In The

Supreme Court of Pennsylvania

No. 17 MAP 2013

TERRENCE D. TINCHER and **JUDITH R. TINCHER**,

Plaintiffs/Appellees,

v.

OMEGA FLEX, INC.,

Defendant/Appellant.

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF APPELLANT

Appeal from Order of the Court of the Superior Court of Pennsylvania,
at No. 1472 EDA 2011, Decided September 25, 2012,
Affirming Order of the Court of Common Pleas of Chester County, Nagle, J.,
Dated June 1, 2011, at June Term, 2006, No. 08-00974

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STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 104 corporate members from a broad cross-section of American and international product manufacturers. PLAC's corporate members are listed at Tab "A". In addition, several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC.

PLAC seeks to contribute to the improvement and reform of the law affecting product liability in the United States and elsewhere. PLAC's point of view reflects the experience of corporate members in diverse manufacturing industries. Since 1983, PLAC has filed over 1000 briefs as *amicus curiae* in state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in product liability law.

PLAC's members, and all product manufacturers, have a strong interest in a rational and consistent product liability regime that can be fairly administered, is comprehensible to judges and juries, and which ensures consideration of all relevant evidence. For thirty-five years Pennsylvania has struggled with an artificial attempt to segregate "strict liability" from "negligence," when legally they are two sides of the same coin. The result has been inconsistent limits upon negligence "concepts" and evidence; juries precluded from deciding risk/utility issues; vague, bare bones jury instructions; and ultimately judicial reluctance to apply "strict liability" at all. The unitary theory of product liability of the Restatement (Third) of Torts: Products Liability – retaining true "strict liability" only for manufacturing defects – is fairer, more logical, and easier to apply than the idiosyncratic approach Pennsylvania has taken. PLAC believes that this Court should therefore should overrule Azzarello v. Black Brothers Co., 480 Pa. 547, 391 A.2d 1020 (1978), and adopt and retrospectively apply the Restatement (Third).

This *amicus curiae* brief is respectfully submitted to the Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case.

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

PLAC accepts the statement of jurisdiction of Defendant-Appellant Omega Flex, Inc. ("Defendant").

II. STATEMENT OF THE QUESTIONS INVOLVED

The questions involved, as stated by the Court's order of March 26, 2013, are:

Whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement.

Tincher v. Omega Flex, Inc., No. 842 MAL 2012, 2013 WL 1222123 (Pa. March 26, 2013).

This question was answered in the negative by the Superior Court.

Whether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively.

Id.

This question was not addressed by the Superior Court.

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

PLAC accepts Defendant's statement of the scope and standard of review.

IV. STATEMENT OF THE CASE, FACTS, AND ORDER IN QUESTION

PLAC accepts Defendant's statements of the case, the facts, and order in question.

The pertinent facts and procedural history, limited to the issues specified by the Court, are these:

The root cause of the damages claimed by the subrogated insurer suing in the name of plaintiffs Terrance and Judith Tincher ("Plaintiff") is a lightning strike – the epitome of what prior generations described as an "act of God."[1] The product at issue, "TracPipe," stainless steel corrugated piping used in this instance to carry natural gas, was not being used as a lightning rod. Under Pennsylvania's existing strict liability/negligence dichotomy only "intended" product uses warrant strict liability; "foreseeable unintended uses" do not.[2] In this litigation, the dichotomy arose first in this context, whether as to household pipe, lightning strikes were an intended use or merely a foreseeable, but unintended, use (R.455) (Plaintiff arguing foreseeability). The trial court allowed the case to proceed in strict liability.

This distinction between "intended" and "unintended" product uses is one of many complexities of current law that would be disappear under the Restatement (Third) of Torts.

The Tincher strict liability claim went to trial. Since 1977, juries do not weigh product risks and utility directly. Instead, the judge decides as a matter of law whether the product could

[1] "Damage done by lightning is an inevitable accident, and also an act of God." McKinley v. C. Jutte & Co., 230 Pa. 122, 125, 79 A. 244, 245 (1911). See Sinkovich v. Bell Telephone Co., 286 Pa. 427, 438, 133 A. 629, 632 (1926) (a "shock . . . produced by atmospheric electricity . . . resulted from the act of God").

