# A WORLD AFTER *TINCHER V. OMEGA FLEX*:

# PENNSYLVANIA COURTS SHOULD PRECLUDE INDUSTRY STANDARDS AND PRACTICES EVIDENCE IN STRICT PRODUCTS LIABILITY LITIGATION*

## I. INTRODUCTION

When a product causes injury—whether that product is functioning, malfunctioning, useful, or non-useful—its manufacturer can be subject to liability under a number of causes of action.[1] Because the manufacturer is responsible for a product's quality, it is strictly liable for defects; this standard "may persuade manufacturers to exercise greater caution in producing their goods."[2] However, nestled behind a strict products liability analysis is a "struggle[] to balance individual fairness with social utility."[3] On one hand, strict liability and warranty law call for the imposition of liability on "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer."[4] Liability in such a case is premised on the idea that manufacturers should bear responsibility for injuries caused by their products.[5] This speaks to one of the main objectives of strict liability law: to protect consumers by providing a remedy for injuries.[6] On the other hand, strict liability also allows for the possibility that "the danger may be overridden by the social utility of a product."[7] In some cases, liability will not attach if, on balance, the inherent

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1. See *infra* Part III.C for a discussion of the causes of action under which relief can be sought when a product causes injury.

2. Michael R. Maule, Comment, *Applying Strict Products Liability to Computer Software*, 27 TULSA L.J. 735, 743 (1992).

3. John L. Watts, *Fairness and Utility in Products Liability: Balancing Individual Rights and Social Welfare*, 38 FLA. ST. U. L. REV. 597, 601 (2011).

4. Douglas A. Kysar, *The Expectation of Consumers*, 103 COLUM. L. REV. 1701, 1710–11 (2003) (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965)).

5. *See* Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1186 (1992) (arguing that strict products liability is intended to protect innocent consumers and was created to hold manufacturers liable for defective products).

6. *See id*. at 1186–87.

7. Barbara Pfeffer Billauer, *Primacy in Products Liability: A Comparison of Israeli and American Law*, 51 TORT TRIAL & INS. PRAC. L.J. 943, 956–57 (2016).

social value of the product outweighs its potential danger.[8]

Understanding this need to balance individual fairness against social utility, modern courts settled on the concept of strict products liability, finding that regardless of the due care exercised by the actor, strict liability attaches when a product is "defective" or "unreasonably dangerous."[9] This standard ensures that products that are useful yet dangerous are not preemptively removed from the market and that injured victims retain a much-needed remedy.[10] However, this judicial attempt to create a new class of liability distinct from negligence proved to be a distinction without a difference.[11] Therein lies the essential problem of this Note.

Since the introduction of strict products liability law into American jurisprudence, scholars and judges have attempted to distinguish strict liability from negligence.[12] This Note will refer to this distinction as the "negligence-strict liability dichotomy."[13] Despite these attempts to create a distinction, courts have used a reasonableness standard in products liability cases that is essentially "negligence, wrapped in a strict liability shroud."[14] Further, until recently, Pennsylvania courts had struggled to define when a product should be subject to strict liability, which has led to confusing results.[15] For example, in *Azzarello v.*

8. *See* Watts, *supra* note 3, at 605–06; *see also* Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1245–48 (1990) ("It is useful to characterize the level of social utility as: (1) conduct utterly lacking social utility as judged by currently prevailing social standards; (2) conduct which has some overwhelming social utility; and (3) conduct having some intermediate level of social utility.").

9. RESTATEMENT (SECOND) OF TORTS § 402A(1). See *infra* Section III for a detailed overview of strict liability and how applies to defectively designed products.

10. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k ("There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs."); Elizabeth A. Weeks, *Beyond Compensation: Using Torts to Promote Public Health*, 10 J. HEALTH CARE L. & POL'Y 27, 49 (2007).

> Products liability, like negligence and abnormally dangerous activities, operates from a utilitarian calculus. Even the most stringent, no-fault formulations of strict products liability are not aimed at perfect safety. Indeed, if that were so, consumers would be denied a whole range of useful yet dangerous products, including everything from children's toys to automobiles to medical devices to firearms. Just as American courts in the industrial age recognized the inevitability, and non-compensability, of some level of accidental injury, products liability law allows some hazardous products to stay on the market and product-related injuries to go uncompensated.

*Id.* (footnote omitted).

11. See *infra* Section III for a discussion of the similarities between strict liability and negligence.

12. See *infra* Part III.C for a discussion of the attempts by Pennsylvania courts to distinguish strict liability from negligence.

13. Tincher v. Omega Flex, Inc., 104 A.3d 328, 376 (Pa. 2014).

14. David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 ILL. U. L. REV. 743, 744 (1996). See *infra* Part III.C for the application of various tests used by Pennsylvania courts in deciding products liability cases.

15. See *infra* Part III.C for a discussion of strict liability cases in Pennsylvania leading up to *Tincher*.

*Black Brothers Co.*,[16] the Pennsylvania Supreme Court drew a sharp line between strict liability and negligence.[17] Later courts applied *Azzarello*'s hard line to prevent the admission of "negligence evidence and theories" in strict liability cases.[18] One such form of negligence-based evidence, industry standards and practices evidence—the subject of this Note—has presented particular difficulties.[19]

In light of these complications, the 2014 Pennsylvania Supreme Court decision, *Tincher v. Omega Flex, Inc.*,[20] restructured the analysis for products liability for defective design in Pennsylvania and laid the framework for understanding its future.[21] *Tincher* overruled *Azzarello*[22] and realigned Pennsylvania law with the law of many other jurisdictions.[23] It primarily accomplished this by acknowledging that negligence-based principles are necessarily woven into the strict liability framework.[24] The *Tincher* court expressly refused to adopt the Restatement (Third) of Torts,[25] thereby retaining Pennsylvania as a Restatement (Second) of Torts jurisdiction, and held that plaintiffs should have the opportunity to argue defective design claims under alternative theories of liability.[26] This Note will examine the impact of *Tincher* on evidentiary issues in Pennsylvania defective design products liability litigation, specifically the admission of industry standards and practices evidence to prove or defend against strict liability claims. This Note will argue that despite *Tincher*'s reintegration of negligence principles into the strict liability framework, industry standards and practices should remain excluded in strict

16. 391 A.2d 1020 (Pa. 1978).

17. *See Azzarello*, 391 A.2d at 1026–27.

18. Lindsey E. Buckley, Comment, *Recreational UAVs: Going Rogue with Pennsylvania's Strict Products Liability Law Post*-Tincher, 15 U. PITT. J. TECH. L. POL'Y 243, 255–56 (2015); *see also* Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 594 (Pa. 1987) (holding that industry standards are inadmissible in a strict liability analysis because industry standards reference the concept of due care, which is inherently negligence based).

19. *See* Buckley, *supra* note 18, at 254–55.

20. 104 A.3d 328 (Pa. 2014).

21. *See Tincher*, 104 A.3d at 432–33; Buckley, *supra* note 18, at 256–60.

22. *Tincher*, 104 A.3d at 376.

23. *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443, 455–56 (Cal. 1978) (holding that plaintiff can prove a product is defective using either the consumer expectations test or the risk utility test); Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 440–41 (Ind. 1990) (acknowledging that negligence-based principles like foreseeability and expected use are necessary considerations in a products liability analysis).

24. *See Tincher*, 104 A.3d at 376–78.

25. *Id.* at 395–99. See Part III.C for a discussion of why *Tincher* refused to adopt the Restatement (Third) of Torts.

26. *Id.* at 406 (holding that plaintiffs in Pennsylvania must prove that a product was defective using the consumer expectations test, the risk-utility test, or a combination of both tests); *see also* Buckley, *supra* note 18, at 259 ("Plaintiffs may now show that a product is in a defective condition by proving: (1) the danger is unknowable and unacceptable to the average or ordinary consumer (i.e., consumer expectations test), or (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden costs of taking precautions (i.e., risk-utility test)." (footnotes omitted)).

liability cases under *Lewis v. Coffing Hoist Divison, Duff-Norton Co.*[27] because their tendency to divert the jury's attention to the reasonableness of a product's design outweighs their evidentiary value. Moreover, allowing such evidence would eliminate any remaining distinction between negligence and strict liability and undermine the protective purpose of strict liability.

## II. FACTS AND PROCEDURAL HISTORY

On June 20, 2007, a fire broke out at the home of Terrence and Judith Tincher.[28] Although no one was injured, the Tinchers faced substantial damage to their home and property.[29] Shortly after the incident, investigators concluded that the fire was caused by a lightning strike adjacent to the home; it punctured the corrugated stainless steel tubing (CSST) used to supply natural gas to their fireplace.[30] Omega Flex manufactured and sold this CSST.[31] Because the insurance company only compensated the Tinchers up to their policy limits, the Tinchers sued Omega Flex for additional losses.[32] In a January 2008 lawsuit, they claimed strict liability, negligence, and breach of warranty.[33]

After the court denied all dispositive motions, Omega Flex proposed a motion *in limine*, jury instructions, and findings of fact consistent with sections 1 and 2 of the Third Restatement.[34] Under the Third Restatement, 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 . . . and the omission of the alternative design renders the product not reasonably safe."[35]

Arguing instead under the Second Restatement, during trial, the Tinchers offered expert testimony that the CSST was defectively designed because it could not withstand a lightning strike; it was substantially thinner than the standard black iron piping used at the time.[36] The Tinchers argued that unlike under the Third Restatement, under Pennsylvania's interpretation of the Second Restatement, a product is subject to liability when that product "leaves the suppliers' control lacking any element necessary to make it safe for its intended use."[37] In response, Omega Flex "expressly assumed that the trial court had denied its request to apply the Third Restatement"[38] and offered expert testimony that the benefits of CSST arose from its greater flexibility (relative to

