

MAKING SENSE OF TINCHER II AND WHAT IT MEANS FOR A PRODUCT TO BE “DEFECTIVE”

By Bradley Smith, Esquire

In 2014, the Pennsylvania Supreme Court altered the product liability landscape in Pennsylvania with its decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014) (“*Tincher I*”). Now that same case is making its way back through the appellate system as Pennsylvania courts try to make sense of the Supreme Court’s 128-page opinion. The Superior Court’s February 16, 2018 published opinion in this same matter focused on how courts should define the term “defect” in their jury instructions. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386 (Pa. 2018) (“*Tincher II*”).

Although it was clear that *Tincher I* set forth new tests for how plaintiffs could prove a defective condition, it was ambiguous whether *Tincher I* had actually altered how Pennsylvania defines a defective condition. While the Pennsylvania Supreme Court Committee for Proposed Jury Instructions opted not to change its definition of a defective condition in its Suggested Standard Civil Jury Instructions (“PaSSJI”), *Tincher II* holds that the decades-old definition no longer accurately reflects the law of this Commonwealth.

Whether a product is defective is for the jury to decide, hence the importance of the court’s definition of defect to the jury. For many years, Pennsylvania products liability law was guided by *Azzarello v. Black Brothers*, 391 A.2d 1020 (Pa. 1978). *Azzarello*

defined a defective condition as “lacking any element necessary to make [the product] safe for its intended use.” 391 A.2d at 1027, n.12. *Azzarello* also required the trial court to analyze, pre-trial, whether the product was “unreasonably dangerous,” essentially conducting its own risk-utility test.

However, the “lacks any element necessary to make it safe” definition of a defect did not originate with *Azzarello*. Rather, that definition originated with *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975), which largely remains good law. By the time *Azzarello* was decided, that definition had already been incorporated into the PaSSJI for products liability cases in 1976. The “lacks every element necessary to make it safe” definition of defect has been part of the PaSSJI ever since, through the most recent revision in 2016. That may change in the wake of *Tincher II*.

What it means for a product to be defective is central to products liability law. If a product is defective, the supplier(s) of that product is strictly liable for any harm that the product causes. It does not matter if a supplier of the product exercised reasonable care, as it would in a negligence case. If a product is “in a defective condition unreasonably dangerous to the user” and that defect was a factual cause of personal injuries, the supplier will have to

compensate the injured party. RST. (SECOND) OF TORTS § 402A.

The *Tincher* case, which has now provided the Pennsylvania product liability world with two precedential opinions, arises from an action brought by homeowners for property damage that occurred as a result of a fire that erupted in their home after lightning struck steel tubing that was used to transport natural gas to the homeowners' fireplace. The homeowners alleged that there was a design defect in the tubing that allowed the lightning strike to ignite the natural gas and, therefore, sued the manufacturer. After a jury awarded the homeowners a verdict of nearly a million dollars, a lengthy battle began over the proper law to apply and the proper instructions to the jury.

The defendant, and the defense bar as a whole, hoped that the Pennsylvania Supreme Court would take the opportunity to adopt the Restatement (Third) of Torts, which would have entirely overturned decades of product liability law in this Commonwealth. Adopting the Third Restatement would have placed a much greater burden on the plaintiff in products liability cases by requiring that the plaintiff show negligence on the part of the manufacturer and requiring that the plaintiff not just show that the product was defective, but show a reasonable alternative design that the manufacturer could and should have adopted. *Tincher I* expressly refused to adopt the Third Restatement, but the Court's opinion went on to reshape how trial courts were required to handle product liability cases.

Most importantly in *Tincher I*, the Supreme Court (1) eliminated the requirement that trial courts make a threshold determination about whether the product was unreasonably dangerous, and (2) set forth two tests by which the plaintiff may prove a defective condition. Those two tests were the consumer expectations test and the risk-utility test. While those two tests set forth means for how to prove a defect, it was subject to debate whether the actual definition of a defective condition had changed.

The plaintiffs and defense bars both claimed victory after *Tincher I*. Eliminating the requirement that trial courts make a determination about whether the product is unreasonably dangerous means more cases are likely to survive summary judgment, which was considered a victory for plaintiffs. However, the risk-utility test articulated by *Tincher I* for plaintiffs to prove a defect was seen by many to favor defendants compared to prior law.

While lawyers and judges alike wrestled with how to interpret *Tincher I*, the opinion itself warned that it was not to be read too strictly, thus possibly leading to even more ambiguity:

It is essential for the bench and bar to recognize that the test we articulate today is **not intended as a rigid formula** to be offered to the jury in all situations. The alternate theories of proof contour the notion of "defective condition" in principled terms intended as comprehensive guidelines that are **sufficiently malleable to account for product diversity and a variety of legal claims, products, and applications of theory**. The crucial role of the trial court is to prepare a jury charge that explicates **the meaning of "defective condition" within the boundaries of the law, i.e., the alternative test standard**, and the facts that pertain.

Tincher I, 104 A.3d at 408.

The consumer expectations and risk-utility tests provide some clarity for how plaintiffs are to prove a defect, but they do not necessarily answer the question of how to define "defect." This is not simply a matter of semantics, as after *Tincher I* there began an immediate fight amongst litigators when the Committee for Proposed Standard Jury Instructions released the post-*Tincher* PaSSJI that still included the same definition of defective condition: lacking every element necessary to make it safe. The Pennsylvania Defense Institute formulated alternative post-*Tincher I* standard jury instructions due to its dissatisfaction with the retention of the old definition.

