguably fail at those joint connections). The difficulty with this argument is that, given Appellees' evidence, the TracPipe has the real potential for failure at any point along the runs of pipe that comprise a total installation, depending upon where lightning energizes the pipe.

In conducting our analysis, we also considered the likelihood of TracPipe's potential for causing serious damage and injury resulting from a breach in the pipe wall, and the Appellant's ability to eliminate the product's unsafe aspects. In another pre-trial motion in limine, Appellant disclosed the type of TracPipe installed in Appellees' home in 1998 was subsequently replaced by its product line called "CounterStrike", a type of CSST that has energy dissipating capability allegedly designed to protect

against transient electrical energy from lightning. Citing Pennsylvania Rules of Evidence 403 and 407[12], Appellant sought to exclude evidence of its later development and sale of this CounterStrike tubing, as an inadmissible subsequent remedial measure. Appellees written response included marketing material published by Appellant that touts CounterStrike as being 5,000% more effective at withstanding electrical energy than TracPipe. Appellees argued that Rule 407 was not implicated because Appellant had not performed remedial measures on its TracPipe, adding that even if CounterStrike was arguably a remedial measure, it was developed and sold before the 2007 fire at Plaintiffs' home rather than after the fire, as Rule 407 requires.

While Appellees also logically argued that the marketing of CounterStrike demonstrated the feasibility of a safer alternate design and product, we were aware that Appellant continued to market TracPipe at the time of trial, and we concluded that simply changing the product by making it safer does not necessarily support an inference that the initial version of the product was defective. *Duchess v. Langston Corp., 564 Pa. 529, 545, 769 A.2d 1131, 1146-50 (2001)(citing Werner v. Upjohn Co.,*

[12] Rule 407 excludes evidence of subsequent remedial measures to prove the party who took the measures sold, designed or manufactured a product with a defect or a need for a warning or instruction.

628 F.2d 848, 858 (4th Cir.1980), cert. denied; (Rule 407's general prohibition is expressly inoperable in relation to remedial measures evidence offered "for impeachment or to prove other controverted matters, such as ownership, control, or feasibility of precautionary measures.")). Nonetheless, it was clear that Appellant markets CounterStrike as a product engineered to significantly decrease the potential for lightning induced damage to its fuel gas piping system, by cladding it with an energy dissipating rubber jacket that allegedly significantly protects its corrugated steel flexible tubing from becoming energized by a lightning strike. Demonstrably then, the mechanical feasibility of a safer design was demonstrated to the court, without adverse consequences to either the product or the consumer, that would significantly lessen, if not eliminate altogether, the unsafe character of TracPipe.

While we ruled evidence of Counterstrike inadmissible to prove the defectiveness of TracPipe, we were fully aware of Counterstrike's availability during our risk-utility analysis.

Likewise considered in the risk-utility analysis, is the likelihood that the average consumer, usually a new home purchaser, is unaware of, or will not be made aware of the potential danger associated with the CSST natural gas piping system employed in construction, much less the ability

to control what components the builder has included in the construction. The same holds true for the housing resale market. Unless a danger is widely known and understood, home inspectors normally alert homebuyers only to "defects" in the house, and not the comparable efficacy of construction materials. These factors implicate both the home-buyers awareness of a potential danger and the ability to avoid loss. Instantly, the Appellees were unaware that TracPipe was used in the construction of their home.

Dr. Thomas W. Eager, Appellees' expert in metallurgy, arc physics and materials science, opined at trial that because the pipe wall thickness of TracPipe is significantly thinner than the wall thickness of black iron pipe, the product commonly used in construction for the transmission within occupied buildings of natural gas, TracPipe is not capable of withstanding the foreseeable effects of an indirect lightning strike.

