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Federal Judge Rules on Post-'Tincher' Products Liability

Saranac Hale Spencer, The Legal Intelligencer

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In one of the first federal opinions to address the Pennsylvania Supreme Court's November decision that retooled products liability law in the state, the judge decided to send the claims for negligence and strict products liability to trial.

U.S. District Judge Robert D. Mariani of the Middle District of Pennsylvania let both claims survive a motion for

summary judgment from the defendant, a German machine manufacturer called Hess.

Joseph Capece, who had his ankle fractured by a plate ejected from a Hess machine at a plant in Pen Argyl, filed the suit in 2012.

For claims of both negligence and strict products liability, the threshold question is whether the product at issue is defective, Mariani said.

And, "under the approach set forth in *Tincher*," the judge said, referring to the state Supreme Court's November ruling in *Tincher v. Omega Flex*, "a plaintiff may prove that a product is in a defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer (consumer expectations test), or (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweighs the burden or costs of taking precautions (risk-utility test)."

"Under either test, whether a product is in a defective condition is a question of fact to be decided by the jury," Mariani said.

Capece pursued an argument under only the risk-utility test.

"Under *Tincher's* risk-utility test, 'proof of risks and utilities are part of the burden to prove that the harm suffered was due to the defective condition of the product,'" the judge said, quoting from *Tincher*. "In explaining the risk-utility standard of proof, the court in *Tincher* referenced Dean [John] Wade's factors, which include the 'usefulness and desirability of the product—its utility to the user and to the public as a whole' and 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.'"

Hess had argued the utility factor would weigh in its favor, noting that Capece's own expert had testified that the "risk of harm could not be 'designed out'" of the machine, according to the opinion. It also pointed to the efficiency of results from its product, which allowed the Pennsylvania plant to double its output, according to the opinion.

Capece, though, argued that a "fixed and interlocked barrier fence along the conveyor" wouldn't interfere with the utility of the machine and would add a useful safety feature.

The effect of that alternative design on the machine's utility is a question for a jury, Mariani said.

As for the risk side of the test, Hess had argued that the facts weighed in its favor since the plant where Capece worked had an excellent safety history with an "accident-free rate of 99.99999 percent," according to the opinion, and that there were a host of precautions that Capece could have taken in order to prevent injury. The company's expert said that his "injury was the result of his own carelessness and disregard of the proper use of the ... safety gate," according to the opinion.

According to Capece, however, Hess' own corporate representative testified that the company's machines have been involved in three accidents over the last decade in other plants, including an accident that killed a worker in Russia.

He also disputed the availability of further precautions he could have taken.

"The court concludes that there is a genuine issue for trial as to whether the Hess machine was in a 'defective condition' under a risk-utility test," Mariani said. "There are factual disputes regarding the risks of harm from the machine as presently designed, the feasibility and effectiveness of a safer alternative design, and the alternative design's effect on the product's utility. These disputes are material because they go to the 'probability and seriousness of harm' and 'the burden or costs of taking precautions.'"

The judge denied summary judgment for negligence and strict liability.

He granted summary judgment on a claim for breach of warranty. Capece had agreed to drop that claim, the judge said, but that move wasn't in the record.

This is the second opinion that Mariani has issued this year that included an analysis of *Tincher*. Last month, he issued an opinion in *Nathan v. Techtronic Industries North America*, which applied *Tincher* retroactively in a products liability case.

Here, Capece's lawyer, Peter Patton of Galfand Berger in Philadelphia, said the judge recognized the disputed issues of fact and differing views of the experts and held summary judgment wouldn't be appropriate.

Patton speculated the judge "would have ... probably decided the case the same way" before *Tincher* came down.

Joshua Wall of Gordon & Rees in Philadelphia represented Hess and declined to comment.

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(Copies of the 17-page opinion in Capece v. Hess, PICS No. 15-0454, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.) •

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