27. 528 A.2d 590 (Pa. 1987).
28. *Tincher*, 104 A.3d at 335–36.
29. *Id.* at 336.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (1998).
36. *Tincher*, 104 A.3d at 337–38.
37. *Id.* at 340–41.
38. *Id.* at 338.

that of black iron piping).[39] These benefits included "resistance to corrosion, structural shifts, and mechanical ruptures; ease of installation, relocation, and retrofitting; and fewer joints accompanied by decreased susceptibility to natural gas leaks at any required joints."[40] After Omega Flex rested, the court denied the Tinchers' motion for a directed verdict and, per Pennsylvania's interpretation of the Second Restatement, instructed the jury, in part, as follows:

> A product is defective when it is not safe for its intended purpose. That is, it leaves the suppliers' control lacking any element necessary to make it safe for its intended use. The inquiry is whether or not there is a defect, not whether the defendant['s] conduct was negligent. In strict liability there is no consideration of negligence. It is simply, was the product defective or wasn't it defective.[41]

In October 2012, the jury awarded the Tinchers nearly $1,000,000.00.[42]

Omega Flex immediately filed a motion for a new trial "premised upon trial court errors in denying its motion in limine and in failing to instruct the jury on the law as articulated in the Third Restatement."[43] Additionally, Omega Flex filed for a motion for "judgment notwithstanding the verdict on the theory that the evidence introduced at trial was insufficient to prove a claim of strict liability under Third Restatement principles."[44]

> Omega Flex emphasized that the trial court's *Azzarello*-based instructions on the Second Restatement confused the jury: first, by mentioning, without explaining, the relevance of evidence of a proposed alternative design, *i.e.,* the black pipe system; second, by failing to guide the jury on the burden of proof relating to the alternative design; and, third, by failing to explain how the jury should consider the role of lightning in assessing liability.[45]

The Superior Court of Pennsylvania upheld the verdict, finding that the trial court did not err by refusing to adopt the Third Restatement.[46] The court further held "that the Tinchers' claims implicated notions of strict liability, and the Tinchers had carried their burden of proof under the Second Restatement and *Azzarello*" because "lightning is a naturally occurring phenomenon outside the control of the Tinchers, who were using the product for its intended use."[47] The Supreme Court of Pennsylvania granted appeal on the limited question of "[w]hether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement."[48] In

39. *Id.*

40. *Id.*

41. *Id.* at 339 (alteration in original) (quoting Notes of Testimony at 794–98, Tincher v. Omegaflex, Inc. No. 2008-00974-CA (Pa. Ct. Com. Pl. Oct. 19, 2010)).

42. *Id.* at 340–41.

43. *Id.* at 341.

44. *Id.*

45. *Id.* at 341–42.

46. *Id.* at 343.

47. *Id.*

48. *Id.* (quoting Order Granting the Appeal, Tincher v. Omega Flex, Inc., No. 842 MAL 2012

other words, it would assess whether a plaintiff must show that "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design."[49]

## III. PRIOR LAW

Part III.A of this Note provides a brief overview of the early history of products liability. Part III.B summarizes the development of strict products liability in the United States, specifically focusing on its development in Pennsylvania. Finally, Part III.C analyzes seminal cases that illustrate Pennsylvania courts' attempts to strike a balance between strict liability and negligence for products liability. Specifically, this Part includes an overview of the risk-utility test, the consumer expectations test, and Pennsylvania courts' preclusion of industry standards and practices evidence.

### *A. Early History of Products Liability Law*

Scholars have suggested that products liability law has ancient roots in the Roman and Babylonian Empires.[50] For instance, "guilds of the various crafts developed an elaborate system of localized criminal regulation of product quality by statutes that often developed into ordinances of the town."[51] Interestingly, the primary goal of the statutes was not to prevent injury to the public, but rather "to protect the public . . . from being cheated."[52] However, English law adopted the concept of caveat emptor, "let the buyer beware," thereby abandoning "any notion of an implied warranty of quality[] lingering from the late Roman and ecclesiastical law."[53] In the nineteenth century, English courts developed the implied warranty of quality doctrine, which replaced the caveat emptor rule.[54] The notion of implied warranty of quality is sometimes referred to as *caveat venditor*.[55] But because claims brought under the implied warranty of quality were rooted in contract,[56] recovery under that theory required privity between parties.[57] Manufacturers responded to the looming possibility of

(Pa. Mar. 26, 2013)).

49. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (AM. LAW INST. 1998).

50. *See, e.g.*, David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 956 (2007) [hereinafter Owen, *The Evolution*].

51. *Id.* at 957–58.

52. *Id.*

53. *Id.* at 958–59 (internal quotation marks omitted) ("For the next two centuries, except for cases of fraud and breach of express warranty, the doctrine of *caveat emptor* ruled supreme.").

54. *Id.* at 959 (defining implied warranty of quality as "the seller impliedly warrants that its products contain no hidden defects").

55. *Id.* at 961–62.

56. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960) (finding that although originally intended to lie in tort, the implied warranty of quality "came to lie mainly in contract" (quoting Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 415 (1929))).

57. *See* Owen, *The Evolution*, *supra* note 50, at 960–63 ("Unlike the development of the implied warranty of quality, which served to broaden contractual protection for buyers of defective goods, the

liability under the implied warranty of quality by creating a system of one-off sales that forced consumers to contract with a retailer, instead of a manufacturer, thereby eliminating privity and allowing the manufacturer to escape liability.[58] Thus, the plaintiffs faced substantial hurdles in bringing implied warranty of quality claims.[59] While caveat emptor perpetuated into the twentieth century, "enough American states had adopted a common law implied warranty of quality that the doctrine was promulgated as a uniform statute in the Uniform Sales Act of 1906."[60]

While some plaintiffs sought relief using negligence-based claims rather than implied warranty of quality claims, they faced similar hurdles, including the privity problem.[61] Many courts refused to extend both negligence-based and contract-based liability beyond parties in privity as they believed that exposing manufacturers to such liability—beyond the immediate purchaser and supplier—would be overly broad and would stunt the growth of the burgeoning American manufacturing market.[62] However, in the 1916 landmark case, *MacPherson v. Buick Motor Co.*,[63] Justice Benjamin Cardozo "rejected the notion of privity in cases where negligently made products caused personal injury."[64] In *MacPherson*, Justice Cardozo stated: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger," and the manufacturer is subject to liability where such danger was foreseeable.[65]

privity of contract rule went the other direction by restricting tort law's protection of persons injured by defective products."); *see also* Prosser, *supra* note 56, at 1100 ("What happened in the next century was enough to make the learned jurist turn in his grave. The courts began by the usual process of developing exceptions to the 'general rule' of nonliability to persons not in privity.").

58. *See* Owen, *The Evolution*, *supra* note 50, at 962–63 ("As courts began imposing implied warranties of quality on manufacturers in the latter part of the nineteenth century, manufacturers increasingly were handing over the retail function to third-party dealers . . . . Thus, manufacturers sued in warranty by consumers of defective products in the late 1800s and early 1900s had available the ready-made defense of no privity of contract . . . ."). *Contra* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) (rejecting the privity requirement for products liability claims, and holding that "the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer").

59. Prosser, *supra* note 56, at 1127–30.

60. Owen, *The Evolution*, *supra* note 50, at 961–62, 962 n.28 (noting that the Uniform Sales Act of 1906 was the "predecessor to Article 2 of the Uniform Commercial Code").

61. *See id.* at 962; *see also* Lebourdais v. Vitrified Wheel Co., 80 N.E. 482, 482–83 (Mass. 1907) ("If such an extended liability attached where no privity of contract exists it would include all persons however remote who had been damaged either in person or property by his carelessness, and manufacturers as a class would be exposed to such far-reaching consequences as to seriously embarrass the general prosecution of mercantile business."); Curtain v. Somerset, 21 A. 244, 245 (Pa. 1891) ("It is safer and wiser to confine such liabilities to the parties immediately concerned.").

62. *See* LYNDA J. OSWALD, THE LAW OF MARKETING 355 (2d ed. 2011); Owen, *The Evolution*, *supra* note 50, at 963–64.

63. 111 N.E. 1050 (N.Y. 1916).

64. OSWALD, *supra* note 62, at 366.

65. *MacPherson*, 111 N.E. at 1053.

### *B. The Development of Strict Products Liability*

Although *MacPherson*'s application of negligence-based products liability in the absence of privity foreshadowed future developments in strict products liability law, the modern concept of strict products liability[66] was not officially presented until Justice Traynor's California Supreme Court concurrence in *Escola v. Coca Cola Bottling Co*.[67] In *Escola*, a retail sales associate suffered an injury after a bottle of Coca-Cola exploded in her hand.[68] Despite the defendant's argument that there was an absence of privity between the sales associate and the manufacturer, Justice Traynor stated that "a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[69]

Seemingly building on Justice Traynor's concurrence in *Escola*, the *Henningsen v. Bloomfield Motors, Inc*.[70] court shifted warranty actions from contract law to tort law.[71] In *Henningsen*, the New Jersey Supreme Court allowed a third party to sue an automobile manufacturer for injuries sustained from a defective automobile despite the absence of privity between the manufacturer and the plaintiff and despite the disclaimer of warranties in the purchase order.[72] The *Henninsgen* court reasoned that the concept of the implied warranty of quality was created to protect the ordinary consumer.[73] Picking up on Justice Traynor's argument in *Escola,* the court allowed recovery because of "the consumer's relative lack of knowledge and control of product safety factors, the pressure of modern advertising and marketing techniques, and the 'gross inequality of bargaining position occupied by the consumer in the automobile industry.'"[74] Therefore, in the absence of adequate inspection opportunity, even without privity, liability was warranted.[75]

Then, in 1963, Justice Traynor's *Escola* analysis was endorsed by a majority

66. See *infra* Part III.C for a discussion of modern strict liability.

67. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

68. *Escola*, 150 P.2d at 438 (majority opinion).