Appellant's expert, Michael Stringfellow, PhD, with a degree in Physics and a specialty in lightning science, acknowledged that lightning is a common occurrence in Pennsylvania. N.T. 10/13/10, p. 356 et seq. He also agreed with the other experts in the case that a lightning storm occurred in the area of the Appellees' home at the time of this fire. He further testified that there was evidence of lightning strikes close to their

home that night, but little evidence of a direct strike. He believed, therefore, that the house was hit by an indirect lightning strike, as did the other experts, which traveled to the house, and created "quite high voltages in the house"; however, he opined the electrical energy of the strike was insufficient to have burned a hole through the TracPipe causing the breach. Appellees' experts disagreed with that opinion. His opinion appears to have been that the lightning strike breached a copper electric wire that arced to the TracPipe, but he agreed he had not seen or been presented with any electric wire from the house evidencing arc damage about which he speculated. N.T. 10/18/2010, direct pp. 657, et seq., cross, pp. 700 et seq., and redirect pp. 712 et seq. Dr. Stringfellow readily admitted that black iron pipe is significantly more resistant to breach by lightning arc damage than is TracPipe due to black iron pipe's thickness. Dr. Eager testified that, in comparison to black iron pipe, CSST, marketed by Appellants as "TracPipe", is far more likely to perforate when an electrical arc current, such as may be caused by an indirect lightning strike occurring more typically in this part of the Country, attaches to the TracPipe. N.T. 10/13/10, pp. 357-358. There was, as well, evidence from which the jury could have concluded the TracPipe was not adequately designed to include the grounding necessary to compensate for the

thinness of its pipe walls, including the furnishing of installation instructions for such grounding, which would dissipate electrical energy sparked by an indirect lightning strike over its installed surface.

It has long been the law in Pennsylvania that a "defective condition" includes the lack of adequate warnings or instructions required for a product's safe use. *Thomas v. Arvon Products Co.*, 424 Pa. 365, 227 A.2d 897 (1967); *Sherk v. Daisy-Heddon*, 498 Pa. 594, 450 A.2d 615, 618 (1982)(plurality); *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 575 A.2d 100, 102 (1990); *Jacobini v. V & O Press Company*, 527 Pa. 32, 588 A.2d 476 (1991). A product will be deemed defective if it left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use. *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1005 (Pa. 2003). Evidence was also educed in this case that if adequate grounding at specified intervals along the length of the pipe installation had been included in the Appellant's installation instructions to protect against electrical arcing with other metal surfaces, the TracPipe pipe would have been better protected from being energized by lightning. This implicated Appellees failure to warn claim, which led to wrangling over the applicability of National Fire

Protection Code 780. Appellees' expert, Mark Goodson, P.E. testified that Appellant should have provided warnings regarding the diameter of the bonding wire that should have been used and the frequency of its use in grounding the TracPipe installed in Appellees' house. N.T. 10/18/10, p. 516.

Considering all of these factors, it was and remains the trial court's opinion that full consideration was given in its risk-utility analysis to the gravity of potential danger posed by TracPipe, and the case was properly submitted to the jury for determination of the issue of strict liability.

Appellant's additional argument that the trial court erred in failing to instruct the jury according to the law reflected in Restatement (Third) with respect to the definition of design defect and risk-utility analysis is also without merit for the reasons discussed earlier in this Opinion.

Fireworthiness Theory

At trial, Appellant unsuccessfully sought to extend the "crashworthiness" doctrine to the instant case by application of a "fireworthiness" theory, requiring, in its words, "a more rigorous standard of proof than the usual 402A claim". "The term crashworthiness" means "the protection that a motor vehicle affords its passenger against personal injury or death as a result of a motor vehicle accident." *Kupetz v. Deere &*

Co., Inc., 435 Pa.Super. 16, 644 A.2d 1213 (1994). The rationale is that manufacturers are strictly liable for defects that do not cause the accident but nevertheless cause an increase in the severity of injuries that would have occurred without the defect. The crashworthiness doctrine is a subset of strict products liability law that most typically arises in the context of vehicular accidents. *Gaudio v. Ford Motor Co.*, 976 A.2d 524 (Pa.Super. 2009).