While *Tincher I* certainly did enact some changes to Pennsylvania law, it remanded to the trial court for a decision on whether the defendant manufacturer was entitled to a new trial or a judgment notwithstanding the verdict in the wake of the Supreme Court's opinion. The defendant manufacturer subsequently requested a new trial. At the trial years earlier, before any appeals, the jury had twice sent a question to the judge asking for the definition of "defective," hence the importance of this question that *Tincher II* would address. The trial court, however, denied the motion for a new trial as it believed the *Tincher I* framework wouldn't change the result based on how the jury had been charged and the evidence with which it had been presented. On appeal, the Superior Court disagreed, and held that the pre-*Tincher I* jury charges did not hold up under the new law for

Continued on page 10

Making Sense of *Tincher II* and What It Means for a Product to be “Defective”

Continued from page 9

proving a defective condition.

Noting that an inaccurate definition of “defect” was enough to merit a reversal under *Azzarello*, *Tincher II* held that the court’s definition of defect—“lacking every element necessary to make it safe”—and its instructions on how the jury was to determine whether the product was in a defective condition were wrong, therefore reversal was required. *Tincher II* did not exactly offer a new definition of “defect” that could be inserted into the PaSSJI, but rather simply held the current definition was inconsistent with the alternative test framework set forth in *Tincher I*.

Tincher II’s decision to throw out the “lacks every element necessary to make it safe” definition of defect due to its ties to *Azzarello* is based on dicta in *Tincher I*, but was not a course that was mandated by the Pennsylvania Supreme Court. *Tincher I* overruled *Azzarello* “to the extent that the pronouncements in *Azzarello* are in tension with the principles articulated in this

Opinion.” *Tincher I*, 104 A.3d at 376. But that definition of defect is not necessarily in tension with *Tincher I*. Clearly the Supreme Court’s Committee for Proposed Jury Instructions believed *Tincher I* and the “lacks every element necessary to make it safe” definition could coexist. When revising the PaSSJI post-*Tincher I* in 2016, the Committee did not alter the definition of defect. The comments to PaSSJI § 16.10 discussed *Tincher I* extensively. However, the Committee did not read *Tincher I* as necessitating a shift in this fundamental definition.

The Superior Court’s decision in *Tincher II* presents an unusual scenario, as it essentially holds that charging the jury with the relevant PaSSJI is reversible error. *Tincher II* held that courts should no longer equate a defective product with one that lacks any element necessary to make it safe. *Tincher II*, 180 A.3d at 397.

As a result of *Tincher II*, it seems likely that courts will shy away from the current PaSSJI, despite its release being post-

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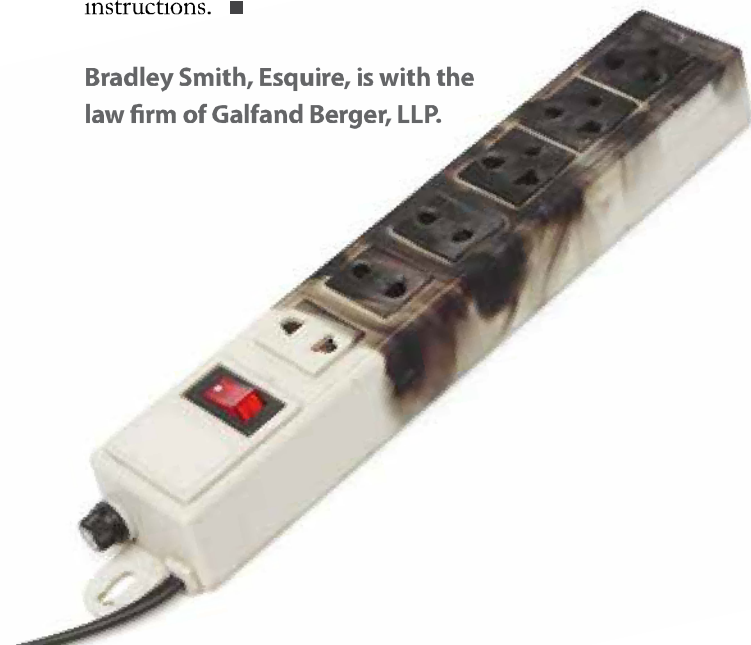
Tincher I. However, that does not mean that a product that lacks every element necessary to make it safe is not defective. It is easy to see how such a definition plays into the consumer expectations and risk-utility tests that are set forth in *Tincher I.* For example, a product that lacks a guard to protect a user from a rotating part is obviously lacking every element necessary to make it safe.

Under *Tincher I*'s consumer expectations test, a product is defective if the danger is unknowable and unacceptable to the average or ordinary consumer. *Tincher I*, 104 A.3d at 387. A product that is lacking a necessary element to make it safe, such as a guard to prevent body parts from coming into contact with a rotating part, is certainly one that a reasonable consumer would find dangerous.

Likewise, under *Tincher I*'s risk-utility test, a product is defective if a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. *Tincher I*, 104 A.3d at 389. If a product is missing an element necessary to make it safe, especially where that element is not cost-prohibitive, then that product would be defective under the risk-utility test.

While juries may no longer be instructed that the definition of a defective product is one that "lacks every element necessary to make it safe" at the time it left the supplier's control, that does not mean such language has to be scrubbed from plaintiff's lawyers' vocabulary. Rather, it can and should be worked into the current framework of the consumer expectations and risk-utility tests, even if this definition is no longer part of the jury instructions. ■

Bradley Smith, Esquire, is with the law firm of Galfand Berger, LLP.



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