69. *Id.* at 440 (Traynor, J., concurring).

70. 161 A.2d 69 (N.J. 1960).

71. *See Henningsen*, 161 A.2d at 80–81; *see also* OSWALD, *supra* note 62, at 359–60 ("The 1960 decision of the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*, radically changed the law regarding privity in warranty actions.").

72. *See Henningsen*, 161 A.2d at 74, 84 (holding that when a manufacturer produces and promotes an automobile, it is accompanied by "an implied warranty that it is reasonably suitable for use" and that "agency between the manufacturer and the dealer . . . is immaterial."); Owen, *The Evolution*, *supra* note 50, at 969–71 (explaining that in *Henningson*, defendants alleged on appeal that claims "should have been dismissed" for lack of privity and because the sales contract contained a "disclaimer of implied warranties and limitation of remedies").

73. *Henningsen,* 161 A.2d at 78.

74. Kysar, *supra* note 4, at 1710 (quoting *Henningsen*, 161 A.2d at 87).

75. *See Henningsen*, 161 A.2d at 78 ("Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.").

of the California Supreme Court in *Greenman v. Yuba Power Products Inc.*,[76] which signaled the shift of products liability entirely out of contract and into tort.[77] In *Greenman,* the plaintiff was injured by a power tool that his wife had purchased as a gift.[78] Writing for the majority, Justice Traynor discarded the breach of warranty requirement previously needed for a strict products liability claim and held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[79] Although *Greenman* officially ushered products liability law into the realm of torts, the *Greenman* court did not identify how to differentiate this strict liability analysis from a negligence analysis.

### *C. Strict Products Liability Law in Pennsylvania*

In 1965, the American Law Institute published the Second Restatement, which reflected this shifting landscape of products liability law in the United States and attempted to distinguish strict products liability from negligence.[80] Section 402A of the Second Restatement "officially promulgated the rule of strict products liability in tort,"[81] providing that strict liability should apply if a product is "defective" or "unreasonably dangerous."[82]

In the late 1960s, building on the reasoning outlined in the Second Restatement and the recommendations of Justice Jones's concurrence and dissent in *Miller v. Preitz*,[83] Pennsylvania began to apply the Second Restatement to products liability cases.[84] In 1966, the Pennsylvania Supreme

76. 377 P.2d 897 (Cal. 1963).

77. *See Greenman*, 377 P.2d at 900–01 ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."); Owen, *The Evolution*, *supra* note 50, at 967 (explaining that *Greenman* "declared that manufacturers of defective products are strictly liable in tort to persons injured by such products, irrespective of any contract limitations that might inhere in the law of warranty").

78. *Greenman*, 377 P.2d at 898.

79. *Id.* at 900.

80. Owen, *The Evolution*, *supra* note 50, at 974–75.

81. *Id.* at 967; *see also* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) ("(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.").

82. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. h; *see also* OSWALD, *supra* note 62, at 367–69.

83. 221 A.2d 320, 334–35 (Pa. 1966) (Jones, J., concurring and dissenting) (reasoning that if the court sought to retain the requirement of privity, the court should adopt the Second Restatement because the result would be the same).

84. *See* Owen, *The Evolution*, *supra* note 50, at 976–77; *see also, e.g.*, Jarnot v. Ford Motor Co., 156 A.2d 568, 572 (Pa. Super. Ct. 1959) ("A person, who after the purchase of a thing, has been

Court formally adopted the Second Restatement as the law in Pennsylvania in *Webb v. Zern*.[85] In *Webb*, the plaintiff purchased a full beer keg from the defendant beer distributor.[86] The same day, after it was tapped, the keg exploded and injured the plaintiff.[87] After adopting section 402A of the Second Restatement as the law in Pennsylvania, the *Webb* court permitted the plaintiff to amend his complaint.[88]

1. The Consumer Expectations Test, the Risk-Utility Test, and the Second Restatement

Under the newly adopted Second Restatement, courts had to instruct juries how to determine whether a product was "in a defective condition unreasonably dangerous."[89] Whereas the Pennsylvania Supreme Court declared that the Second Restatement was intended only as an outline meant to guide courts and lawyers,[90] other jurisdictions looked to comments i and g of section 402A for guidance in drafting jury instructions.[91] Comment i to section 402A of the Second Restatement outlines what is now called the consumer expectations test.[92] In relevant part, comment i states: "The article sold must be dangerous to

damaged because of its unfitness for the intended purpose may bring an action in assumpsit against the manufacturer based on a breach of implied warranty of fitness; and proof of a contractual relationship or privity between the manufacturer and the purchaser is not necessary to impose liability for the damage.").

85. 220 A.2d 853, 854–55 (Pa. 1966).

86. *Webb*, 220 A.2d at 854.

87. *Id.*

88. *Id.* at 854–55.

89. *See* RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. LAW INST. 1965); Thomas E. Riley et al., *Recent Developments in Products Liability*, 51 TORT TRIAL & INS. PRAC. L.J. 601, 602–03 (2016).

90. *See, e.g.*, Azzarello v. Black Bros. Co., 391 A.2d 1020, 1026 (Pa. 1978) ("Thus the mere fact that we have approved Section 402A, and even if we agree that the phrase 'unreasonably dangerous' serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury's consideration."), *overruled by* Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014); Coyle *ex rel.* Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383, 1385 (Pa. 1991) ("Even where this Court has 'adopted' a section of the Restatement as the law of Pennsylvania, the language is not to be considered controlling in the manner of a statute.").

91. *See, e.g.*, Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 440–41 (Ind. 1990) ("The intended thrust of *Bemis* was to emphasize that § 402A liability should not be imposed for dangers so obvious that manufacturers could reasonably expect anticipated users to perceive and act to avoid injury. This is an entirely proper consideration, as reflected in comments g and i to § 402A."); Lester *ex rel.* Lester v. Magic Chef, Inc., 641 P.2d 353, 361 (Kan. 1982) ("Having determined that the instruction using the term 'unreasonably dangerous' and defining it in the terms of the Restatement § 402A, Comment i, was proper, the judgment is affirmed."); Phipps v. Gen. Motors Corp., 363 A.2d 955, 959 (Md. 1976) ("For a seller to be liable under s 402A, the product must be both in a 'defective condition' and 'unreasonably dangerous' at the time that it is placed on the market by the seller. Both of these conditions are explained in the official comments in terms of consumer expectations."); Ellis v. Chicago Bridge & Iron Co., 545 A.2d 906, 912 (Pa. Super. Ct. 1988) (reciting comment g of the Second Restatement, and highlighting the consumer's "reasonable expectation of buying a product that is reasonably safe").

92. Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT'L. & COMP. L. REV. 227, 234 (1997).

an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[93] Comment g adds that the product, "at the time it leaves the seller's hands, [must be] in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[94] Interestingly, comment i differentiates between "unreasonably dangerous" products and common products that involve a certain degree of risk.[95] For example, "[g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous."[96]

Some courts began to find that liability was inappropriate under the consumer expectations test where the products served some crucial function in society, despite that they were inherently unsafe or dangerous.[97] Therefore, these courts adopted a second test to analyze the defectiveness of a product—the risk-utility test. The risk-utility test asks the fact finder to balance "the utility of the product against the seriousness and likelihood of injury and the availability of precautions that, although not foolproof, might prevent an injury."[98] In essence, the risk-utility test asks the fact finder to weigh the product's social costs against its benefits.[99] In a law review article, John Wade presented a number of risk-utility factors to consider, factors that the Pennsylvania Superior Court adopted:

> (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 instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the

93. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i.

94. *Id.* cmt. g.

95. *Id.* cmt. i.

96. *Id.*

97. See *supra* notes 7–8 and accompanying text for an explanation of why finding liability under the consumer expectations test may be inappropriate for socially useful and functioning products.

98. 3A SUMM. PA. JUR. 2D TORTS § 41:263 (2d ed. 2014).

99. *See* Owen, *The Evolution*, *supra* note 50, at 987.

loss of setting the price of the product or carrying liability insurance.[100]

Over time, some jurisdictions adopted a "composite standard," which allowed plaintiffs to alternatively rely on "either standard, or both."[101] *Barker v. Lull Engineering Co.*,[102] a California case, is illustrative: the plaintiff, an operator of a high-lift loader, brought strict liability defective design claims against the manufacturer of the loader after it tipped over and caused falling lumber to strike the plaintiff.[103] Finding that "the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action,"[104] the *Barker* court concluded that a plaintiff could use either the consumer expectations test or the risk-utility test to prove that a product was defective.[105] Moreover, *Barker* held that "once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective."[106]

2. Development of the "Any Element Necessary Test" under *Azzarello*

After the Pennsylvania Supreme Court formally adopted the Second Restatement, it was still unclear how Pennsylvania courts were to apply the newly developing concept of strict products liability in jury instructions.[107] This confusion led to a string of Pennsylvania tort cases that tried to decipher the seemingly enigmatic difference between negligence and strict products liability.[108] In *Bialek v. Pittsburgh Brewing Co.*,[109] the Pennsylvania Supreme Court held that a plaintiff "is not required to prove that the defendants were negligent, that the defendants can be held liable even if they exercised all possible care, and that no consideration should be given to negligence."[110] In

100. Dambacher *ex rel.* Dambacher v. Mallis, 485 A.2d 408, 423 n.5 (Pa. Super. Ct. 1984) (quoting John Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837–38 (1973) (footnote omitted)).

101. Riley et al., *supra* note 89, at 604; *see also* Barker v. Lull Eng'g Co., 573 P.2d 443, 446–47 (Cal. 1978) ("As we explain in more detail below, we have concluded from this review that a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design. . . .This dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be.").

102. 573 P.2d 443 (Cal. 1978).

103. *Barker*, 573 P.2d at 445–46.

104. *Id.* at 455.

105. *Id.* at 457–58.

106. *Id.* at 455.