Essentially, Appellant argued that since, in its opinion, TracPipe did not cause the lightning strike, Appellees' claim that TracPipe increased their damages by failing to protect against the foreseeable occurrences of a lightning strike required this court to hold Appellees to a "fireworthiness" burden of proving a safer alternative design. The upshot of Appellant's argument is that just as automobile accidents are foreseeable, and a car maker must design and manufacture the product so that it protects occupants from harm by being "reasonably crashworthy," so, too, in order to prevail, Appellees were required to prove TracPipe was not "fireworthy". In so arguing, Appellant concedes that *General Services* prohibits further expansion of foreseeability-based strict liability beyond the crashworthiness context, but argues "the Court was obliged to at least apply a legal standard similar to that of a crashworthiness case",

specifically by proving there existed a safer alternative design for TracPipe. Appellant's lower court brief, p. 11.

In products liability actions, the plaintiff can recover under strict liability by showing the product was sold in a defective condition that was unreasonably dangerous, and that defect was the proximate cause of the plaintiff's injuries. *French v. Commonwealth Associates*, supra. "'[D]efect' is defined in terms of safety for intended use; that is, 'the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Estate of Hicks v. Dana Companies, LLC*, supra (quoting *Azzarello v. Black Bros. Co.*, supra.). Appellant argues it was entitled to judgment as a matter of law because Appellees failed to prove a safer alternate design. Appellant contended during this litigation that the occurrence of a lightning strike causing an electrical arc to its CSST pipe was not an *intended use* of TracPipe, and, therefore, could not form the basis for the imposition of strict liability. It posited that TracPipe was designed to provide a flexible alternative to rigid black iron pipe to transport natural gas throughout a dwelling, but was never intended to safely conduct electric currents or act as a lightning protection system.

The general rule is that there is no strict products liability where the harm is caused by *unintended uses* of the product, even where the use is foreseeable by the manufacturer. *Pennsylvania Dep't of General Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (citing *Phillips v. Cricket Lighters*, supra (plurality opinion)). *General Services* involved a fire that occurred in a building in which PCBs were detected in the aftermath of a fire. The building's materials emitted PCBs when exposed to the fire.

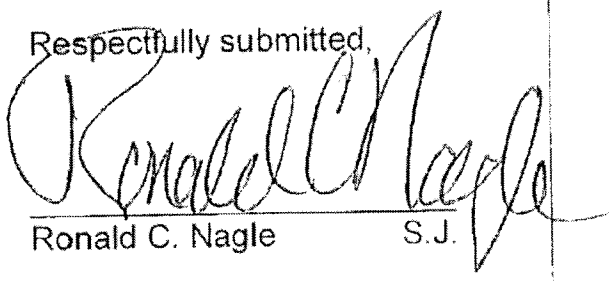
In contrast, TracPipe was intended to transmit flammable natural gas in buildings, including residential homes. Appellees' allegations involving Appellant's TracPipe relate not to how the product performed during the fire, but how the product actually caused the fire that destroyed Appellees' home and contents because it was unsafe when exposed to lightning-induced energy that created an electrical arc with other metal that burned a hole in the TracPipe, causing a gas-fed fire. *Pennsylvania Dep't of General Services*, 898 A.2d at 600-601 n.11. The *General Services* case stands for the proposition that incineration of building materials is not a use intended by the manufacturer; therefore, damages in strict liability are unavailable where the harm flowing from the product was the contamination it causes upon its burning.

Instantly, the important factual distinction between the instant case and *General Services* is that Appellees based their strict liability claims upon the contention that TracPipe is defective because it is susceptible to being easily perforated by a current generated by a lightning strike, which in this case burned a hole in the pipe's thin wall through which natural gas was then ignited. Thus, the jury was confronted with the product's defect and its origin that led to its combustion, rather than its design and reaction to combustion.

This simply was not a "fireworthiness" case, and there is no merit in Appellant's argument. Appellant's development and marketing of CounterStrike, which it advertizes as 5,000% more effective at withstanding electrical energy than TracPipe also militates against Appellant's argument. For these reasons, we also reject as without merit Appellant's contention that the jury verdict slip should have asked the jury to determine whether Appellees had proven that a safer alternate design to TracPipe existed at the time it was designed.

