2015 WL 718278 (Pa.Super.) (Appellate Brief)
Superior Court of Pennsylvania.

Thomas AMATO and Jean Amato, his wife, Appellees,
v.
BELL & GOSSETT, et al., Appellants.
Thomas AMATO and Jean Amato, his wife, Appellees,
v.
BELL & GOSSETT, Clark-Reliance Corp., Copes-Vulcan, Inc., Crane Co., Dezurik/copes-Vulcan, Electrolux Home Products, Inc., Goodyear Canada, Inc., Greene, Tweed & Company, Inc., Henry Vogt Machine Company, Industrial Holdings Corp., f/k/a Carborundum Company, Inc., J.A. Sexauer, Inc., John Crane, Inc., Lincoln Electric Co., Nibco, Inc., Parker-Hannifin Corp., Saintgobain Abrasives, Inc., Sepco Corp., Spx Corp., Velan Valve Corp., William Powell Company, Ingersoll Rand Company, Trane US, Inc., Individually and /k/a American Radiator Standard Sanitary Corp., Kewanee Boiler Co. and/or Kewanee Boiler Div. Of American Standad, Union Carbide Corp., and Warren Pumps, LLC, Appellants.

No. 2344 EDA 2013.
January 7, 2015.

On appeal from an order of the Court of Common Pleas of Philadelphia County, per the Honorable Mark I. Bernstein, entered July 18, 2013, denying Appellant Crane Co.'s motion for post-trial relief in the Case docketed at No. 3373, August Term 2011, and from the judgment entered pursuant to that order. Appeal of Crane Co.

Supplemental Brief of Appellant Crane Co.

Swartz Campbell LLC, Daniel Bruch, Jr. (Pa. I.D. # 23193), 50 S. 16th Street, 28th Floor, Philadelphia, PA 19102, (215) 564-5190, (215) 299-4301 (Fax), for appellant Cran CO.

K&L Gates LLP, Nicholas P. Vari (Pa. I.D. # 59033), Michael J. Ross (Pa. I.D. # 200981), K&L Gates Center, 210 Sixth Avenue, Pittsburgh, PA 15222, (412) 355-6500, (412) 355-6501 (Fax), for appellant Crane CO.

***i** TABLE OF CONTENTS

***ii** TABLE OF AUTHORITIES

State Cases

*1 I. PRELIMINARY STATEMENT

The Pennsylvania Supreme Court's decision in Tincher v. Omega Flex, Inc., No. 17 MAP 2013, 2014 WL 6474923 (Pa. 2014) [1] reinstates into Pennsylvania law the factual inquiry of whether an allegedly defective product was "unreasonably dangerous" at the time of sale. Under the holding of Tincher, the trial court in these cases should have instructed the jury to decide whether Crane Co.'s "Cranite" product was "unreasonably dangerous" at the time of sale, by considering, among other things, whether the alleged risk of harm posed by "Cranite" was reasonably foreseeable at the time of sale. (R. 422a.) The trial court instead charged the jury under a then-existing Pennsylvania's pattern civil jury instruction that precluded the jury from considering whether "Cranite" was unreasonably dangerous at the time of sale. (R. 435a.) That pattern jury ***2** instruction is no longer consistent with Pennsylvania law, and a new trial on liability, only, under a charge consistent with Tincher is warranted.

Tincher overruled a line of precedents that grew out of the Pennsylvania Supreme Court's flawed decision in Azzarello v. Black Brothers Company, 391 A.2d 1020 (Pa. 1978). Collectively, those now-overruled precedents excluded any jury inquiry into whether a strict liability defendant's product was "nreasonably dangerous." Under this now-abandoned view of the law, a defendant like Crane Co. could have been held liable on a strict liability /failure-to-warn failure-to-warn theory even if the purported danger of which the defendant allegedly should have warned was unknown to and unknowable by science and industry when the defendant sold the product at issue. *See, e.g.,* Nicholas P. Vari i Michael J. Ross, *In a League of Its Own: Restoring Pennsylvania Product Liability Law to the Prevailing Modern "Attitude" of Tort Law,* 23 Widener L.J. 279 (2013).

By overruling *Azzarello,* the Supreme Court necessarily vacated any legal standard that would have prevented a jury from assessing whether a strict liability defendant's product was "unreasonably dangerous" at the time of sale. Thus, to implement Tincher, the Court should order a new trial in these cases, on liability, only, in these cases, so that a jury can determine whether Cranite was "unreasonably dangerous" at the time of sale.

