IN THE SUPREME COURT OF PENNSYLVANIA

18 EAP 2022

Michael and Melissa Sullivan, H/W,
Plaintiff/Appellee,

v.

Werner Company and Lowe's Companies, Inc.,
Appellants,

and

Middletown Township Lowe's Store #1572,
Defendant.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS

Appeal from the Judgment of Superior Court
entered on April 15, 2021, Affirming the November 19, 2019
Judgment of the Court of Common Pleas of
Philadelphia County, at October Term 2016, No. 3086

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the business community. Many members of the Chamber and the broader business community are manufacturers and designers of products that have an interest in Pennsylvania's strict-liability regime and this Court's jurisprudence post-*Tincher*. The business community relies upon industry and government standards to safely and cost-effectively design products for consumer use, and believes such standards are

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[1] Pursuant to Pennsylvania Rule of Appellate Procedure 531(a)(2), nobody other than the Chamber, its members, and its counsel paid for or authored the brief in whole or in part.

highly relevant to a jury's determination of the alleged defectiveness of a product. The Chamber has an interest in ensuring that businesses continue to market safe and cost-effective products, consistent with industry and government standards, for consumers in Pennsylvania and across the nation.

INTRODUCTION

Before *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), Pennsylvania courts categorically excluded evidence of a product's compliance with industry and government standards in strict product-liability cases on the assumption that such evidence "go[es] to the reasonableness of the [manufacturer's] conduct in making its design choices . . . [and thus] improperly" introduces "concepts of negligence law." *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 528 A.2d 590, 594 (Pa. 1987); *Gaudio v. Ford Motor Co.*, 976 A.2d 524 (Pa. Super. 2009). But consistent with national trends, *Tincher* dismantled the impermeable barrier between strict liability and negligence in product-liability cases when it recognized that "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." *Tincher*, 104 A.3d at 401.

Evidence of industry and government standards falls squarely within the overlap. Across the nation, these standards are admitted in design-defect cases as relevant evidence that tends to show the likelihood the design of a product will cause injury, the availability of a substitute

product that would meet the same need and not be unsafe, and the anticipated awareness by consumers of the dangers inherent in the design of a product and the consumer's ability to avoid them. Thus, industry and government standards are highly relevant to an assessment of a product's risk versus its utility.

Excluding evidence of these standards reverses the course that *Tincher* plotted for Pennsylvania courts. The Court should recognize the relevance of compliance with industry and government standards in design-defect cases.

ARGUMENT

Industry and Government Standards Are Relevant Evidence That Should Be Considered by the Jury.

Pennsylvania Rule of Evidence 401 provides that evidence is relevant if it "has *any tendency* to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Pa.R.E. 401 (emphasis added). "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material

fact." *Commonwealth v. Stallworth*, 781 A.2d 110, 117-18 (Pa. 2001).

To facilitate judgments based on an accurate understanding of the facts, the system of proof presupposes that the parties may present to the court or jury all the evidence that bears on the issues to be decided." McCormick on Evidence, § 184 (8th Ed. 2020). Thus, "*[a]ll* relevant evidence is admissible, except as otherwise provided by law." Pa.R.E. 402 (emphasis added).

The Court should recognize that industry and government standards easily satisfy the relevancy requirements in strict product-liability cases for three reasons. *First*, the business community relies upon industry and government standards to safely and cost-effectively design and manufacture products. These standards promote uniformity in product design, reduce costs associated with development and testing, and ensure the product is safely designed and manufactured. *Second*, industry and government standards are widely recognized by the majority of courts as relevant to a design-defect claim; the Court should take this opportunity to align Pennsylvania with the

majority of states on this issue. *Third*, Pennsylvania currently permits plaintiffs to introduce evidence of *non-compliance* with industry and government standards; permitting manufacturers to introduce testimony of compliance levels the currently uneven litigation playing field.

A. The Business Community Relies Upon Industry and Government Standards to Safely and Cost-Effectively Design and Manufacture Products.

Manufacturers across the country rely upon industry and government standards as their guideposts when designing a product for consumer use. Government rules and regulations frequently serve as the baseline by which a product is designed in order to comply with the law. And industry standards reflect a proven and often longstanding consensus among stakeholders and experts in the industry of the safest, most cost-effective method of designing a product that is useful to the consumer.

Businesses have good reason to rely upon these standards. For example, the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) "conduct[]

research on various safety and health problems," provide a notice and comment period to allow the industry to weigh in on any proposed standard, and publish standards that "[e]mployers must comply with." OSHA, *Law and Regulations: OSHA Standards Development*, https://www.osha.gov/laws-regs/standards-development (last accessed July 14, 2022).