For the foregoing reasons, we perceive no trial error, and recommend the Appellant's appeal be denied.

Respectfully submitted,



Ronald C. Nagle S.J.

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

TERENCE D. TINCHER & JUDITH R. TINCHER, Appellee v. OMEGA FLEX, INC., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1472 EDA 2011

Appeal from the Judgment Entered June 1, 2011
in the Court of Common Pleas of Chester County
Civil Division at No(s): June Term, 2006, No. 08-00974

BEFORE: MUSMANNO, MUNDY, AND FITZGERALD,* JJ.

MEMORANDUM BY MUNDY, J.: **FILED SEPTEMBER 25, 2012**

Appellant, Omega Flex, Inc., appeals from the judgment entered June 1, 2011, in favor of Appellees, Terence D. Tincher and Judith R. Tincher, in this strict product liability action, involving the destruction of Appellee's home in a fire. After careful review, we affirm.

The factual and procedural history of this case as contained in the certified record follows. On January 28, 2008, Appellees initiated this action by filing a complaint against Appellant and others alleging negligence, strict liability, and breach of warranty[1] in connection with a fire that resulted in extensive damage to Appellee's home and its contents. On July 1, 2010,

[1] In their amended complaint filed March 18, 2008, Appellees changed the third count against Appellant to breach of implied warranty.

*Former Justice specially assigned to the Superior Court.

Appellant filed a motion for summary judgment on various grounds, which the trial court denied on September 27, 2010. On October 1, 2010, by agreement of all parties, the claims against all the other defendants in the case were dismissed. The matter proceeded to a jury trial held October 11, 2010 to October 20, 2010. The trial court has summarized the facts developed during the trial as follows.

> On June 20, 2007, a fire ignited at the Appellees' home located at 570 Gramercy Lane, Downingtown, Chester County, PA. The source of the fire was determined by the jury to be an indirect lightning strike[1] that energized the corrugated stainless steel tubing ("CSST") line[2], marketed by Appellant as "TracPipe" and installed in the house, connecting the main natural gas supply to a natural gas fireplace located on the first floor of Appellees' home. The fire caused substantial undisputed damage to Appellees' home and its contents. They were not at home at the time of the lightning strike and ensuing fire. ...
>
> The predominant issue in the case was whether the corrugated stainless steel tubing, manufactured and sold by Appellant under the brand name "TracPipe", was defective because of its inferior wall thickness (equal to the thickness of 4 sheets of paper), rendering it incapable of withstanding perforation by an electrical arc produced by lightning. The Appellees' expert testimony posited that a lightning strike energized the TracPipe, and in doing so created an electrical arc with other metal that perforated the TracPipe by burning a hole in the pipe through which natural gas was then ignited. The hole in the TracPipe was recovered from the area of the fire's origin near the fireplace, and was tested. A severed grounding wire, called a "bonding wire"[3], and its clamp were found hanging in the area of the fire's origin, and displayed

signs of melting and "forced damage". It was determined to have been connected to the TracPipe's manifold.

Substantial expert testimony was educed during this trial in the disciplines of metallurgy, materials science, arc physics and both direct and indirect lightning strikes. Appellees produced evidence from which the jury could find that, in comparison to black iron pipe, TracPipe has substantially greater susceptibility to perforation by lightning-induced energy than does black iron pipe, rendering it defective and posing a substantially greater fire hazard. Appellees also produced uncontroverted scientific evidence which established the approximate melting temperature of TracPipe, which is a stainless steel material, to be 2,600 degrees, well over two-times higher than the temperatures reached in a house fire, thereby eliminating the possibility that the TracPipe's perforation was caused by the fire itself. The house was examined after the fire by both fire officials and experts in fire cause and origin, who determined through examination of the physical evidence that the area of the house exposed to the greatest intensity of combustible fire damage occurred in the area of the fireplace where the perforated TracPipe was found.