*3 *II. ARGUMENT*

A. Tincher Overruled the Precedents Underlying the Trial Court's Failure-to-Warn Jury Instruction.

The Tincher decision applies broadly to all strict product liability claims in Pennsylvania, including failure-to-warn claims. See *Tincher,* 2014 WL 6474923 at *72 (noting that the "decision to overrule *Azzarello* ... may have an impact upon other foundational issues regarding manufacturing and warning claims" and that Tincher did not foreclose the court from adopting "available alternatives suggested by commentators or the Restatements, relating to foundational or subsidiary considerations" in the manufacturing defect and failure-to-warn contexts). The *Tincher* court held unequivocally that *Azzarello* incorrectly interpreted Section 402A of the Restatement (Second) of Torts by precluding a factual inquiry into whether a defendant's product was "unreasonably dangerous" at the time of sale. See Tincher, 2014 WL 6474923 at *39-43.

Prior to Tincher, Pennsylvania courts (including the trial court here) routinely cited Azzarello as the basis for preventing defendants in strict liability failure-to-warn cases from introducing any evidence ofthe "state-of-the-art" knowledge as it related to the product at issue at the time of sale. See Carrecter v. Colson Equip., Co., 499 A.2d 326 328-29 (Pa. Super. 1985) (relying on Azzarello and "hold[ing] that the trial court may not invite the jury to consider the reasonableness ofthe defendant's conduct by instructing on the State of the art *4 defense."); *Lewis v. Coffing Hoist Div., Duff-Norton Co.,* 528 A.2d 590, 594 (Pa. 1987) (relying on Azzarello to exclude "evidence of industry standards relating to the design of the [product], and evidence of its widespread use in the industry" because such evidence "go[es] to the reasonableness of the [defendant's] conduct in making its design choice... [and] such evidence would have improperly brought into the case concepts of negligence law"). By overruling *Azzarello,* the Supreme Court overruled all of the erroneous product liability jurisprudence that grew from it. See Bugosh v. *I.U. N. Am., Inc.,* 971 A.2d 1228, 1229 (Pa. 2009) (Saylor, J., dissenting) (noting that Pennsylvania's product liability scheme is "grounded on the seminal decision in Azzarello"). These overruled precedents are the ones that would have precluded Crane Co. from offering state-of-the-art evidence in this case.

B. Tincher Requires Pennsylvania Courts to Apply a "Properly Calibrated" Second Restatement Standard.

Pennsylvania's pre-*Tincher* approach to strict liability / failure-to-warn claims was facially inconsistent with Section 402A of the Second Restatement. Section 402A provides, in relevant part, that a seller is strictly liable for the injuries caused by his or her product only if the defendant sold a "product in defective condition unreasonably dangerous to the user or consumer..." See Rest.2d Torts, § 402A (emphasis added). Yet, despite Pennsylvania's adoption of the entirety of Section 402A as "the law of Pennsylvania" because it "reflect[ed] this *5 mode attitude" of tort law, Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966), Pennsylvania courts subsequently erased the "**unreasonably dangerous**" language from Section 402A, thereby imposing what was tantamount to absolute liability in such cases. *See, e.g., Berkebile v. Brandy Helicopter Corp.,* 337 A.2d 893, 900 (Pa. 1975), *abrogated by Reott v. Asia Trend, Inc.,* 55 A.3d 1088 (Pa. 2012) (noting that "the 'reasonable man' standard in any form has no place in a strict liability" and that "[i]t is therefore unnecessary and improper to charge the jury on 'reasonableness'").

Prior to Tincher, several Pennsylvania failure-to-warn decisions referenced the inherent unfairness in holding a defendant liable for failing to warn of a danger that may have been completely unknowable during the relevant time period. *See Sweitzer v. Dempster Sys., a Div. of Carrier Corp.,* 539 A.2d 880, 882 (Pa. Super. 1988) ("The role of foreseeability in a product liability case is consistent with the broad and sound social policy underlying § 402A."); *Ellis v. Chicago Bridge & Iron Co.,* 545 A.2d 906, 912-13 (Pa. Super. 1988) ("[A] determination of whether an object is unreasonably dangerous without adequate warnings, and thus defective, necessarily involves negligence principles such as reasonableness or foreseeability."). Tincher corrected this long-standing unfairness and brought Pennsylvania's decisional law in line with the text of Section 402A, which includes a factual inquiry into an allegedly defective product's "unreasonable" danger, in *6 accordance with the generally accepted views of Section 402A, which permits state-of-the-art evidence on this

point. *See Tincher,* 2014 WL 6474923, at *63 (noting that "the notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action, which reflects the standard of review or application of the tort, and its history").