[2] Pennsylvania Dept. of General Services v. U.S. Mineral Products Co., 587 Pa. 236, 253-54, 898 A.2d 590, 600-01 (2006) ("General Services").

be considered "unreasonably dangerous" in light of available alternative designs Procedurally, this determination requires a dispositive motion (here for summary judgment), so the burden of proof is effectively borne by defendants. See (RR 232) (sending unreasonably dangerous issue to jury; "A court may grant summary judgment only when there is no genuine issue of any material fact and the right to such a judgment is clear and free from doubt.").

This unique procedure forcing defendants to establish a favorable balance of product utility and risks as a matter of law would be abolished under the Restatement (Third) of Torts.

In Tincher the balance of product benefits and risks was the key to the case. A full risk/utility discussion appears in Defendant's brief. Briefly, corrugated stainless steel piping like TracPipe has a number of advantages over cast-iron "black" pipe, which Plaintiff offered as an alternative design.[3] The defense contended that corrugated pipe was lighter, more flexible, easier to install, and more resistant to another "act of God" – earthquakes. Nonetheless stainless steel, being stronger than "black" pipe, is made thinner. Should a lightning strike occur, extreme conditions can generate electrical arcing that can perforate the thinner material.

At the end of Plaintiff's case, the trial court denied Defendant's nonsuit motion, which reasserted risk/utility issues (R.400-11, 448-68). At the end of all evidence, Plaintiff voluntarily dismissed warning-based claims. Defendant's risk/utility based directed verdict motion was denied. The case went to the jury on strict liability design defect and negligent design theories. As to strict liability the trial court gave the jury an Azzarello[4] "any element" defect charge:

[3]As discussed below, at pp. 42-43, existing Pennsylvania law, like the Restatement (Third), requires an alternative design as an "essential element" in defective design cases – but only in connection with preliminary judicial evaluation. The law does not require a jury charge on alternative design, or any other aspect of risk/utility balancing.

[4]Azzarello v. Black Brothers Co., 480 Pa. 547, 559-60, 391 A.2d 1020, 1027-28 (1978).

> 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.

(RR. 493). Defendant's request that the jury be explicitly charged on risk/utility under the Restatement (Third) was denied.

As to negligent design the trial court provided the jury with an "all the circumstances" instruction referencing industry standards:

> Now, in determining, first of all, the negligence portion of this claim, you are able to consider industry standards and custom. . . . Compliance with an industry standard is not necessarily conclusive as to the issue of duty or negligence and does not in and of itself excuse the defendant from liability merely because there has been compliance with an industry standard. The defendant must still exercise reasonable care in the design of its product under all the circumstances.
>
> If you find that the prevailing practices in the industry do not comply with a reasonable standard of care, then you could find that there was a breach on the part of this defendant not withstanding compliance with standards or customs of the industry that the defendant is in.

(RR. 499-500).

Under the Restatement (Third) of Torts, divergent product liability jury instructions, such as the Azzarello "any element" instruction that omits risk/utility and alternative design, would no longer be required. The Restatement (Third) also permits admission of industry standards and other evidence excluded or restricted under Pennsylvania's current version of strict liability.

The jury found for Defendant on the negligent design claim, but reached a verdict for Plaintiff under the "any element" strict liability design defect formulation.

This appeal followed. Bound by current law, the Superior Court was unwilling to consider Defendant's advocacy of the Restatement (Third) of Torts. Otherwise, that court affirmed the verdict.

V. SUMMARY OF ARGUMENT

For thirty-five years, the Pennsylvania courts have struggled with the negligence/strict liability dichotomy created in Azzarello v. Black Brothers Co., 480 Pa. 547, 391 A.2d 1020 (1978). Supposedly, "negligence concepts" such as reasonableness and foreseeability "have no role in. . . strict liability." Lewis v. Coffing Hoist Division, Duff-Norton Co., 515 Pa. 334, 337, 528 A.2d 590, 591 (1987). In practice this exclusion has proven futile. Ever since Azzarello, distinctions between negligence and strict liability have been illusory and contradictory. This and other courts have analyzed many strict liability issues in light of "reasonableness" and "foreseeability." More importantly, it defies common sense for the same facts and same defect theory to produce diametrically opposite results – as produced by the jury in this case.

Accordingly Pennsylvania law should abandon the Azzarello negligence/strict liability dichotomy in favor of the unitary defect standard of the Restatement (Third) of Torts, Products Liability §2 (1998) – which this Court has cited with approval since Duchess v. Langston Corp., 564 Pa. 529, 769 A.2d 1131 (2001). Already, Pennsylvania law and the Restatement agree upon two critical aspects of Restatement (Third) §2 – application of a risk/utility test for defect and the need for an alternative feasible design before a plaintiff can reach the jury. Thus, Pennsylvania should join the many states, including neighboring New York and New Jersey, and adopt Restatement (Third) §2. The Azzarello negligence/strict liability dichotomy should be abandoned, the decision of the Superior Court reversed, and the cause remanded for a new trial.