The fire was of such intensity that the fireplace and significant parts of the first floor collapsed into the basement. Fire cause and origin experts for both sides examined the house, David Smith for Appellant, and Michael J. Moyer, Reading Fire Department Fire Investigator for Appellees. Smith opined that lightning had caused the fire at the TracPipe tubing near the fireplace. Moyer opined the cause of the fire was an indirect lightning strike which affected the TracPipe causing it to breach at a hole.

Appellant's testimony, while not disagreeing with the location in which the fire had started or the

TracPipe's perforation, opined that the fire was not caused by the indirect lightning strike, but instead caused by the electrical system which caused an electric arc, in turn causing the perforation in the TracPipe.

Appellants argued, that considering the risk-utility of TracPipe, Appellees had not proven it to be unreasonably dangerous, thereby requiring the court's analysis of same to resolve in Appellant's favor.

Secondly, Appellants moved for dismissal of Appellees' failure to warn claim. Appellees sued on a theory, among others, that Appellant should have provided warnings to use bonding wire of a greater diameter and with greater connection frequency than was used in the Appellees' house. Appellant argued that under the National Fire Protection Code a licensed electrician was not required to follow any such instruction and would not have done so. Conversely, Appellees argued, for reasons we discuss hereinafter, that the risk-utility standards predominated in their favor, and that the duty to warn related not to the electrician installing an electric system in a building, but to the Appellees as the end user's of the TracPipe product.

At the close of Appellees' case, Appellant moved for a nonsuit, which [the trial court] declined to grant. ...

At the close of all the evidence, Appellant moved for a directed verdict on the risk-utility strict liability claim. Appellees withdrew their negligent duty to test claim, agreeing it was subsumed in their negligent design claim. Appellees also voluntarily dismissed their failure to warn claim. ... [The trial court] denied the motion for a directed verdict.

On the verdict slip returned by the jury, the jury found that Appellant's TracPipe was defective, that the defect existed when the TracPipe left the

Appellant's hands, and that the defect was a proximate cause of Appellees harm; however, the jury also found that Appellant was not negligent in designing the TracPipe.[2]

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[1] There are 3 types of lightning strike: direct, indirect via air, and indirect via ground. Instantly, there was no evidence of a direct lightning strike to the Appellees' house. Rather, it was determined that lightning traveled in the ground from a direct strike nearby to the Appellees' house, in turn energizing the CSST pipe.

[2] CSST is a flexible tubing used to carry natural gas in buildings. It originated in Japan, which is subject to substantial earthquake activity. There, experience having taught that black iron pipe, traditionally used in building construction in the United States to convey natural gas, was highly susceptible to rupturing during an earthquake, corrugated flexible tubing was devised and successfully employed as a substitute material because of its ability to bend without breaking during such occurrences. It subsequently achieved some acceptance in the United States for such purpose in commercial and residential construction.

[3] Bonding refers to the fact that in a building with electric service it is normal for safety reasons to connect all metal objects, such as pipes, together to the alternating current (AC) electric power supply to form an equipotential zone. Equipotential bonding involves joining together metalwork to the Earth's conductive surface so that it is at the same potential (i.e., voltage) everywhere. Inadequate bonding renders metal objects susceptible to a hazardous conductive path. Examples of articles that require

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[2] The jury awarded Appellees aggregate damages in the amount of $958,895.85.

> bonding include metallic water piping systems and gas piping.

Trial Court Opinion, 8/5/11, at 1-7 (citations to record and some footnotes omitted).

On October 25, 2010, Appellees filed a motion for delay damages, and on November 1, 2010, Appellant filed a motion for post-trial relief, seeking, *inter alia*, JNOV.[3] On May 18, 2011, the trial court granted Appellees delay damages for $69,336.05 and denied Appellant's motion for post-trial relief. On June 1, 2011, upon praecipe of Appellees, the Prothonotary entered final judgment against Appellant in the amount of $1,028,231.90. Appellant filed a timely notice of appeal on June 3, 2011.[4]

Appellant raises the following issues on appeal.