107. *See* Buckley, *supra* note 18, at 261.

108. *See id.*

109. 242 A.2d 231 (Pa. 1968).

110. *Bialek*, 242 A.2d at 235.

*Kuisis v. Baldwin-Lima-Hamilton Corp.*,[111] the court reversed a motion for judgment on the record for the defendants, reasoning that although no defect was proven, the occurrence of five similar malfunctions and the evidence of the malfunction itself at the time of the accident sufficiently proved liability.[112] Finally, in *Berkebile v. Brantly Helicopter Corp.*,[113] the court held that the negligence standard has no place in a strict products liability case.[114] *Berkebile* not only clarified that a "'defective condition' is not limited to defects in design or manufacture" but also eliminated the "reasonable man standard" from the products liability analysis and held that "[t]he seller must provide with the product every element necessary to make it safe for use."[115]

In 1978, the Pennsylvania Supreme Court granted review in *Azzarello* to "discuss the concept of 'unreasonable danger' and to define its role in products liability generally."[116] In *Azzarello*, the plaintiff was injured by an industrial coating machine and pursued strict liability claims against the manufacturer, Black Brothers Co.[117] Black Brothers Co. added Azzarello's employer as an additional defendant, arguing that the employer's negligence caused the injuries.[118] Because the case contained both a strict liability claim and a negligence claim, the trial court had faced the difficulty of delineating clear jury instructions for each claim.[119] It had used the phrase "unreasonably dangerous" from the Second Restatement in its strict liability instruction.[120] The jury had found in favor of Black Brothers Co., assigning all liability to Azzarello's employer under a negligence theory.[121] The court then granted Azzarello's motion for a new trial, and Black Brothers Co. appealed.[122] The Pennsylvania Supreme Court then reviewed whether the words "unreasonable dangerous" belonged in the jury instruction.[123] To answer this question, the court discussed "the more fundamental question whether the determination as to the risk of loss is a decision to be made by the finder of fact or by the court."[124]

In an effort to consolidate and clarify the law in Pennsylvania, the *Azzarello* court found that "unreasonably dangerous" and "defective" were used interchangeably and have no independent significance within the context of the

111. 319 A.2d 914 (Pa. 1974).

112. *Kuisis*, 319 A.2d at 919–20.

113. 337 A.2d 893 (Pa. 1975) (plurality opinion), *abrogated by* Reott v. Asia Trend, Inc., 55 A.3d 1088 (Pa. 2012).

114. *Berkebile*, 337 A.2d at 900.

115. *Id.* at 901–02.

116. Ellen Wertheimer, Azzarello *Agonistes: Bucking the Strict Products Liability Tide*, 66 TEMP. L. REV. 419, 421 (1993) [hereinafter Wertheimer, Azzarello].

117. Azzarello v. Black Bros. Co., 391 A.2d 1020, 1022 (Pa. 1978).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1022–23.

123. *Id.* at 1025.

124. *Id.*

Second Restatement.[125] However, the court held that the phrase "unreasonably dangerous" was not appropriate in the strict liability jury instruction because it implied that the plaintiff must prove elements of negligence within a strict liability claim.[126] Because of this potential for confusion, the *Azzarello* court determined that a judge should decide "as a matter of law, whether the product should be subject to strict liability."[127] Thus, the court would "perform a risk-utility analysis . . . to determine whether a product was 'unreasonably dangerous' under Section 402A of the Restatement (Second) of Torts."[128] If the court found that the product was "unreasonably dangerous," then it would remain a question for the jury "whether the product was in a defective condition."[129] Furthermore, the *Azzarello* court insisted that a manufacturer acts as a "guarantor" of a "product's safety."[130] In essence, even if a manufacturer exerts all possible due care, the existence of a defect may warrant the application of strict liability.[131] Borrowing verbiage from *Berkebile*, the *Azzarello* court held that "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."[132]

### 3. The Preclusion of Industry Practices, Foreseeability, and the Third Restatement

Questions remained regarding the admissibility of evidence in Pennsylvania products liability cases, even despite *Azzarello*'s delineation of "the rigorous negligence-strict liability dichotomy."[133] In *Lewis*, the court excluded expert testimony regarding industry standards and practices as a defense to defective design allegations, concluding that the accompanying inference of a due care standard was an inherently negligence-based analysis that could not be

125. *See id.* ("It must be understood that the words, 'unreasonably dangerous' have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier."); Wertheimer, Azzarello, *supra* note 116, at 421. ("In other words, under *Azzarello* a product is defective when it is 'unreasonably dangerous,' and 'unreasonably dangerous' when it is defective.").

126. *Azzarello*, 391 A.2d at 1026; *see also* Wertheimer, Azzarello, *supra* note 116, at 422 ("The main problem is how to charge the jury in a strict liability case, given the need to protect the standard from the pollution of negligence concepts. The underlying, tacit difficulty lies in developing acceptable strict products liability jury instructions while at the same time ensuring that these instructions will only be applied in cases in which strict liability is appropriate.").

127. *See* Wertheimer, Azzarello, *supra* note 116, at 422 ("It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint." (quoting *Azzarello*, 391 A.2d at 1026)).

128. *See* Riley et al., *supra* note 89, at 602.

129. *Id.*

130. *Azzarello*, 391 A.2d at 1026 (quoting Salvador v. Atlanta Steel Boiler Co., 319 A.2d 903, 907 (Pa. 1974)).

131. *See* Buckley, *supra* note 18, at 253–54.

132. *Azzarello*, 391 A.2d at 1023, 1027 (emphasis added).

133. *See* Buckley, *supra* note 18, at 255–56.

entertained in a strict liability defense.[134] Relying on the Third Circuit's interpretation of Pennsylvania law in *Holloway v. J. B. Systems, Ltd.*,[135] the *Lewis* court held that despite general consensus among jurisdictions that "due care" is not part of a strict liability analysis for defective design, "the courts part company when it comes to the relevance, and hence admissibility, of evidence showing industry standards, customs and practices concerning the design of products."[136]

Drawing on persuasive authority, the *Lewis* court built upon the Washington Supreme Court case *Lenhardt v. Ford Motor Co.*:[137]

> In *Lenhardt* the Court concluded that the question of whether or not the defendant has complied with industry standards *improperly focusses* [sic.] *on the quality of the defendant's conduct in making its design choice*, and not on the attributes of the product itself. Therefore, in the view of the *Lenhardt* Court, such evidence should be excluded because it tends to *mislead the jury's attention from their proper inquiry*. The *Lenhardt* Court also observed that if a manufacturer's product has design attributes which make it unsafe for its intended use, there is no relevance in the fact that such a design is widespread in the industry.[138]

The preclusion of industry standards evidence in *Lewis* was later extended by the Pennsylvania Superior Court to include the preclusion of Occupational Safety and Health Administration (OSHA) safety standards,[139] American Nation Standards Institute (ANSI) safety standards,[140] and Federal Motor Vehicle Safety Standards (FMVSS).[141] Notably, in *Gaudio v. Ford Motor Co.*,[142] the court excluded the use of industry standards at trial but identified exceptions: "Evidence of a plaintiff's voluntary assumption of the risk, misuse of a product, or highly reckless conduct is admissible to the extent that it relates to the issue of

134. Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 591, 593 (Pa. 1987).

135. 609 F.2d 1069, 1073 (3d Cir. 1979) ("It was inappropriate to admit testimony regarding trade custom, because the jury might have inferred that if virtually no other tank manufacturer in 1969 included a warning about pressurization it could hold EGW not liable. This use of trade custom as evidence of the reasonableness of EGW's inaction would be permissible if the case were tried under negligence principles, but is inconsistent with the doctrine of strict liability.").

136. *Id.* at 593–94.

137. 683 P.2d 1097 (Wash. 1984).

138. *Lewis*, 528 A.2d at 594 (emphasis added).

139. *See, e.g.*, Sheehan v. Cincinnati Shaper Co., 555 A.2d 1352, 1355 (Pa. Super. Ct. 1989) ("We conclude that the OSHA regulations proffered would introduce into a strict liability action the reasonableness of Shaper's failure to provide the new safety device for this machine, an issue irrelevant to whether liability attaches.").

140. *See, e.g.*, Majdic v. Cincinnati Mach. Co., 537 A.2d 334, 339 (Pa. Super. Ct. 1988) ("Further, we hold that the trial judge improperly permitted evidence of the 1973 ANSI Safety Standards for power presses. Accordingly, we must remand this case for a new trial.").

141. *See, e.g.*, Gaudio v. Ford Motor Co., 976 A.2d 524, 545 (Pa. Super. Ct. 2009).

142. 976 A.2d 524 (Pa. Super. Ct. 2009) (excluding industry standards where plaintiff sued Ford Motor Company for products liability and negligence following a traffic accident that resulted in the death of her husband).

causation."[143] That is, industry standards can only be introduced to show causation, not breach. However, the *Gaudio* court clarified that evidence of negligence by the plaintiff is not admissible "unless it is shown that the accident was **solely** the result of the user's conduct and not related in any [way] with the alleged defect in the product."[144] Relying on a Pennsylvania Superior Court case, *Leaphart v. Whiting Corp.*,[145] and an Eastern District of Pennsylvania court case, *Markovich v. Bell Helicopter Textron, Inc.*,[146] the *Gaudio* court limited this exception in two ways: (1) opening arguments "should be reasonably related in scope to the substance of the offending testimony," and (2) the evidence to be introduced must be "limited to testimony necessary to respond to the evidence presented."[147]

Likewise, in *Kimco Development Corp. v. Michael D's Carpet Outlets*,[148] the court rejected comparative negligence as a defense to a strict products liability claim.[149] In 1998, shortly after *Kimco*, the American Law Institute presented the Third Restatement, which included a categorical differentiation between strict liability and negligence.[150] In relevant part, the Third Restatement states:

> 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 . . . .[151]

Although the Pennsylvania Supreme Court did not adopt the Third Restatement, a number of cases have referenced it.[152]

143. *Gaudio*, 976 A.2d at 540–41.