Failure-to-warn case law from other "Second Restatement" jurisdictions - most notably California, whose jurisprudence the Tincher court drew upon heavily in framing its holding - are consistent with Tincher's guidance that a "properly calibrated" application of Section 402A permits a jury assessment of the defendant's knowledge of the potential harm and the reasonableness of any warning (or lack thereof) in light of this knowledge. These precedents expressly permit the admission of evidence on the fundamental point of the "state-of-the-art" at the time of the product's sale. See Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 559 (Cal. 1991) (limiting a defendant's duty to warn to "a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution."). Other "Second Restatement" jurisdictions are in accord. See, e.g., Woodill v. Parke Davis & Co., 402 N.E.2d 194, 198 (Ill. 1980) ("Requiring a plaintiff to plead and prove that the defendant manufacturer knew or should have known of the danger that caused the injury, and that the defendant ***7** manufacturer failed to warn plaintiff of that danger, is a reasonable requirement, and one which focuses on the nature of the product and on the adequacy of the warning..."); Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1172 (Colo. 1993) ("A manufacturer cannot warn of dangers that were not known to it or knowable in light of the generally recognized and prevailing scientific and technical knowledge available at the time of "anufacture and distribution."); Barton v. Adams Rental, Inc., 938 P.2d 532, 539 (Colo. 1997) (same); Wilkinson v. Duff, 575 S.E.2d 335, 340 (W. Va. 2002) ("In ascertaining whether a duty to warn exists, the fundamental inquiry is whether it was reasonably foreseeable that the product would be unreasonably dangerous if distributed without a particular warning.").

At bottom, *Tincher* holds that a "properly calibrated" Second Restatement analysis is the law of Pennsylvania. Precedents from other Second Restatement jurisdictions provide ample guidance regarding the three practical implications of this calibration:

● First, consistent with the majority rule in "Second Restatement" jurisdictions, liability should attach in Pennsylvania only if the jury determines that the harm of which plaintiff complains - i.e., the "unreasonably dangerous" nature of the product - was "known or knowable" to the defendant at the time the product was sold. *See Anderson, 810 P.2d at 559; Woodill, 402 N.E.2d at 198; Fenton,* 845 P.2d at 1172.

***8** ● Second, plaintiff must bear the burden of proof on this issue. See CACI 1205 (California pattern jury instruction in which plaintiff "must prove... that the [product] had potential risks... that were [known/ [or] knowable in light of the [scientific/and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/ distribution/sale]"); IL-IPICIV 400.02 & 400.07D (Illinois pattern jury instruction in which "the plaintiff has the burden of proving... the condition made the [product] unreasonably dangerous" and that the manufacturer's duty to warn applies only to "the dangers of the product of which it knew, or in the exercise of ordinary care, should have known, at the time the product left the manufacturer's control"); Colo. CJI-CIV 14:1 & 14:6 (Colorado pattern jury instruction in which "plaintiff, to recover from defendant... [must] have proved by a preponderance of the evidence... the [product] was defective and, because of the defect, the [product] was unreasonably dangerous (to a person)" and that "[a] product is not defective and unreasonably dangerous if a particular risk was not known or knowable by the manufacturer in light of the generally recognized and prevailing scientific and technical knowledge available at the time of manufacture and distribution").

● ***Third,*** a defendant must be entitled to introduce "state-of-the-art" evidence - to refute a plaintiff's contention that the product at issue was "unreasonably ***9** dangerous" at the time the product was sold. *See Anderson,* 810 P.2d at 559 ("[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution."); *Fenton,* 845 P.2d at 1172 ("State-of-

the-art evidence is properly admissible to establish that a product is not defective and unreasonably dangerous because of a failure-to-warn.").

C. The Trial Court's Liability Charge in the Matters Sub Judice Does Not Survive Tincher.

At trial, Crane Co. requested a jury charge on Plaintiffs' failure-to-warn claim stating that:

> A product is defective because of inadequate instructions or warnings when, at the time of sale or distribution, the foreseeable risks of the harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller and the omission of the instructions or warnings renders the product not reasonably safe.