Should the Court adopt the Restatement (Third) of Torts, that decision should apply retrospectively to all pending cases. No legal issue in recent years has been as thoroughly foreshadowed as moving from Restatement (Second) of Torts §402A (1965) to the Restatement (Third). Ten years ago, in 2003, three members of this Court advocated this change. Since then, the Court has averted to the need for a fundamental reexamination of Pennsylvania product

liability doctrine on several occasions. In 2009, the Third Circuit predicted that this Court would adopt the Restatement (Third), a prediction it has twice reaffirmed. The prospect of the Restatement (Third) of Torts has existed longer than any relevant statute of limitations. No plaintiff with an accrued product liability action can credibly claim surprise at this development.

VI. ARGUMENT

A. Azzarello's Unique Strict Liability Standard Has Proven To Be Unworkable And Unfair.

The Court has ordered the parties to address whether the Restatement (Third) of Torts: Products Liability §2 (1998), should "replace" the Restatement (Second) of Torts §402A (1965), in Pennsylvania product liability cases. In reality, Pennsylvania law does not follow Restatement (Second) §402A. Rather, for reasons of doctrinal purity, Pennsylvania law omitted critical portions of Restatement (Second) §402A in Azzarello and other early strict liability decisions. In this respect, Pennsylvania is unique. In thirty-five years, "no other state has adopted the Azzarello approach to strict products liability." Phoebe A. Haddon, "An Independent Judiciary: The Life and Writings of Robert N.C. Nix, Jr.," 78 TEMP. L. REV. 331, 349 (2005).

1. Azzarello's Unique Standard For Strict Liability Attempts Absolute Separation From Negligence.

"Section 402A" as now applied in Pennsylvania is not what this Court initially adopted in Webb v. Zern, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966). As envisioned by the American Law Institute ("ALI") and later approved in Webb, §402A, expressly limited liability to "unreasonably" dangerous" products:

> One who sells any product in a defective condition **unreasonably dangerous** to the user or consumer or to his property is subject to liability. . . .

Restatement (Second) of Torts §402A(1) (1965) (emphasis added).

That the ALI intended §402A to judge products by a "reasonableness" standard is repeatedly confirmed by that section's comments. Explaining "defective condition," §402A's drafters explained:

> The rule stated in this Section applies only where the product is . . . in a condition not contemplated by the ultimate consumer, which will be **unreasonably dangerous** to him.

Restatement (Second) §402A, comment g (emphasis added). Reasonableness is also the standard for abnormal use:

> Where, however, [a seller] has **reason** to anticipate that danger may result . . ., he may be required to give adequate warning.

Id., comment h (emphasis added). The "unreasonably dangerous" aspect of strict liability involves precisely what the ALI intended – a determination of "reasonableness":

> The rule stated in this Section applies only where the defective condition of the product makes it **unreasonably dangerous** to the user or consumer. Many products cannot possibly be made entirely safe. . . . That is not what is meant by "**unreasonably dangerous**" in this Section.

Restatement (Second) §402A, comment i (emphasis added).[5]

Likewise, "reasonableness" and "foreseeability" ("foresight") figure into §402A's standard for warnings and their adequacy:

> In order to prevent the product from being **unreasonably dangerous**, the seller may be required to give directions or warning. . . . Where, however, the product contains [a] . . . danger [that] is not generally known, or if known is one which the consumer would **reasonably** not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of **reasonable**, developed human skill and **foresight** should have knowledge. . . . [A] product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it **unreasonably dangerous**.

[5]Section 402A has always tempered its strict liability formulation with a negligence-based concept of defect – that, for liability to attach, a product must be "in a defective condition unreasonably dangerous to the user or consumer or to his property." See George W. Conk, "Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?," 109 Yale L.J. 1087, 1092 (2000).

Restatement (Second) §402A, comment j (emphasis added). "Unreasonable" danger determines when "unavoidably unsafe" products require warnings:

> 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. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it **unreasonably dangerous**. . . . The seller of such products . . . is not to be held to strict liability for. . .an apparently useful and desirable product, attended with a known but apparently **reasonable** risk.