Industry groups frequently employ a similar methodology when developing standards. For example, the American National Standards Institute (ANSI) "provide[s] a neutral forum for coordination and identification of standards and conformity assessment needs." ANSI, *Coordination in the U.S. Standardization System*, https://www.ansi.org/standards-coordination/coordination-us-system (last updated 2022). The institute "establishes standardization collaboratives, holds stakeholder workshops, and convenes other activities to bring together the relevant stakeholders to assess and address standardization needs in a particular industry." *Id.* The creation of these standards is guided by the analysis and balancing of principles that encompass *Tincher's* risk-utility standard for products-

liability cases. *Compare Tincher*, 104 A.3d a 398-99 (listing factors including usefulness of product, likelihood it will cause injury to user, ability to eliminate unsafe character, and ability for user to avoid danger with exercise of care) *with* ANSI, *Consumers and Standards*, https://www.ansi.org/outreach/consumers/consumers-standards (last updated 2022) ("Consumers provide critical, first-hand perspectives on how products will be perceived and used in the marketplace. The consideration of these insights improves standards outcomes for all end users . . .").

Before *Tincher*, Pennsylvania courts had held—contrary to the majority of states—that evidence of these standards is not relevant to the question of design defect. *Lewis*, 528 A.2d at 594. That position harms manufacturers who invest time and resources to meet or exceed industry standards, because they cannot rely on their compliance efforts as a defense against a strict product-liability claim in Pennsylvania. Depriving manufacturers of this defense undermines the incentive to undertake compliance efforts in the first place.

By contrast, as discussed below, the majority of states reward compliance with uniform standards for designing safe, cost-effective products by recognizing the relevance of this evidence to a design-defect claim. Under the Superior Court's rule, Pennsylvania would push manufacturers in the other direction.

B. Permitting Industry and Government Standards Evidence is Consistent with *Tincher* and the Majority of States.

Before *Tincher*, Pennsylvania stood as an outlier with its strict adherence to eliminating all concepts of negligence in strict product-liability cases.[2] This also made Pennsylvania an outlier with respect to the treatment of industry and government standards in design-defect cases. The majority of courts recognize that, although "customs in the trade, guidelines of voluntary associations, and regulations by legislatures and administrative agencies" are generally "admissible in evidence," they are "not . . .

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[2] The Chamber focuses on design-defect claims because it is the particular claim at issue in this case. The Chamber also contends that evidence of industry and government standards is relevant in other strict product-liability claims based upon manufacturing defects and failure to warn. Those issues are not before the Court in this appeal.

controlling" and do "not insulate a manufacturer from liability." John W. Wade, *On Product 'Design Defects' and Their Actionability*, 33 Van. L. Rev. 551, 569 (1980). Pennsylvania, however, categorically excluded such evidence. *See Lewis*, 528 A.2d at 594.

In *Tincher*, the Court took the first step towards bringing Pennsylvania in line with the majority of states. It recognized that "trial courts simply do not necessarily have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous." 104 A.3d at 380. The Court in *Tincher* adopted a "composite" test for strict-liability claims, which permits a plaintiff to prove a design defect using *either* of the prevailing tests: the consumer's expectations test or the risk-utility test. 104 A.3d at 401. The Court, however, left open the question of the treatment of industry and government standards.

Under either test, compliance with industry and government standards is highly relevant to establishing

whether a product's design is defective.[3] As to risk-utility, which is the test at issue here, in forming standards and regulations, government agencies and industry associations regularly consider factors similar to those identified by the Court in *Tincher*. These factors include "[t]he safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury," "[t]he availability of a substitute product which would meet the same need and not be as unsafe," "[t]he manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness of making it too expensive to maintain its utility," and "[t]he user's anticipated awareness of the dangers

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[3] Plaintiffs only pursued the risk-utility test, and the jury was not instructed as to consumer expectations. As such, the Chamber focuses its attention on the risk-utility test. However, industry and government standards are also relevant to a consumer's expectations because they inform what an ordinary consumer "would expect when [a product is] used in an intended or reasonably foreseeable manner." *Tincher*, 104 A.3d at 368 (quoting *Lewis*, 528 A.2d at 593). A consumer can be expected to rely upon "any express or implied representations by a manufacturer or other seller." *Id.* at 387. A manufacturer's representation that a product complies with an applicable standard is a factor considered by the consumer when using the product, and a jury should be permitted to hear whether the product complied with that standard.

inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions." *Tincher*, 104 A.3d at 327-28.

Relevant to the scaffolding design here, courts have consistently recognized the relevance of OSHA-issued standards to strict-liability claims. *See, e.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 50 (Conn. 1997) ("[W]here the OSHA regulation at issue relates to the safety of a product, evidence that the product is in compliance with that regulation may be considered by the jury as a factor in determining whether the product is defectively designed . . . ."); *Knitz v. Minster Mach. Co.*, No. L-84-125, 1987 WL 6486 at *31 (Oh. Ct. App. Feb. 9, 1987) (unpublished) ("[T]here is strong support to indicate when OSHA regulations are promulgated, they are done so in a manner which requires that the regulations take into consideration the feasibility of the design."); *Deyoe v. Clark Equip. Co., Inc.*, 655 P.2d 1333, 1337 (Az. Ct. App. 1982) ("The evidence that we approve is that the compactor, not the

manufacturer's conduct, conforms to federal OSHA standards.").