(R. 422a.) This charge is entirely consistent with *Tincher.* The trial court, however, rejected Crane Co.'s requested instruction and instead charged the jury under Pennsylvania's now-obsolete pattern instruction, which foregoes the "unreasonably dangerous" test based upon *Azzarello* and its progeny (e.g., *Carrecter),* by providing that:

> ***10** Even a perfectly made and designed product may be defective if not accompanied by proper warnings and instructions concerning its use. A supplier must give the user or consumer any warnings and instructions of the possible risks of using the product that may be required, or that are created by the inherent limitations in the safety of such use. If you find that such warnings or instructions were not given, the defendant is liable for all harm caused to the plaintiff by the failure to warn.

Pa. SSJI (Civ) § 16.30. Because the pattern failure-to-warn instruction permits no consideration of whether the absence of a warning rendered a product "unreasonably dangerous," this instruction is at odds with Tincher, and, therefore, at odds with Pennsylvania law.

Crane Co. undoubtedly suffered prejudice as a result of the trial court's omission of the "unreasonably dangerous" test, because the charge as given precluded the jury from even considering whether any of the harms of which Crane Co. should have warned were knowable to Crane Co. at the time of sale. Indeed, Crane Co. produced evidence from its expert witnesses that any asbestos exposure generated by this "Cranite" gasket material would have been below 0.1 fibers per cubic centimeter of air (T.T. 2/15 [AM] at 56-57), which is the current limit for occupational exposure in the workplace under OSHA (id. at 51-52), and, thus, Cranite would not have presented a risk of asbestos-related disease to users or bystanders. The jury should have been permitted to decide - in the context of those facts - whether the absence of a warning rendered Cranite "unreasonably dangerous."

***11** On remand, the trial court should instruct the jury consistent with Crane Co.'s proposed charge. (R. 422a.) Such a charge is loyal to Tincher and consistent with the current charges given in other states to whose law the Tincher court looked to "calibrate" Pennsylvania product liability law. *See Anderson,* 810 P.2d at 559; *Woodill,* 402 N.E.2d at 198; Fenton, 845 P.2d at 1172. In accordance with this jury charge, Crane Co. should be permitted to present evidence regarding "state-of-the-art" knowledge at the time the product was sold, because such evidence is directly relevant to the question of whether the Cranite product was "unreasonably dangerous."

Alternatively, given that the *Tincher* court drew heavily on California jurisprudence in defining how a "properly calibrated" Section 402A should apply in Pennsylvania, the trial court should instruct the jury in accordance with California's pattern failure-to-warn jury instruction. See CACI 1205. California's pattern failure-to-warn instruction is consistent with both Tincher and the Second Restatement and provides as follows:

[Name of plaintiff] claims that the [product] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [manufactured/distributed/sold] the [product];

2. That the [product] had potential [risks/side effects/allergic reactions] that were [known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/ distribution/sale];

***12** 3. That the potential [risks/side effects/allergic reactions] presented a substantial danger when the [product] is used or misused in an intended or reasonably foreseeable way;

4. That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];

5. That [name of defendant] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];

6. That [name of plaintiff] was harmed; and

7. That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [name of plaintiff]'s harm.

CONCLUSION

This Court should reverse and remand for a new trial on liability, only, because the trial court erroneously applied Section 402 A of the Second Restatement and incorrectly charged the jury on Plaintiffs' failure-to-warn claim. A new trial must account for the controlling failure-to-warn law after Tincher, under which the jury must be instructed that, before finding Crane Co. liable, Plaintiffs must have carried their burden of proving that Crane Co. knew, or should have known, of the alleged danger associated with Cranite, based on the "state-of-the-art" knowledge available at the time it sold the product.

Footnotes

1 At Crane Co.'s request, the Court allowed Crane Co. to submit this supplemental brief to discuss the impact of Tincher as it pertains to Crane Co.'s request for a new trial on liability. *See McHugh v. Litvin, Blumberg, Matusow & Young,* 574 A.2d 1040, 1044 (Pa. 1990) ("[T]he general law of our Commonwealth continues to be, as it was at common law, that our decisions announcing changes in the law are applied retroactively, until and unless a court decides to limit the effect of the change, and that litigants have a right to rely on the change, especially if they have a suit pending in our courts at the time the change is announced."); *Christy v. Cranberry Volunteer Ambulance Corps., Inc.,* 856 A.2d 43, 51 (Pa. 2004) ("Our general principle is that we apply decisions involving changes of law in civil cases retroactively to cases pending on appeal."). Crane Co. stands on its briefing and arguments with respect to all remaining issues.