Restatement (Second) §402A, comment k (emphasis added).

Reasonableness is also a consideration in the Restatement (Second)'s treatment of what was then known as contributory negligence:

> If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds **unreasonably** to make use of the product and is injured by it, he is barred from recovery.

Id., comment n (emphasis added).

Both the black letter law and the comments demonstrate that the ALI never contemplated a negligence/strict liability dichotomy in Restatement (Second) §402A. Rather, two justices of this Court (with three others concurring in the result) brought the notion of absolute separation between negligence and strict liability into Pennsylvania law. Berkebile v. Brantley Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).[6] The Berkebile plurality held that "the 'reasonable man' standard in any form has no place in a strict liability case." 462 Pa. at 96, 337 A.2d at 900. The plurality followed California law, which it characterized as "the vanguard of products liability," to find it "improper to charge the jury on 'reasonableness'" in a strict liability case. Id. at 96, 337 A.2d at 899-900 (following Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972)).

[6]As pointed out in Reott v. Asia Trend, Inc., 55 A.3d 1088, 1099 (Pa. 2012), as a plurality opinion, Berkebile "is not binding on this Court."

Part and parcel of Berkebile's rejection of the "reasonable man" negligence standard was the plurality's disapproval of liability based upon foreseeability. "Foreseeability," the plurality stated, "is a test of negligence," and is therefore "irrelevant" to strict product liability. 462 Pa. at 97, 337 A.2d at 900 (citation omitted):

> In the strict liability context we reject standards based upon what the "reasonable" consumer could be expected to know or what the "reasonable" manufacturer could be expected to "foresee" about the consumers who use his product.

Id. at 101, 337 A.2d at 902 (citation omitted).

The California law that Berkebile followed, however, was a **rejection** of Restatement (Second) §402A. Strict liability in California predates §402A. Cronin, 501 P.2d at 1158-59. Far from applying §402A, California law in Cronin refused to adopt it. 501 P.2d at 1160 ("[w]e have not hesitated to reach conclusions contrary to those set forth in Restatement [§]402A").[7] Thus, in Berkebile the plurality deviated from, and did not follow, Restatement (Second) §402A as adopted by the ALI. Thus, to call current Pennsylvania law "§402A" is a misnomer.

Three years later, this Court used Berkebile as the foundation for erecting the current doctrinal wall separating "strict liability" and "negligence." See Azzarello v. Black Brothers Co., 480 Pa. 547, 391 A.2d 1020 (1978). Azzarello justified its result "principally because [manufacturers] are in a position to absorb the loss by distributing it as a cost of doing business." 480 Pa. at 553, 391 A.2d at 1023. Relying on the same California precedent, Azzarello disapproved §402A's "unreasonably dangerous" formulation of product defect because it "rings of negligence." 480 Pa. at 555, 391 A.2d at 1025 (quoting Cronin, 501 P.2d at 1162). Defining

[7]The California Supreme Court retreated from Cronin's absolutist view of strict liability in Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 536 (Cal. 1991) ("the claim that a particular component 'rings of' or 'sounds in' negligence has not precluded its acceptance in the context of strict liability"). Anderson, which applied state of the art principles to strict liability, "blended or accommodated the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence." Id. at 557.

product defects in terms of unreasonable danger "tend[ed] to suggest considerations which are usually identified with the law of negligence." 480 Pa. at 555, 391 A.2d at 1025. The strict liability terminology invented in Azzarello for charging the jury focused on "whether the product is safe for its intended use." Id. at 558-59, 391 A.2d at 1026-27 (footnote omitted).

> [T]he supplier must at least provide a product which is designed to make it safe for the intended use. Under this standard, in this type case, 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.

480 Pa. at 559-60, 391 A.2d 1027-28.[8]

Unlike Berkebile, the Azzarello decision did not completely exclude "reasonableness." Rather, the Court repurposed the Restatement's "unreasonably dangerous" criteria, demoting it to a preliminary "question of law" for courts to decide before strict liability claims are submitted to juries; juries were only to be instructed about "elements" that made products "safe" or "unsafe" for their "intended use." 480 Pa. at 558, 391 A.2d at 1026.