> 1. Whether the trial court erred by denying [Appellant's] JNOV motion on the strict-liability claim under the standard set forth in the *Restatement (Second) of Torts*.
>
> 2. Whether, if the trial court did not err by denying [Appellant's] JNOV motion on the strict-liability claim under the standard set forth in the Restatement (Second) of Torts, the Pennsylvania Supreme Court should revisit that standard.

Appellant's Brief at 5.

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[3] October 30, 2010, the tenth day following the entry of the jury verdict, fell on a Saturday. Accordingly, Appellant's motion filed on Monday, November 1, 2010, was timely. ***See*** 1 Pa.C.S.A. § 1908.

[4] Appellant and the trial court have complied with Pa.R.A.P. 1925.

When we review a trial court's denial of a motion for JNOV, we apply the following standard of review.

> [W]e will reverse a trial court's denial of a motion for JNOV or a new trial only if we find an abuse of discretion or an error of law that controlled the outcome of the case. When, as here, the issue raised on appeal presents a question of law, our standard of review is *de novo* and our scope of review is plenary.

Walnut St. Assocs, Inc. v. Brokerage Concepts, Inc., 982 A.2d 94, 97 (Pa. Super. 2009) (citations omitted), *affirmed*, 20 A.3d 468 (Pa. 2011).

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict.... Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact.... A JNOV should be entered only in a clear case.

Braun v. Target Corp., 983 A.2d 752, 759-760 (Pa. Super. 2009) (citation omitted), *appeal denied*, 987 A.2d 158 (Pa. 2009).

In its first issue, Appellant asserts that it is entitled to a JNOV because the trial court misapplied the standard to prove strict product liability in this case. That standard derives from our Supreme Court's adoption of section

402A of the RESTATEMENT (SECOND) OF TORTS as the law of this Commonwealth. ***See Webb v. Zern***, 220 A.2d 853 (Pa. 1966).

> § 402A. Special Liability Of Seller Of Product For Physical Harm To User Or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate 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.

RESTATEMENT (SECOND) OF TORTS § 402A.

> To state a section 402A products liability claim in Pennsylvania, the plaintiff must prove that the defendant sold a product "in a defective condition," that the defect existed when the product left the defendant's hands, and that the defect caused the plaintiff's injuries. A product is "in a defective condition" when it lacks "any element necessary to make it safe for **its intended use** or possessing any element that renders it unsafe for **the intended use**." Because the key inquiry in all products liability

> cases is whether or not there is a defect, it is the product, and not the defendant's conduct, that is on trial.

Gaudio v. Ford Motor Co., 976 A.2d 524, 531-532 (Pa. Super. 2009) (citations omitted; emphasis added), *appeal denied*, 989 A.2d 917 (Pa. 2010).

Citing ***Pa. Dep't. of Gen. Servs. v. U.S. Mineral Prod. Co.***, 898 A.2d 590 (Pa. 2006), Appellant argues as follows.

> [S]trict liability applies only where a product causes injury in the ordinary course of its use—i.e., where it is used as intended by its intended users under its intended conditions of use.
>
> The legal and logical corollary to the foregoing is that Section 402A does not apply where a product causes injury when not used as intended by its intended users under its intended conditions of use—regardless of whether such injury is foreseeable.

Appellant's Brief at 19.

In ***General Services***, the Commonwealth commenced a strict products liability suit seeking recovery for property damage occasioned by the release of polychlorinated biphenyls (PCBs) from building materials manufactured by Monsanto Company. The allegations relevant to the appeal in that case averred the PCBs were released and spread during a fire in the building. A jury entered a verdict against Monsanto. On appeal, Monsanto argued that subjecting the materials to fire was not an intended use of the product. It also argued that the fact such an occurrence was foreseeable

was irrelevant and impermissibly inserted negligence concepts into a strict liability cause of action. Our Supreme Court agreed.