Courts have also recognized the relevance of other government-issued standards to strict-liability design-defect claims. *Grundberg v. Upjohn Co.*, 813 P.2d 89, 97, 97 n.8 (Utah 1991) (recognizing "the expertise of certain governmental agenc[ies]" the legislature created a "rebuttable presumption that a product which fully complies with the applicable government standards at the time of marketing is not defective."); *Rucker v. Norfolk*, 396 N.E.2d 534, 537 (Ill. 1979) ("[E]vidence of compliance with Federal standards is relevant to the issue of whether a product is defective . . . . If the product is in compliance with Federal standards, the finder of fact may well conclude that the product is not defective, thus ending the inquiry into strict liability.").

Industry standards are no different: "Compliance with industry standards may be relevant to the question of whether a product was reasonably safe as designed, and with respect to the feasibility of alternative designs . . . . Not to permit such evidence would . . . unfairly limit a

defendant's opportunity to provide the trier of fact with information that may be helpful in its assessment of liability." *Church Ins. Co. v. Trippe Mfg. Co.*, No. 04 Civ. 6111 (HB), 2005 WL 2649332 at *2 (S.D.N.Y. 2005).

Industry and government standards therefore directly inform a manufacturer's design choices. Such standards also inform consumer decision-making. Industry and government standards provide consumers valuable information regarding the safety of a product and its intended uses, reduce potential confusion between products through the creation of clear and publicized benchmarks, and aid the comparison of products—all of which are relevant to the utility of the product to a consumer. Industry and government standards therefore meet Evidence Rule 401's broad relevancy requirement.

C. Permitting Compliance Evidence in Design-Defect Cases Levels the Litigation Playing Field Between Plaintiffs and Manufacturers.

Before *Tincher*, "industry standards [were] irrelevant and inadmissible to show that a product is not defective . . . [but] relevant and admissible for the purpose of showing that a product is defective." *Majdic v. Cincinnati Mach. Co.*,

537 A.2d 334, 345 (Pa. 1988) (Wieand, J., dissenting). This created an uneven litigation playing field between plaintiffs and manufacturer defendants in Pennsylvania with respect to standards. Plaintiffs can readily seek to admit evidence of *non-compliance* as proof of a defect. *See, e.g.*, *Gaudio*, 976 A.2d at 524 (permitting only plaintiffs to "'open the door' to the introduction of evidence of compliance with industry or government standards . . ."); *Castner v. Milwaukee Elec. Tool Corp.*, No. Civ.A. 02-5371, 2004 WL 2577554 at *1 (E.D.Pa. 2004) (finding that, absent plaintiff's introduction of an industry standard, "the defendants will not be able to introduce evidence of industry standards."). But manufacturer defendants cannot introduce such evidence. Instead, they have to wait for plaintiffs to "open the door." *Gaudio*, 976 A.3d at 544.

General widespread knowledge of the existence of industry and government standards tilts the playing field even further in a plaintiff's favor, worsening the unfair prejudice for defendants. Jurors are acutely aware that manufacturers design their products in conformance with industry and government standards. (*See* R. 1201a-1202a

(deliberating jury returning a note specifically asking whether "OSHA inspect[s] every product that is put on the market . . . ?").) As a result, if manufacturers are categorically excluded from admitting evidence of compliance in the first instance, jurors may draw the improper inference that the product *is non-compliant*, because they have not heard the evidence they expect to exist of compliance with applicable industry and government standards. A plaintiff should not have to introduce evidence of non-compliance and "open the door" before a manufacturer can address compliance with standards.

Regardless of the questionable merits of the prior one-sided evidence rule favoring plaintiffs, after *Tincher*, there is simply no basis to continue this uneven litigation playing field. Rather, the Court should adopt the view of the "majority of courts" which have held "industry standards are generally admissible in strict product liability cases, although not conclusive" evidence in either direction. *Majdic*, 537 A.2d at 345.

Falling in line with the majority of courts has beneficial, downstream consequences for manufacturers and

consumers alike. Uniform measures of product safety that are relevant to a defense against strict-liability claims provide manufacturers safe and cost-effective guidance on how to design and manufacture a product. Such guidance avoids costly product-development testing as well as litigation concerning disparate and non-compliant designs. Absent uniform standards, manufacturers will be forced to independently undertake costly development and testing procedures, resulting in higher costs passed on to consumers. A uniform standards development process absorbs those costs, while still guaranteeing a safe product. Moreover, precluding manufacturers from introducing compliance with industry and government standards evidence results in unpredictable, large judgments against compliant manufacturers. Not only is this manifestly unfair to the manufacturer, it risks driving compliant-manufacturers out of the market. For all of the above reasons, the Court should take this opportunity to conform Pennsylvania law to the majority rule.

CONCLUSION

The Court should reverse the Superior Court's decision.

July 18, 2022

/s/ Robert L. Byer

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CERTIFICATE OF COMPLIANCE Pa. R.A.P. 127

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

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CERTIFICATE OF COMPLIANCE Pa. R.A.P. 2135

Pursuant to Pa.R.A.P. 2135, I certify that this Brief complies with the word-count limit set forth in Rule 2135. Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required under Rules 531, and 2135(b), (d)), contains 2,806 words.

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