As for juries, however, Azzarello prohibits their exposure to negligence concepts such as reasonableness and foreseeability. Under current law, there is no dispute that foreseeability is a negligence concept. As discussed in Pennsylvania Dept. of General Services v. U.S. Mineral Products Co., 587 Pa. 236, 253-54, 898 A.2d 590, 600-01 (2006) ("General Services"), reliance upon foreseeability concepts to define strict liability was roundly rejected under existing law in Phillips v. Cricket Lighters:

> [T]he cause of action presently being examined is not a negligence claim; rather, it sounds in strict liability. And **strict liability affords no latitude for the utilization of foreseeability concepts** such as those proposed by [plaintiff]. We have

[8] Azzarello's formulation followed proposed Pennsylvania Standard Jury Instruction 8.02 (Civil) Subcommittee Draft (Jun. 6, 1976). 480 Pa. at 559-60 n.12, 391 A.2d at 1027 n.12. The sole precedent for Azzarello's terminology was a draft jury instruction.

> bluntly stated that negligence concepts have no place in a case based on strict liability.

576 Pa. 644, 655, 841 A.2d 1000, 1006 (2003) (footnote omitted) (emphasis added). Under current law, "there is no strict liability in Pennsylvania relative to non-intended uses even where foreseeable by a manufacturer." General Services, 587 Pa. at 253, 898 A.2d at 600.

2. Azzarello's Purported Negligence/Strict Liability Dichotomy Is Unworkable In Practice And Generates Inconsistent Results.

Since Azzarello, the lower courts, and occasionally this Court, have struggled to enforce the separation between negligence and strict liability mandated by that decision. Initially, courts tried expunging from strict liability anything seemingly resembling negligence – at least when plaintiffs benefitted. This Court prohibited juries from learning about a product's conformity to industry standards in Lewis, because such "standards. . .go to the reasonableness of the [defendant's] conduct." 515 Pa. at 343, 528 A.2d at 594. The Court extended its pre-Azzarello holding rejecting the complete defense of contributory negligence[9] to prohibit the mere reduction of a plaintiff's strict liability recovery by his or her own comparative negligence. Kimco Development Corp. v. Michael D's Carpet Outlets, 536 Pa. 1, 7-8, 637 A.2d 603, 606 (1993).

In the lower courts, confusion reigns. On issue after issue, courts have reached contradictory results concerning what does, or does not "ring of negligence," and therefore cannot be asserted in strict liability. A few examples:

a. Plaintiff Conduct Relating To Causation

Plaintiffs frequently do things that cause their own injuries – conduct that, in other contexts, might also be considered negligent. In Reott v. Asia Trend, Inc., 55 A.3d 1088 (Pa. 2012),

[9] McCown v. International Harvester Co., 463 Pa. 13, 17-18, 342 A.2d 381, 382 (1975).

a strict liability case involving a manufacturing defect,[10] the Court sought to keep negligence and strict liability separate by adopting a "highly reckless conduct" standard already used by the Superior and Commonwealth Courts. Only a plaintiff's "highly reckless conduct" – not mere "contributory negligence" – was admissible in strict liability. The dichotomy between negligence and strict liability forced this distinction:

> [U]nder Pennsylvania's scheme of products liability, evidence of highly reckless conduct has the potential to erroneously and unnecessarily blend concepts of comparative/contributory negligence. . . . [W]ithout some further criteria, highly reckless conduct allegations by defendants could become vehicles through which to eviscerate a Section 402A action by demonstrating a plaintiff's comparative or contributory negligence.

Id. at 1098. The conduct at issue in Reott – the plaintiff's "self-taught maneuver" of "rais[ing] himself on his toes and c[o]m[ing] down on" a hunter's tree stand in order to "set" it, id. at 1091, was deemed not sufficiently "unforeseeable and outrageous" to be admissible. Id. at 1101.

By ratifying the lower courts' standard in Reott, the Court inherited distinctions that in practice have proven ephemeral. Courts have struggled to identify "highly reckless" conduct in case after case. Many decision admit "highly reckless" plaintiff conduct as relevant to causation in strict liability cases:

- That plaintiff used an improper product attachment, failed to use an available safety device, malpositioned the product, and without looking stuck his head out an open window. Daddona v. Thind, 891 A.2d 786, 810-11 (Pa. Commw.), allocatur denied, 589 Pa. 732, 909 A.2d 306 (2006).

- That plaintiff used the product without a safety shield in violation of explicit warnings. Gigus v. Giles & Ransome, Inc., 868 A.2d 459, 462 (Pa. Super. 2005), allocatur denied, 586 Pa. 758, 895 A.2d 550 (2006).