> [T]he two lines of reasoning applied by a majority of Justices in ***Phillips*** [***v. Cricket Lighters***, 841 A.2d 1000 (Pa. 2003)] to reach a common holding apply to foreclose a generalized conditions-of-use/ outside-cause-or-instigator exception to the bar against resort to negligence-based precepts within the strict liability scheme as it presently exists in Pennsylvania.

General Services, ***supra*** at 604.

Appellant contends that

> ***General Services*** is materially indistinguishable from this case. In both cases, a building product was damaged by an "outside cause or instigator" (fire in ***General Services***/lightning here) that damaged the product, and that damage in turn allowed substances within the product (chemicals in ***General Services***/natural gas here) to escape and injure the plaintiff's property (contamination in ***General Services***/fire here). Neither the fire in **General Services** nor the lightning here was part of the product's ordinary and intended conditions of use: just as the building materials at issue in ***General Services*** were not intended to fireproof a building, the TracPipe CSST at issue here is not intended to "lightning-proof" a house.

Appellant's Brief at 28-29.

The trial court rejected Appellant's argument and determined ***General Services*** to be distinguishable. The trial court noted that the Court in ***General Services*** cautioned that their "discussion does not address a situation in which a defect ... is the cause of combustion occurring **during**

their ordinary use." ***General Services***, ***supra*** at 601, n.11 (emphasis added). Thus, the trial court concluded as follows.

> In contrast [to the facts in ***General Services***], TracPipe was intended to transmit flammable natural gas in buildings, including residential homes. Appellees' allegations involving Appellant's TracPipe relate not to how the product performed during the fire, but how the product actually caused the fire that destroyed Appellees' home and contents because it was unsafe when exposed to lightning-induced energy that created an electrical arc with other metal that burned a hole in the TracPipe, causing a gas-fed fire. The ***General Services*** case stands for the proposition that incineration of building materials is not a use intended by the manufacturer; therefore, damages in strict liability are unavailable where the harm flowing from the product was the contamination it causes upon its burning.

Trial Court Opinion, 7/11/2011, at 23 (citation omitted).

We agree with the trial court. Instantly, Appellees claimed that Appellant's product was defective because TracPipe's thin walls were susceptible to perforation by an electrical arc generated by a lightning strike, which in this case caused the fire that destroyed their home. Appellant argues that the lightning was an outside instigator and not a normal condition of use. Appellant's Brief at 28. In both ***General Services*** and ***Phillips***, the unintended use or condition of use involved a circumstance that was ultimately in the control of the user of the product, unrelated to the normal use of the product. In ***General Services*** the source of the fire was unrelated to the products in question and the issue became the safety of the

product when burned as opposed to the safety of the product under normal use.[5] In ***Phillips*** a fatal fire was caused when a two-year-old child played with a cigarette lighter he took from his mother's purse, as opposed to intended use by an intended user. In both ***General Services*** and ***Phillips***, the fire and child-access, respectively, while possibly foreseeable, were nevertheless avoidable by the ultimate consumer of the product. In that sense, the alleged defects did not implicate the products under their intended uses. In the instant case, the occurrence of lightning, albeit arguably random and infrequent, is a natural recurring phenomenon in Chester County, beyond the control of Appellees when using the product for its intended use. TracPipe is designed and intended to convey natural gas to points of use, including residences, and Appellees employed the product as intended when the perforation and fire occurred.

In this case, the trial court performed the required risk-utility analysis, weighing appropriate factors. ***See*** Trial Court Opinion, 7/11/2011, at 11-20; ***see also Azzarello v. Black Bros. Co., Inc.***, 391 A.2d 1020, 1026 (Pa. 1978) (holding, in a strict product liability case, "[i]t is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be

[5] The Commonwealth also claimed that the building materials released PCBs under normal use, independent of the fire. This claim was not addressed in the referenced appeal but was the subject of subsequent litigation upon remand. ***See Pa. Dep't. of Gen. Servs. v. U.S. Mineral Prod. Co.***, 956 A.2d 967 (Pa. 2008).

justified" before submission to a jury); ***Surace v. Caterpillar, Inc.***, 111 F.3d 1039 (3d Cir. 1997) (noting required factors to be considered under Pennsylvania law in the trial court's risk-utility analysis).[6] Accordingly the jury was tasked with determining whether TracPipe "left [Appellant's] control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." ***Azzarello***, ***supra*** at 1027. In light of the foregoing, we conclude Appellant's first allegation of error affords it no relief.