144. *Id.* at 541 (quoting Charlton v. Toyota Indus. Equip., 714 A.2d 1043, 1047 (Pa. Super. Ct. 1998)).

145. 564 A.2d 165 (Pa. Super. Ct. 1989).

146. 805 F. Supp. 1231 (E.D. Pa. 1992).

147. *Gaudio*, 976 A.2d at 541.

148. 637 A.2d 603 (Pa. 1993).

149. *Kimco*, 637 A.2d at 607.

150. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. LAW INST. 1998); Owen, *The Evolution*, *supra* note 50, at 986–87 ("In short, liability in section 2 of the *Third Restatement* truly is strict for manufacturing defects but is based in negligence principles (but not explicitly in negligence doctrine) for design and warning defects.").

151. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b).

152. *See, e.g.*, Phillips v. Cricket Lighters, 841 A.2d 1000, 1018–21 (Pa. 2003) (plurality opinion) (Saylor, J., concurring) ("I believe, however, that the above summation of Pennsylvania law demonstrates a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement."); Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 898 A.2d 590, 616 n.2 (Pa. 2006) [hereinafter *Mineral Prods. Co.*] (Newman, J., concurring and dissenting) ("I recognize the apparent and possible appeal in the more progressive approach adopted by the Third Restatement, in particular, in cases such as this involving a known dangerous chemical where a risk-utility test would be a just measure of a manufacturer's liability for the product. However, I will proceed to analyze the present matter pursuant to our existing caselaw and the Second Restatement of Torts.").

In *Phillips v. Cricket Lighters*,[153] the court struck down the use of foreseeability to prove strict liability.[154] In *Phillips*, the plaintiff pursued a strict liability claim against a cigarette lighter manufacturer for its failure to include a safety mechanism to prevent the use of the lighter by a child.[155] The plaintiff argued that liability should attach because it was "reasonably foreseeable that a small child may play with a butane lighter" and that harm would result.[156] In a plurality opinion,[157] the court rejected this argument and held that negligence principles, including foreseeability, have no place in a strict liability analysis.[158]

Justice Saylor, joined by Justice Castille, concurred but wrote separately to discuss three points: (1) "Central conceptions borrowed from negligence theory are embedded in strict products liability doctrine in Pennsylvania,"[159] (2) "[s]everal ambiguities and inconsistencies in the prevailing Pennsylvania strict products liability jurisprudence affect proper resolution of the question framed in this appeal,"[160] and (3) "[t]he Restatement's considered approach illuminates the most viable route to providing essential clarification and remediation."[161]

In *Pennsylvania Department of General Services. v. United States Mineral Products Co.*,[162] the Pennsylvania Supreme Court granted a new trial to a manufacturer of building materials containing dangerous chemicals because the trial court failed to instruct the jury that, consistent with Pennsylvania law, "a manufacturer can be deemed liable only for harm that occurs in connection with a product's intended use by an intended user; the general rule is that there is no strict liability in Pennsylvania relative to non-intended uses even where foreseeable by a manufacturer."[163] In *Mineral Products Co.*, the Pennsylvania Department of General Services, the Pennsylvania Department of Transportation, the Pennsylvania Public Utility Commission, the Pennsylvania Emergency Management Agency, and the Pennsylvania Department of State brought claims of strict liability and negligence against United States Mineral Products Co. for property damage and contamination of a government building

153. 841 A.2d 1000 (Pa. 2003) (plurality opinion).

154. *Phillips*, 841 A.2d at 1006 ("[S]trict liability affords no latitude for the utilization of foreseeability concepts such as those proposed by Appellee."). *But see id.* at 1012 (Saylor, J., concurring) ("[T]he lead opinion acknowledges that under prevailing authority of this Court, foreseeability, a conception firmly rooted in negligence theory, is assessed in strict liability cases involving certain types of product alterations.").

155. *Id.* at 1005–07 (plurality opinion).

156. *Id.* at 1006.

157. *See id.* at 1011–12.

158. *Id.* at 1007 ("Recognition that strict liability is not a type of mongrel derivative of negligence is also consistent with the historical development of this cause of action. Strict liability was intended to be a cause of action separate and distinct from negligence, designed to fill a perceived gap in our tort law.") (citing Azzarello v. Black Bros. Co., 391 A.2d 1020, 1023–24 (Pa. 1978)).

159. *Id.* at 1012 (Saylor, J., concurring).

160. *Id.* at 1016.

161. *Id.* at 1019.

162. 898 A.2d 590 (Pa. 2006).

163. *See Mineral Prods. Co.*, 898 A.2d at 600–01.

by polychlorinated biphenyls (PCBs) contained in building materials.[164] The plaintiffs discovered the PCBs after the building was partially destroyed in a fire.[165] Despite noting the foreseeability that building materials may eventually encounter a fire,[166] the court followed *Phillips* and rejected the negligence-based foreseeability doctrine "within the strict liability scheme as it presently exists in Pennsylvania."[167] In her concurrence and dissent, Justice Newman referenced the issues from *Azzarello* and *Phillips* raised in Justice Saylor's concurrence in *Phillips.*[168] Further, she acknowledged the "possible appeal" of the Third Restatement.[169]

In light of this support for adopting the Third Restatement in *Phillips* and *Mineral Products*, the Third Circuit applied the Third Restatement as the law in Pennsylvania, stating that if allowed the opportunity, the Pennsylvania Supreme Court would adopt the Third Restatement.[170] In *Berrier v. Simplicity Manufacturing, Inc.*,[171] the Third Circuit applied the duty of care outlined in the Third Restatement as Pennsylvania law, holding that plaintiff parents could recover for their child's injuries from a defective lawnmower.[172] Relying on Justice Saylor's concurrence in *Phillips* and Justice Newman's opinion in *Mineral Products Co.*, the *Berrier* court agreed that the Third Restatement "eliminates much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims."[173] Thus, the Third Circuit concluded that "there is substantial support on the Court to adopt the Third Restatement's approach to product liability in an appropriate case."[174]

Before *Berrier*, the Pennsylvania Supreme Court had granted appeal in

164. *Id.* at 593.

165. *Id.*

166. *Id.* at 601.

167. *Id.* at 600–04.

168. *See id.* at 615–16, 619 (Newman, J., concurring and dissenting) ("Thus, I find that, under current strict liability law, a colorable strict liability issue exists for the jury in a case such as this. Namely, when a product is used by its intended user (building owner) and for its intended use (in the construction and maintenance of a building), a question exists as to whether or not the product was 'lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.'" (quoting Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978))). See *supra* notes 159–61 and accompanying text for a discussion of Justice Saylor's concurrence in *Phillips*.

169. *See id.* at 616 n.2 ("I recognize the apparent and possible appeal in the more progressive approach adopted by the Third Restatement, in particular, in cases such as this involving a known dangerous chemical where a risk-utility test would be a just measure of a manufacturer's liability for the product. However, I will proceed to analyze the present matter pursuant to our existing caselaw and the Second Restatement of Torts.").

170. *See* Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 68 (3d Cir. 2009) ("Because we have predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts, §§ 1 and 2, we hold that summary judgment should not have been granted to Simplicity on the Berriers' claim of strict products liability.").

171. 563 F.3d 38 (3d Cir. 2009).

172. *Berrier*, 563 F.3d at 41, 68.

173. *Id.* at 55, 57.

174. *Id.* at 57.

*Bugosh v. I.U. North America, Inc.*[175] to decide whether section 2 of the Third Restatement should replace section 402A of the Second Restatement.[176] However, sixteen months after granting the appeal,[177] the court dismissed it "as having been improvidently granted."[178] In his dissent, Justice Saylor again advocated overruling *Azzarello* and adopting the Third Restatement.[179] Despite the Third Circuit's speculation in *Berrier*, in light of *Bugosh*, *Azzarello* and the Second Restatement remained the law in Pennsylvania.[180]

## IV. COURT'S ANALYSIS

In *Tincher*, the Pennsylvania Supreme Court "embarked on a new approach to strict products liability, overruling its decades-old decision in *Azzarello v. Black Brothers Co*."[181] In this monumental 2014 opinion, the Pennsylvania Supreme Court provided an in-depth analysis of the history of products liability law,[182] the social policies it aims to protect,[183] the progression of the common law throughout the mid-twentieth century,[184] and the consequences of adopting the Second Restatement.[185] After discussing the evolution of Pennsylvania law, the *Tincher* court overruled *Azzarello*[186] and refused to adopt the Third Restatement, thereby retaining Pennsylvania as a Second Restatement jurisdiction.[187] Finally, the *Tincher* majority concluded by articulating the framework for products liability law in Pennsylvania, allowing plaintiffs to plead products liability claims using either the consumer expectations test, the risk utility test, or both.[188] Yet still, the court left a number of questions unanswered, specifically, how Pennsylvania courts should handle negligence-based evidence in strict liability cases.[189]

### *A. Overruling* Azzarello

After acknowledging the numerous opinions on restructuring products

175. 942 A.2d 897 (Pa. 2008) (per curiam).

176. *Id.* at 897.

177. *See id.* (granting the appeal on February 27, 2008); Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1229 (Pa. 2009) (per curiam).

178. *Bugosh*, 971 A.2d at 1229.

179. *Id.* at 1244.

180. Arthur L. Bugay, *Pennsylvania Products Liability at the Crossroads*: Bugosh, Berrier *and the Restatement (Third) of Torts*, 81 PA. B. ASS'N Q. 1, 33 (2010).

181. Riley et al., *supra* note 89, at 602.

182. *See* Tincher v. Omega Flex, Inc., 104 A.3d 328, 355–70 (Pa. 2014).

183. *See id.* at 394–99.

184. *See id.* at 355–70.

185. *See id.* at 358–70.