[10]The product in Reott was "was defectively manufactured in that it was held together only with glue, rather than with glue and stitching." Id. at 1091. As discussed, below at p. 41, the Restatement (Third) retains non-fault "strict" liability for "manufacturing defects" where the product was not manufactured as the defendant intended.

- That plaintiff either inserted or withdrew a plug from an electrical outlet while using a product known to give off inflammable fumes. Coffey v. Minwax Co., 764 A.2d 616, 621 (Pa. Super. 2000).

- That plaintiff, in violation of law, drove a motorcycle with a non-functional headlight. Frey v. Harley Davidson Motor Co., 734 A.2d 1, 6-8 (Pa. Super. 1999) (finding reversible error), allocatur denied, 561 Pa. 697, 751 A.2d 191 (2000).

- That plaintiff operated the product while intoxicated. Madonna v. Harley Davidson, Inc., 708 A.2d 507, 508-09 (Pa. Super. 1998) (motorcycle); Gallagher v. Ing, 367 Pa. Super. 346, 352, 532 A.2d 1179, 1182 (1987) (automobile), allocatur denied, 519 Pa. 665, 548 A.2d 255 (1988).

- That both participants in a collision, including plaintiff, were inattentive to where they were going. Foley v. Clark Equipment Co., 361 Pa. Super. 599, 628-29, 523 A.2d 379, 394 (finding reversible error), allocatur denied, 516 Pa. 614, 641, 531 A.2d 712, 780 (1987).

- That plaintiff did not change from gasoline-soaked clothing and was burned. Keirs v. Weber National Stores, Inc., 352 Pa. Super. 111, 117, 507 A.2d 406, 409 (1986).

- That plaintiff, without looking, put his hand into a can with a jagged edge. Gottfried v. American Can Co., 339 Pa. Super. 403, 412, 489 A.2d 222, 227 (1985).

- That plaintiff lost control of a vehicle while speeding at approximately 100 mph. Bascelli v. Randy, Inc., 339 Pa. Super. 254, 260-61, 488 A.2d 1110, 1114 (1985) (finding reversible error), allocatur denied (Pa. Dec. 10, 1985).

- That plaintiff and others failed to maintain the product, so that it malfunctioned and caused injury. Moyer v. United Dominion Industries, Inc., 473 F.3d 532, 542-45 (3d Cir. 2007) (finding reversible error) (Pennsylvania law).

- That plaintiff failed to read an owner's manual and stood near an open flame wearing flammable clothing. Wilson v. Vermont Castings, Inc., 170 F.3d 391, 395-96 (3d Cir. 1999) (Pennsylvania law).

Other decisions have excluded almost any plaintiff conduct that might also be considered "negligent" under the Azzarello negligence/strict liability dichotomy. These courts have barred admission of often indistinguishable plaintiff conduct:

- That plaintiff operated the product under the influence of alcohol and drugs, and violated explicit warnings. Smith v. Yamaha Motor Corp., 5 A.3d 314, 321 (Pa. Super. 2010), allocatur denied, 612 Pa. 700, 30 A.3d 489 (2011).

- That plaintiff was distracted and unable to control his vehicle. Gaudio v. Ford Motor Co., 976 A.2d 524, 539-42 (Pa. Super. 2009), allocatur denied, 605 Pa. 686, 989 A.2d 917 (2010).

- That plaintiff was inattentive while handling metal near a high tension power line. Clark v. Bil-Jax, Inc., 763 A.2d 920, 924 (Pa. Super. 2000), allocatur denied, 566 Pa. 656, 782 A.2d 541 (2001).

- That plaintiff or a third party started the product running while plaintiff stood on it. Jara v. Rexworks Inc., 718 A.2d 788, 793-94 (Pa. Super. 1998), allocatur denied, 558 Pa. 620, 737 A.2d 743 (1999).

- That both participants in a collision, including plaintiff, were inattentive to where they were going. Charlton v. Toyota Industrial Equipment, 714 A.2d 1043, 1047-48 (Pa. Super. 1998).

- That plaintiff, without setting an emergency brake, tried to exit a vehicle while it was in gear. Childers v. Power Line Equipment Rentals, 452 Pa. Super. 94, 107-08, 681 A.2d 201, 208 (1996), allocatur denied, 547 Pa. 735, 690 A.2d 236 (1997).

- That plaintiff failed to read an operator's manual and failed to use the emergency brake. Dillinger v. Caterpillar, Inc., 959 F.2d 430, 440-44 (3d Cir. 1992) (Pennsylvania law).