Appellant's second issue, as phrased, is addressed to our Supreme Court. To the extent Appellant requests this Court to adopt the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, we decline to do so.

> Neither this Court nor the trial court has the authority to overrule the Supreme Court. ***See Foflygen v. R. Zemel, M.D. (PC)***, 420 Pa.Super. 18, 615 A.2d 1345, 1353 (1992) (stating "As an intermediate appellate court, this Court is obligated to follow the precedent set down by our Supreme Court."); ***see also, Bugosh v. Allen Refractories Co.***, 932 A.2d 901, 911 (Pa.Super.2007), wherein this Court rejected the same argument noting that ("[u]ntil and unless our Supreme Court alters its approach to strict liability, we will continue to adhere to established principles.") []. Consequently, the trial court did not err when it denied Appellant's request to have this matter proceed pursuant to the Restatement (Third) of Torts, *Products Liability,* § 2 (1997).

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[6] In its brief, Appellant has not pursued its challenge, as contained in its 1925(b) statement, to the trial court's risk-utility analysis conclusions.

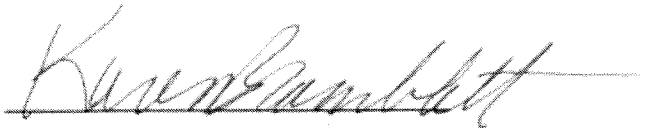
Estate of Hicks v. Dana Companies, LLC, 984 A.2d 943, 976 (Pa. Super. 2009).

Furthermore, our Supreme Court in its recent opinion in ***Beard v. Johnson & Johnson, Inc.***, 41 A.3d 823 (Pa. 2012), again declined to address the adoption of the RESTATEMENT THIRD OF TORTS: PRODUCTS LIABILITY § 2. ***See Sikkelee v. Precision Airmotive, Corp.***, 2012 U.S. Dist. LEXIS 91497, *26–30 (M.D. Pa. July 3, 2012) (holding that in light of ***Beard***, the Third Circuit's prediction that the Pennsylvania Supreme Court would adopt the RESTATEMENT THIRD OF TORTS: PRODUCTS LIABILITY § 2 is no longer binding on U.S. District Courts sitting in diversity and the RESTATEMENT (SECOND) OF TORTS § 402A remains the law of Pennsylvania).

In sum, we conclude the trial court did not err as a matter of law in allowing the strict product liability claim to be presented to the jury. We further conclude the trial court did not err in refusing to adopt the RESTATEMENT THIRD OF TORTS: PRODUCTS LIABILITY § 2 to the claim in this case. Accordingly, we affirm the June 1, 2011 judgment in favor of Appellees.

Judgment affirmed.

Judgment Entered.



Prothonotary

Date: 9/25/2012

M.D. Appeal Dkt.
17 MAP 2013

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TERENCE D. TINCHER AND JUDITH R. TINCHER,	:	No. 842 MAL 2012
Respondents	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
OMEGA FLEX, INC.,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 26th day of March 2013, the Petition for Allowance of Appeal is **GRANTED**, **LIMITED TO** the issue set forth below. Allocatur is **DENIED** as to all remaining issues. The issue, slightly rephrased, is:

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

In addition, the parties are directed to brief the question of whether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively. See generally Bugosh v. I.U. North America, Inc., 971 A.2d 1228, 1242-43 (Pa. 2009) (Saylor, J., dissenting, joined by Castille, C.J.).

The Motion to File a Reply Brief is **DENIED**.

A True Copy Elizabeth E. Zisk
As Of 3/26/2013

Attest: _____
Chief Clerk
Supreme Court of Pennsylvania