186. *Id.* at 410.

187. *Id.* at 399. See *infra* Part IV.C for a discussion of why the *Tincher* court retained Pennsylvania as a Second Restatement jurisdiction.

188. *Tincher*, 104 A.3d at 406–10.

189. *See* Buckley, *supra* note 18, at 261–64.

liability law after *Azzarello*,[190] *Tincher* overruled *Azzarello*, stating that it failed "to reflect the realities of strict liability practice and to serve the interests of justice."[191] The court believed that applying *Azzarello* led to practical problems because its progeny went too far in stripping strict liability of its negligence origins, leading to "puzzling trial directives that the bench and bar understandably have had difficulty following in practice."[192] Moreover, the court stated that *Azzarello* was "dogmatic" in its interpretation of the Second Restatement.[193] Therefore, the court commented that "[t]he rule derived by *Azzarello* premised upon this type of analysis is that negligence concepts and rhetoric—although addressed in the negative by the Restatement—somehow affected a plaintiff's burden of proof in all strict liability cases, regardless of the pertinent facts."[194] The court stated that the *Azzarello* court's incorrect "negligence-strict liability dichotomy may be explained by the Second Restatement's explicit reference to negligence in the negative, *i.e.*, that compensation under Section 402A does not require proof of due care."[195]

Additionally, the *Tincher* court criticized the *Azzarello* court's treatment of the Second Restatement as a statute.[196] The *Tincher* court explained that the American Law Institute is not a governing body with legal authority, and the Restatement does not constitute a statute to be interpreted.[197] While the *Azzarello* court held that plaintiffs have the burden of proof in strict liability cases, the *Tincher* court asserted that "[t]he facts of Azzarello, when viewed with the appropriate judicial modesty, did not require such a broad pronouncement."[198] Moreover, the *Tincher* court criticized the *Azzarello* decision for not explaining "the leap in logic necessary to extrapolate that every lay jury would relate reasonableness and other negligence terminology, when offered in a strict liability charge, to a 'heavier,' negligence-based burden of proof."[199] As such, the holding in *Azzarello* "speaks volumes to the necessity of reading legal rules—especially broad rules—against their facts and the corollary that judicial pronouncements should employ due modesty."[200]

In addition, *Tincher* emphasized that the holding in *Azzarello* was

190. *See Tincher*, 104 A.3d at 370–75 (citing Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228 (Pa. 2009); Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co., 898 A.2d 590 (Pa. 2006) (Newman, J., concurring and dissenting); Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003) (Saylor, J., concurring)).

191. *Id.* at 376.

192. *See id.*

193. *Id.*

194. *Id.* at 376–77.

195. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmts. i, g (AM. LAW INST. 1965) (explaining when a product is in a "defective condition" and "unreasonably dangerous," respectively).

196. *Tincher*, 104 A.3d at 377.

197. *See id.*

198. *Id.*

199. *Id.*

200. *Id.* at 378.

supported by nonbinding cases from California (*Cronin v. J.B.E. Olsen Corp.*[201]) and New Jersey (*Glass v. Ford Motor Co.*[202]), rather than Pennsylvania authority.[203] *Tincher* rejected the reliance on *Cronin* because the facts were distinguishable and "the rationale of the decision was explained as significantly narrower by later California Supreme Court decision law."[204] And *Tincher* rejected the reliance on *Glass* because the New Jersey Supreme Court subsequently clarified the law.[205] To make matters worse, the primary holding in *Azzarello*—the "any element necessary" test—was drawn from an out-of-context quote from *Berkebile*.[206]

The *Tincher* court declared that *Azzarello*'s standard was "impracticable" for two reasons.[207] First, *Azzarello* improperly separated the issue of defectiveness from the issue of unreasonable danger.[208] Because of this, *Tincher* "returns to the finder of fact the question of whether a product is 'unreasonably dangerous,' a determination part and parcel of whether the product is, in fact, defective.[209] Similarly, under *Tincher*, a defectiveness determination depends on "whether that product is 'unreasonably dangerous,'" which requires an analysis of social policy.[210] Second, the *Tincher* court criticized *Azzarello* for overlooking "the practical reality . . . 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." The court rejected the *Azzarello* court's discussion of "jury confusion," because "[d]istinctions in theories of products liability are no more or less confusing than in other difficult areas of law."[211]

Although the *Tincher* court acknowledged *Azzarello*'s social policy considerations, its holding's tremendous impact on later strict liability cases was

201. 501 P.2d 1153 (Cal. 1972).

202. 304 A.2d 562 (N.J. 1973).

203. *Id.* at 377–78.

204. *Id.*

205. *Id.* at 377–78. The *Tincher* court noted that *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J. Super. Ct. 1973), was disapproved of by *Cepeda v. Cumberland Engineering Co.*, 386 A.2d 816 (N.J. 1978). *Id.*

206. *Tincher*, 104 A.3d at 379. In *Tincher*, the court drew a comparison between *Berkebile* and *Azzarello*. *Id.* The *Tincher* court noted that *Berkebile* provided that the "seller must provide with the product every element necessary to make it safe for use," while in *Azzarello*, the court provided that a "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." *Id.* (first quoting Berkebile v. Brantley Helicopter Corp, 337 A.2d 893, 902 (Pa. 1975) (Jones, C.J., dissenting) (emphasis omitted); then quoting Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 n.12 (Pa. 1978)).

207. *See id.*

208. *Id.* at 380.

209. Robert W. Zimmerman et al., Philadelphia Bar Ass'n, *Tincher v. Omega Flex, Inc.*: An Audit Sampling, *in* PHILADELPHIA BAR ASSOCIATION 2015 BENCH-BAR & ANNUAL CONFERENCE 378 (Oct. 17, 2015), http://benchbar.philadelphiabar.org/course_materials/2015BB_ProductLiability LawinPennsylvania.pdf [http://perma.cc/NZP4-2UJ3].

210. *Tincher*, 104 A.3d at 380.

211. *Id.* at 380.

overwhelming, specifically on those cases "whose merits were not examined to determine whether such a bright-line rule was consistent with reason in light of the considerations pertaining to the case."[212] In light of these considerations, *Tincher* overruled *Azzarello*, finding that it went against "the realities of strict liability practice" and did not "serve the interests of justice."[213]

### *B. The Social Policy of Strict Liability in Pennsylvania and a Combined Test*

The *Tincher* majority began its analysis of the current state of strict products liability by affirmatively stating that strict liability for defective design rests in tort principles.[214] Strict liability is presumptively available because "[n]o product is expressly exempt."[215] The court discussed the competing standards: the consumer expectations standard, the risk-utility standard, and the composite standard.[216] The first two reflect the opposing interests of sellers and consumers.[217] To recover under a theory of strict products liability, the plaintiff must "prove that the product is in a 'defective condition'" by a preponderance of the evidence.[218] The plaintiff can demonstrate this "by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions."[219]

Aligning its analysis with the duty outlined in the Second Restatement, the court specified that "a person or entity engaged in the business of selling a product has a duty to make and/or market the product . . . free from 'a defective condition unreasonably dangerous to the consumer or [the consumer's] property.'"[220] After briefly touching on the requirement of duty,[221] the court continued with an in-depth analysis of what constitutes a "defect,"[222] how a product is determined to be "unreasonably dangerous,"[223] and ultimately, what constitutes a breach of the duty.[224]

A successful claim of strict liability may relate to "any product, provided that the evidence is sufficient to prove a defect."[225] However, the term "defect" in this context is simply "an expression for the legal conclusion rather than a test

212. *Id.* at 380–81.
213. *Id.* at 376.
214. *Id.* at 355.
215. *Id.* at 381–82.
216. *Id.* at 387–91.
217. *Id.* at 387.
218. *Id.* at 335.
219. *Id.*
220. *Id.* at 383 (second alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. LAW INST. 1965)).
221. *See id.* at 382–84.
222. *See id.* at 384–94.
223. *See id.* at 387–94.
224. *See id.* at 383–84.
225. *Id.* at 382.

for reaching that conclusion."[226] Recognizing the availability of various tests to show that a product is defective, the court analyzed the "theoretical and practical limitations" of the consumer expectations test and the risk-utility test.[227] First, the *Tincher* court pointed out that under the consumer expectations test, injuries sustained by a plaintiff from a danger that is "obvious or within the ordinary consumer's contemplation would be exempt from strict liability."[228] Second, "a product whose danger is vague or outside the ordinary consumer's contemplation runs the risk of being subjected to arbitrary application of the strict liability doctrine."[229] Similarly, the court identified the shortcomings of the risk-utility test—for example, though this test can produce efficiency, "in some respects, it conflicts with bedrock moral intuitions regarding justice in determining proper compensation for injury to persons or property in individual cases."[230]

Understanding that unfixable logical fallacies are inherent in each test, the court was presented with the following options: (1) "state the two standards in the alternative [where] a plaintiff's injury is compensable whether either test is met;" (2) "incorporate the risk calculus into a test of consumer expectations or, vice versa, to incorporate consumer expectations into the risk-utility determination;"[231] or (3) choose one test over the other.[232] The *Tincher* court adopted the California "composite" test that allows the plaintiff to use either test[233] because it "retains the best functioning features of each test, when applied in the appropriate factual context."[234]

### *C. Refusal to Adopt the Third Restatement*

Understanding the limitations of both the risk-utility test and the consumer expectations test, the court retained the application of the Second Restatement in Pennsylvania for a number of reasons.[235] First, the court rejected the Third Restatement's requirement that plaintiffs present a feasible alternative design, because such a restriction "proscriptively limits the applicability of the cause of

226. *Id.* at 384 (quoting Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 182 (Mich. 1984)).

227. *Id.* at 388.

228. *Id.*

229. *Id.*

230. *Id.* at 390.