While the recent Reott decision affirms admissibility of at least some plaintiff conduct in strict liability, utter lack of consensus persists over the line between inadmissible "contributory negligence," as opposed to admissible "recklessness" evidence. This persistent difficulty further demonstrates that negligence and strict liability are not nearly as separate and distinct as assumed in Azzarello. "[T]he requirements of proving substantial-factor causation remain the same" for both negligence and strict liability. Summers v. Certainteed Corp., 606 Pa. 294, 316, 997 A.2d 1152, 1165 (2010) (citations omitted). Since the standard for proving causation is identical, logically the evidence admissible to prove causation under each theory should also be the same.

b. State Of The Art – Compliance With Voluntary Industry Standards

The high water mark of the negligence/strict liability dichotomy was Lewis, 515 Pa. 334, 528 A.2d 590, in which a bitterly divided Court held evidence of voluntary industry standards

per se inadmissible in strict product liability. Following Azzarello, the majority emphasized the distinction between negligence and strict liability. 515 Pa. at 340-41, 528 A.2d at 592-93 (strict liability inheres despite a manufacturer's "exercis[e of] 'all possible care'"). Even though industry standards could bear upon defectiveness or feasibility of alternative designs, id. at 342, 528 A.2d at 593-94, such evidence also went "to the reasonableness of the [manufacturer's] conduct in making its design choice." Id. at 343, 528 A.2d at 594. Industry standards evidence was held excludable because it "ha[d] a tendency to distract the jury from its main inquiry [and to] confuse the issue." Id. Dissenting Justices Hutchinson and Flaherty lamented that strict liability was becoming "madness."[11]

A blanket exclusionary rule against evidence that might also bear on a manufacturer "reasonableness" proved untenable. In Spino v. John S. Tilley Ladder Co., 548 Pa. 286, 696 A.2d 1169 (1997), the Court unanimously rejected "per se" exclusion of "negligence" evidence in strict liability cases. Id. at 290, 696 A.2d at 1170. Instead, Spino held that in strict liability as anywhere else, "while evidence can be found inadmissible for one purpose, it may be admissible for another." Id. at 292, 696 A.2d at 1172 (citing Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 185, 242 A.2d 231, 235 (1968)).[12] Notwithstanding Lewis, evidence probative of strict liability

[11]"I am compelled, in the words of a popular song, to 'speak out against the madness.' The instant madness is a creeping consensus among us judges and lawyers that we are more capable of designing products than engineers. A courtroom is a poor substitute for a design office." Id. at 346, 528 A.2d at 596 (quoting, "Long Time Gone," by Crosby, Stills & Nash (1973)) (Hutchinson & Flaherty, JJ., dissenting).

[12]Bialek concerned admissibility of a description of the defendant's manufacturing process as relevant to whether the product was defective at sale. Although that evidence indisputably bore also on the defendant's negligence, the Court held it admissible for the limited purpose for which it was offered:

> Because the evidence also tends to show due care, which is irrelevant under §402A, plaintiff contends that its admission misleads the jury. . . . The objection is not sufficient to bar the admission of this evidence. It is elementary that evi-

remains admissible even though it would be inadmissible if offered to prove reasonableness or due care. Commonwealth v. United States Mineral Products Co., 598 Pa. 331, 344-45, 956 A.2d 967, 975 (2008) (lack of sprinklers in plaintiff's building admissible; following Spino).

Still, in too many cases courts continue applying Lewis to bar palpably relevant evidence. In Martinez v. Triad Controls, Inc., 593 F. Supp.2d 741 (E.D. Pa. 2009), evidence of applicable federal regulations was excluded under Lewis even though offered to show that the opinion of the plaintiff's expert was "contrary to" those governing regulations. Id. at 752-53.

c. State Of The Art – Compliance With Mandatory Government Regulations

Another confused "state of the art" area is compliance with mandatory government standards. Increasingly, the appellate courts have analogized regulatory compliance to voluntary industry standards and held both inadmissible under Lewis – even though regulatory compliance also relates to a product's condition, since sale of noncompliant products is illegal. See Estate of Hicks v. Dana Cos., 984 A.2d 943, 968 (Pa. Super. 2009) (en banc) ("[o]ne who asserts that their product is not defective because it is in compliance with either industry or governmental standards necessarily implicates their behavior in seeing to it that their product so complies"), allocatur denied, 610 Pa. 586, 19 A.3d 1052 (2011); Harsh v. Petroll, 840 A.2d 404, 424-25 (Pa. Commw. 2003) (equating compliance with mandatory federal motor vehicle standards to conformity to industry practice), aff'd on other grounds, 584 Pa. 606, 887 A.2d 209 (2005).

