

Products Liability Practitioners Anxiously Await *Tincher* Ruling

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Tincher v. Omega Flex, 64 A.3d 626 (Pa. 2013) (per curiam) is currently pending before the Pennsylvania Supreme Court.

The central issue in the case focuses on whether Pennsylvania courts should replace the strict liability analysis of Section 402A of the Restatement (Second) of Torts with that of the Restatement (Third) of Torts, and if so, whether that holding should be applied prospectively or retroactively.

Tincher has the potential to change the entire landscape of products liability law in Pennsylvania. Historically, Pennsylvania courts have maintained that negligence concepts have no place in Pennsylvania's strict liability law. As succinctly stated by the Pennsylvania Supreme Court in *Schmidt v. Boardman*, 11 A.3d 924 (Pa. 2011), however, this no-negligence-in-strict-liability mantra has resulted in "material ambiguities and inconsistencies in Pennsylvania's procedure."

The Third Restatement, however, addresses many of these concerns. For one, the Third Restatement endorses a reasonableness-based, risk-utility balancing test as the standard for evaluating product designs. The Third Restatement also provides that the cost-benefit test will be applied by the jury—guided by appropriate instructions—where sufficient evidence has been presented to preclude

summary judgment or a directed verdict.

Further, and perhaps most important, the Third Restatement does not limit a strict liability cause of action to the "user or consumer" of a defective product, but rather, broadly permits any person harmed by a defective product to recover in strict liability. Therefore, were the Pennsylvania Supreme Court to adopt the Third Restatement in *Tincher*, it would represent a fundamental shift in the area of Pennsylvania products liability law.

Such a ruling would also end the schism that presently exists between Pennsylvania state courts and federal courts applying Pennsylvania law. In 2008, the Pennsylvania Supreme Court granted allocatur in *Bugosh v. I.U. North America*, 942 A.2d 897 (Pa. 2008) (per curiam). The sole question presented on appeal was whether the court "should apply Section 2 of the Restatement (Third) of Torts in place of Section 402A of the Statement (Second) of Torts." However, the Supreme Court subsequently dismissed the appeal in *Bugosh* as improvidently granted.

Thereafter, the U.S. Court of Appeals for the Third Circuit addressed the question of whether the Pennsylvania Supreme Court would adopt the Third Restatement in *Berrier v. Simplicity Manufacturing*, 563 F.3d 38 (Pa. 2009). Based upon Justice Thomas Saylor's concurring opinion in *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003), the Third Circuit predicted that, if confronted with the issue, the Pennsylvania Supreme Court would discard Section 402A of the Second Restatement and move to the Third Restatement.

In the wake of *Berrier*, however, the Pennsylvania Supreme Court has yet to answer that question. Consequently, for the past five years, Pennsylvania state courts, bound by prior rulings of the Pennsylvania Supreme Court, have continued to apply Section 402A of the Second Restatement, while federal courts, bound by the Third Circuit's decision in *Berrier*, have employed the analysis provided under the Third Restatement. This has created a classic "Erie problem," whereby courts have interpreted Pennsylvania law differently depending upon whether the matter is pending in state or federal court.

Accordingly, *Tincher* presents the Pennsylvania Supreme

Court with the opportunity to end this split, and once and for all settle the issue of whether it will adopt the Third Restatement.

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