231. *Id.* (citing Soule v. Gen. Motors Corp., 882 P.2d 298, 308 (Cal. 1994); Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178, 1182 (N.H. 2001)) (providing examples of cases that included a consumer expectations analysis as one element to consider within the risk-utility analysis).

232. *See id.* ("[T]wo standards have emerged, that purport to reflect the competing interests of consumers and sellers, upon which all American jurisdictions judge the adequacy of a product's design: one measures 'consumer expectations,' and articulates the standard more from the perspective of the reasonable consumer; the second balances 'risk' and 'utility,' and articulates the standard more from the perspective of the reasonable seller. Other jurisdictions and the Third Restatement have combined the two standards.").

233. *Id.* at 401–02 (citing *Barker*, 573 P.2d at 443).

234. *Id.* at 401.

235. *Id.* at 399.

action to certain products as to which that sort of evidence is available."[236] This restriction would essentially create "categorical exemptions for some products," such as those for which no alternative design is available.[237] Second, the court rejected *Azzarello*'s "broad pronouncement" and leap in logic[238] and was hesitant to articulate a broad, overarching rule "beyond the necessities of an individual case."[239] Third, the court rejected the Third Restatement because "articulating common law principles in terms of extrapolations from evidence relevant in the typical case is problematic."[240] Specifically, the court was hesitant to adopt bright-line rules because "they also risk elevating the lull of simplicity to doctrine."[241] Lastly, the court refused to adopt the Third Restatement, given the "longterm deleterious effects" of *Azzarello* on strict products liability jurisprudence in Pennsylvania.[242]

### *D. The Future of Products Liability Law for Defective Design*

The *Tincher* court identified the difference between strict liability and negligence, noting that strict liability does not encompass "the more colloquial notion of 'fault.'"[243] The court conceded that strict liability has evolved into a cause of action that has "retained . . . aspects of negligence **and** breach of warranty liability theories."[244] Choosing a combined calculus to analyze products liability in Pennsylvania, the *Tincher* majority held that "the cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product."[245] *Tincher* explained that strict liability "effectuates a further shift of the risk of harm onto the supplier than either negligence or breach of warranty theory by combining the balancing of interests inherent in those two causes of action."[246] Whether a plaintiff would use one or both of the tests depends on numerous factors, including "the nature of the product," the standard of proof, the likelihood of confusing the jury, and the availability of evidence.[247]

In short, *Tincher* overruled *Azzarello*, declined to adopt the Third Restatement, and acknowledged that negligence-based principles are woven into the strict liability framework.[248] The *Tincher* court's overhaul of products liability law in Pennsylvania provided much needed clarity to judges and juries

236. *Id.* at 395.
237. *Id.*
238. *Id.* at 377.
239. *Id.* at 396.
240. *Id.* at 397.
241. *Id.* at 399.
242. *Id.*
243. *Id.* at 400.
244. *Id.* at 401.
245. *Id.* at 400–01.
246. *Id.* at 402.
247. *Id.* at 406.
248. *See id.* at 410.

for defective design products liability, particularly in light of the Third Circuit's inaccurate prediction that if given the opportunity, the Pennsylvania Supreme Court would adopt the Third Restatement.[249] However, it remains unclear how *Tincher* will shape future decisions, especially since unanswered questions remain within its framework.[250] As relevant to this Note, *Tincher* left open whether negligence-based evidence like industry standards and practice should remain precluded from a strict liability analysis.

## V. ANALYSIS

This analysis will evaluate the impact of *Tincher* on the introduction of industry standards and practices evidence as a means of proving or defending against a claim of strict products liability. This Note argues that although *Tincher* reintegrated negligence principles into the strict liability analysis[251] and overturned *Azzarello*, evidence of industry standards and practices should remain excluded under *Lewis* because its tendency to divert the jury's attention to the reasonableness of a product's design outweighs its evidentiary value, and allowing such evidence would eliminate any remaining distinction between negligence and strict liability and undermine the protective purpose of strict liability.

Under *Azzarello*, which *Tincher* overruled, the Pennsylvania Supreme Court had removed the last vestiges of a negligence analysis from the purview of strict liability.[252] Drawing on this decision, the *Lewis* court precluded the introduction of industry standards and practices evidence in strict liability.[253] *Lewis* articulated that this evidence unnecessarily introduces negligence principles[254] and could confuse the jury or interject misleading information into

249. Zimmerman et al., *supra* note 209, at 382; *see also* Berrier v. Simplicity Mfg. Inc., 563 F.3d 38, 53 (3d Cir. 2009) ("We believe that Justice Saylor's concurring opinion in *Phillips* foreshadows the Pennsylvania Supreme Court's adoption of §§ 1 and 2 of the Third Restatement's definition of a cause of action for strict products liability.").

250. *See* Buckley, *supra* note 18, at 263–64 ("Major cavities exist in Pennsylvania's products liability law following *Tincher*."); Riley et al., *supra* note 89, at 604 ("[I]t will be for future cases to address these many complications.").

251. *See* Buckley, *supra* note 18, at 261 ("One of the principal effects of *Tincher* is its perceived abolishment of the separation between negligence concepts and strict liability.").

252. *See* Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978) ("It is clear that the term 'unreasonably dangerous' has no place in the instructions to a jury as to the question of 'defect' in this type of case."), *overruled by* Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014).

253. *See* Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 591 (Pa. 1987) ("[T]he court concluded that proof of the defendant's compliance with industry-wide standards, practices and customs would inject into the case concepts of negligence law, and that under our decision in *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), negligence concepts have no role in a case based entirely on strict liability under Section 402A of the Restatement (Second) of Torts."); *see also* Majdic v. Cincinnati Mach. Co., 537 A.2d 334, 338–39 (Pa. Super. Ct. 1988) ("We are aware that there exists in Pennsylvania cases which have discussed, and even suggested, that custom or usage and state of the art, as well as similar matters, should be admissible in design/defect cases. It is abundantly clear that the rationale employed in this body of cases has been expressly rejected by *Lewis*.").

254. *See Lewis*, 528 A.2d at 594.

their analysis.[255] First, the court adopted the Third Circuit's interpretation of Pennsylvania law holding that industry standards and customs too closely resemble a negligence analysis—thereby warranting their exclusion in a strict liability case.[256] Second, in the same vein, *Lewis* excluded this evidence because of its propensity to divert the jury's attention to the "reasonableness" of the choice of design.[257] Third, *Lewis* applied *Lenhardt*'s reasoning to exclude this evidence because it "improperly focuses on the quality of the defendant's conduct in making its design choice, and not on the attributes of the product itself."[258] Importantly, *Lewis* relied on *Lenhardt* as persuasive authority, noting that "[t]he *Lenhardt* Court also observed that if a manufacturer's product has design attributes which make it unsafe for its intended use, there is no relevance in the fact that such a design is widespread in the industry."[259] Finally, having decided that evidence of industry standards and practices should be excluded, the *Lewis* court affirmed the trial court's denial of a new trial.[260]

Despite *Lewis*'s logic, the widespread acceptance of industry standards and practices under a *negligence* regime may incentivize overturning its holding.[261] In other words, because *Tincher* reintegrated negligence principles into the strict products liability analysis,[262] there is a reasonable possibility that future strict liability cases will reconsider the admissibility of currently prohibited negligence-based evidence.[263] Moreover, it makes intuitive sense that *Tincher* may overrule *Lewis*[264] because *Lewis* rested upon *Azzarello*,[265] which *Tincher* overruled.[266]

255. *See id.*

256. *Lewis*, 528 A.2d at 594.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *See, e.g.*, Covell v. Bell Sports, Inc., 651 F.3d 357, 365–66 (3d Cir. 2011) ("Lewis based its reasoning entirely upon the premise that there shall be no negligence in products liability. No longer can a court assume that premise is true . . . which means, by extension, that no longer can a court assume Lewis accurately reflects the law of Pennsylvania." (citations omitted)); Surace v. Caterpillar, Inc., 111 F.3d 1039, 1046 (3d Cir. 1997) ("At all events, *Lewis* does not purport to cut back on *Azzarello*, and the discussion in *Lewis* that seems to have caused some confusion is background and arguably dicta . . . .").

262. *See* Buckley, *supra* note 18, at 261.

263. *See* James M. Beck, *'Tincher' Opens Door to Previously Excluded Negligence Evidence*, REED SMITH (Feb. 3, 2015), http://www.reedsmith.com/Tincher-Opens-Door-to-Previously-Excluded-Negligence-Evidence-02-03-2015/ [http://perma.cc/J7GA-GX35] ("*Tincher* thus made explicit the court's understanding that, with *Azzarello* and its negligence/strict liability dichotomy overruled, all of the prior restrictions on what were previously considered 'negligence-derived' or 'use-related' defenses and evidence are now fair game for reconsideration. By no means are any or all of them defunct, as yet, but these restrictions on how defendants may try their cases must now be evaluated on their substantive merit, and can no longer be justified simply because they involve negligence principles or evidence.").

264. Zimmerman et al., *supra* note 209, at 378 ("*Tincher* necessarily pulls the rug from beneath Lewis.").

265. *Lewis*, 528 A.2d at 591.

266. Tincher v. Omega Flex, Inc., 104 A.3d 328, 376, 410 (Pa. 2014).

However, although intuitive, this argument fails to consider the underlying rationale for precluding industry standards and practices—namely, its tendency to divert the jury's attention to the reasonableness of a product's design.[267]

Along the same lines, some scholars argue that *Lewis* should remain good law.[268] Moreover, the fact that *Tincher* does not address this topic suggests that its overruling of *Azzarello* may not automatically overturn *Lewis*:

> This Opinion [*Tincher*] does not purport to either approve or disapprove prior decisional law, or available alternatives suggested by commentators or the Restatements, relating to foundational or subsidiary considerations and consequences of our explicit holdings. In light of our prior discussion, the difficulties that justify our restraint should be readily apparent. The common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy.[269]

In light of *Tincher*, litigants have sought to overturn *Lewis* in recent cases,[270] and this has reinvigorated the industry standards and practices debate.[271]

One example is *Cancelleri v. Ford Motor Co.*,[272] a nonprecedential Pennsylvania Superior Court opinion.[273] In *Cancelleri*, the plaintiff brought strict products liability claims against defendant Ford Motor Company following a car accident that resulted in significant injuries when the plaintiff's airbag did not deploy.[274] At trial, Ford was precluded from introducing evidence of industry standards, including tests performed by the National Highway Traffic Safety Administration and the Insurance Institute for Highway Safety.[275] Following a plaintiff's verdict, Ford sought a new trial and lost; on appeal, Ford argued that *Tincher*'s reintegration of negligence principles into a strict liability analysis required that a jury determine the "unreasonably dangerous" component of the claim and that Ford should have been allowed to introduce evidence of industry

267. *Lewis*, 528 A.2d at 594.

268. *See, e.g.*, Buckley, *supra* note 18, at 261–62 ("Nonetheless, *Tincher* did not overrule the cases that barred industry and government standards from being introduced."); Arthur L. Bugay, *A New Era in Pennsylvania Products Liability Law*-Tincher v. Omega-Flex, Inc.*: The Death of* Azzarello, 86 PA. B. ASS'N Q. 10, 16 (2015) [hereinafter Bugay, *A New Era*] ("After Tincher, Pennsylvania Courts should continue to preclude state of the art and industry standards evidence and should permit evidence of foreseeable use.").

269. *Tincher*, 104 A.3d at 410.

270. *See, e.g.*, Webb v. Volvo Cars of N. Am., LLC, 148 A.3d 473, 483 (Pa. Super. Ct. 2016) ("The *Lewis* and *Gaudio* Courts both relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim. According to Appellees, it follows that the trial court did not err in permitting the jury to consider the FMVSS evidence in connection with Appellant's strict liability claims. . . .").

271. *See* David R. Kott & Christopher A. Rojao, *Admissibility of Industry Standards After* 'Tincher', LEGAL INTELLIGENCER (Jan. 19, 2017), http://www.thelegalintelligencer.com/all-coumns/id=1202777176721/AdmissibilityofIndustryStandardsAfterTincher?mcode=1202615324341&curindex=0 [http://perma.cc/4ZDP-UYD2].

272. No. 267 MDA 2015, 2016 WL 82449 (Pa. Super. Ct. Jan. 7, 2016).

273. *Id.*

274. *Cancelleri*, 2016 WL 82449, at *1.

275. *Id.* at *2.

standards.[276] Citing *Lewis* and *Gaudio*, the trial court denied the post-trial motion "because such an exception to the general exclusion of evidence of compliance with industry and government standards had yet to be decreed."[277] The Superior Court of Pennsylvania affirmed.[278]

*Webb v. Volvo Cars of North America, LLC*[279] is also illustrative of the *Lewis*-focused litigation after *Tincher*. Following the death of his son in a vehicle collision, Webb (the administrator of his son's estate) raised theories of both strict liability and negligence.[280] The trial court permitted the introduction of FMVSS (Federal Motor Vehicle Safety Standards) evidence over Webb's objection that the evidence was only relevant as a defense to his negligence claim, not his strict liability claim.[281] The trial court admitted the evidence, despite entering a "nonsuit on the negligence claims."[282] The jury returned a verdict in favor of defendants on the strict products liability claim.[283] Webb appealed, arguing that the court "erred in permitting the jury to consider the FMVSS evidence in connection with Appellant's strict product liability claims."[284]

Following a detailed analysis of *Lewis*, *Gaudio*, and *Tincher*, the superior court granted the plaintiff a new trial, finding that *Tincher*'s overruling of *Azzarello* did not sufficiently support a decision to cast aside "the evidentiary rule expressed in *Lewis* and *Gaudio*."[285] *Webb* noted that "*Tincher* cited *Lewis* and *Gaudio* but did not overrule either case."[286] Moreover, rather than focus on the *Lewis* court's concern that industry standards and practices may confuse the jury,[287] *Webb* highlighted the *Lewis* court's assertion that a "defective design could be widespread in an industry."[288] Based on the facts presented—particularly the nonsuit of the negligence claims—the superior court found that the trial court should have instructed the jury to disregard the FMVSS evidence.[289] With that, it granted Webb a new trial on the strict liability

276. *Id.* at *1–2.

277. Cancelleri v. Ford Motor Co., No. 2011-CIV-6060, 2015 WL 263476, at *55 (Pa. Ct. Com. Pl. Jan. 9, 2015).

278. *Cancelleri*, 2016 WL 82449, at *4.

279. 148 A.3d 473 (Pa. Super. Ct. 2016).

280. *Webb*, 148 A.3d at 476–77.

281. *Id.* at 478–80.

282. *Id.* at 483.

283. *Id.* at 477.

284. *Id.* at 480.

285. *Id.* at 480–83.

286. *Id.* at 483.

287. *See* Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 594 (Pa. 1987) ("It is well established that a trial court should exclude evidence which has a tendency to distract the jury from its main inquiry or confuse the issue.")

288. *See Webb*, 148 A.3d at 483 ("Lewis, in particular, noted that a defective design could be widespread in an industry. The *Tincher* opinion does not undermine that rationale for excluding governmental or industry standards evidence." (citation omitted)).

289. *Id.* at 480–81.

claims.[290] Although ruling on a narrow issue based on particular facts, *Webb* warned that *Tincher* would impact future cases:

> These contingencies illustrate that *Tincher* will affect every stage of future products liability cases. Post-*Tincher*, parties must tailor their pleadings, discovery, and trial strategy to one or both of the new theories of liability. We believe the continued vitality of the prohibition on government and industry standards evidence is a question best addressed in a post-*Tincher* case.[291]

For future strict products liability cases, therefore, the rationale proposed in *Webb*—that "defective design could be widespread in an industry"[292]—seems insufficient to maintain the preclusion of industry standards and practice evidence. That is, *Webb*'s focus on potential widespread defectiveness undervalues the importance of the negligence-strict liability dichotomy and the protective purpose of strict liability. In turn, it distracts from the more important reason for precluding such evidence proposed by *Lewis*: that evidence of industry standards and practices "divert the jury's attention from the [defendant's product] to the reasonableness of the appellant's conduct in choosing its design."[293] Because the reasonableness of a defendant's design, as evidenced by industry standards and practices, is an inherently negligence-based analysis, such evidence suggests a negligence-like approach to what should be a pure strict liability analysis.[294] In light of the inherently convoluted nature of the negligence-strict liability dichotomy, allowing a jury to consider inherently negligence-based concepts like industry standards and practices compounds jury confusion and distraction[295] to a degree that outweighs such evidence's probative value.

The understanding that strict liability attaches, regardless of the *action* or the *actor* is paramount to strict liability—even if the defendant exercised all possible due care.[296] The protective purpose of strict liability depends upon this foundation.[297] As such, to successfully prove a claim of strict products liability, a plaintiff must only show "that a seller (manufacturer or distributor) placed on the market a product in a 'defective condition.'"[298] Therefore, any post-*Tincher* analysis must preclude industry standards and practices evidence because it should focus on the product itself rather than the reasonableness of manufacturing, designing, or distributing of the product.[299] Most importantly,

290. *Id.* at 486.

291. *Id.* at 483.

292. *See id.* at 483 ("Lewis, in particular, noted that a defective design could be widespread in an industry. The *Tincher* opinion does not undermine that rationale for excluding governmental or industry standards evidence." (citation omitted)).

293. *See Lewis*, 528 A.2d at 594.

294. *See id.*

295. *See id.*

296. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

297. *See* Bugay, *A New Era*, *supra* note 268, at 17.

298. Tincher v. Omega Flex, Inc., 104 A.3d 328, 384 (Pa. 2014).

299. *See* Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 594 (Pa. 1987) ("Using the

introducing this type of evidence would allow a defendant to escape liability by merely demonstrating that the defective product satisfied industry standards,[300] which would undermine the protective purpose of strict liability.[301]

In short, because such evidence "divert[s] the jury's attention from the [defendant's product] to the reasonableness of the appellant's conduct in choosing its design,"[302] it undermines the protective purpose of strict liability. Pennsylvania courts should, therefore, continue to preclude such evidence.[303]

## VI. CONCLUSION

In conclusion, although *Tincher*'s overruling of *Azzarello* clarified a number of points within Pennsylvania products liability law by acknowledging the negligence-based origin of the strict liability framework, Pennsylvania courts should not interpret it as also overruling *Lewis* and, in effect, permitting industry standards and practices evidence in strict products liability claims. Despite that "*Lewis* explicitly depends upon *Azzarello*'s dictum, now discarded,"[304] this Note argues that *Lewis* remains good law and should be followed to preclude the introduction of industry standards and practices evidence.[305] Its likelihood to cause confusion outweighs its evidentiary value, and allowing industry standards evidence in a strict liability analysis would eliminate any remaining distinction between negligence and strict liability and undermine the protective purpose of strict liability.

theory that negligence concepts are to be kept out of cases based on strict liability under Section 402A, various courts have excluded attempts by manufacturer-defendants to prove that the quality or design of the product in question comports with industry standards or is in widespread industry use."); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (stating that liability attaches even when "the seller has exercised all possible care in the preparation and sale of his product").

300. *See Lewis*, 528 A.2d at 595 (Larsen, J., concurring); Buckley, *supra* note 18, at 261–62.

301. *See* Bugay, *A New Era*, *supra* note 268, at 13–15 ("*Tincher*, like *Barker*, preserves Section 402A's policy of protecting the public from unsafe products.").

302. *See* Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 594 (Pa. 1987).

303. Buckley, *supra* note 18, at 261–62.

304. Zimmerman et al., *supra* note 209, at 376.

305. *See* Buckley, *supra* note 18, at 261–62.