Previously, the same courts had viewed compliance with mandatory regulations as "essential" to proof of "alternative, feasible design," Dadonna, 891 A.2d at 811, or as "of probative

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> dence admissible for one purpose is not rendered inadmissible because it would be inadmissible for another purpose.

430 Pa. at 185, 242 A.2d at 235 (citation omitted).

value in determining whether there is a defect." Jackson v. Spagnola, 349 Pa. Super. 471, 479, 503 A.2d 944, 948 (1986), allocatur denied, 514 Pa. 643, 523 A.2d 1132 (1987). This Court has not yet had occasion to determine the admissibility of regulatory compliance evidence.

Plaintiffs, however, can assert violations of mandatory governmental standards, under Pennsylvania law in strict liability actions on principles similar to negligence per se. Stanton v. Astra Pharmaceutical Products, Inc., 718 F.2d 553, 571 (3d Cir. 1983) (jury may use regulatory violation to determine product defect); see Restatement (Second) of Torts §288, comment d (1965) (violation of "statutory provisions" have been "a basis for civil liability in actions for torts other than negligence, such as. . .strict liability"). To admit evidence of regulatory violations – while excluding regulatory compliance – is another example of using the negligence/strict liability dichotomy a one-way street benefiting only plaintiffs, contrary to this Court's precedent.

> It would be incongruous to constrain manufacturer resort to use-related defenses based on the logic that negligence concepts have no place in strict liability cases, while at the same time expanding the scope of manufacturer liability without fault in a generalized fashion using the negligence-based foreseeability concept.

General Services, 587 Pa. at 258, 898 A.2d at 603.

d. State Of The Art – Feasibility/Unknowability

Similarly, lower courts lack consensus on core "state of the art" − whether strict liability embraces impossible duties such as adding safety devices that have not yet been invented, or warning about risks not yet discovered at the time a warning was (or should have been) given. In Leibowitz v. Ortho Pharmaceutical Corp., the court held:

> In no reported case, has a court imposed liability on a . . . manufacturer on the basis of facts or discoveries made subsequent to the date a particular cause of action accrued. . . . A warning should not be held improper because of subsequent revelations.

224 Pa. Super. 418, 433-34, 307 A.2d 449, 458 (1973). Accord Phatak v. United Chair Co., 756 A.2d 690, 693 (Pa. Super. 2000) ("evidence is allowed to show the state of the art" in safety

design at the time in question), allocatur denied, 566 Pa. 666, 782 A.2d 548 (2001); cf. Dambacher v. Mallis, 336 Pa. Super. 22, 60 n.9, 485 A.2d 408, 428 n.9 (1984) (en banc) (declining to decide if strict liability exists for unknowable risks), app. dismissed, 508 Pa. 643, 500 A.2d 428 (1985).

Nevertheless, in Carrecter v. Colson Equipment Co., 346 Pa. Super. 95, 499 A.2d 326 (1985), the Superior Court reached a diametrically opposite conclusion, rejecting any defense based on "the technological feasibility aspect of state of the art," because the duty to design a safe product applies "regardless of whether the seller knew or had reason to know of the risks and limitations" of its product. Id. at 101 n.6, 104, 499 A.2d at 330 n.6, 331 (1985). Once again, this issue had not been authoritatively determined by this Court.

3. Azzarello's Purported Negligence/Strict Liability Dichotomy Unfairly Allocates The Burden Of Proof And Produces Unjust Results In Strict Liability Cases.

a. "Preliminary" Risk/Utility Shifts The Burden Of Proving Defect To Defendants.

Pennsylvania's peculiar treatment of risk/utility balancing eclipses even the confusion over attempts to use strict liability to exclude intuitively relevant evidence. That Azzarello would consider risk/utility balancing relevant to the design defect is not unusual, since "[t]here is widespread agreement among courts and scholars today that the cost-benefit balancing test is the appropriate test for design defect." John M. Thomas, "Defining 'Design Defect' in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts," 71 TEMP. L. REV. 217, 221 (1998) (footnote omitted). The remarkable aspect is the unique procedural edifice constructed upon this Court's "brief" reference to risk/utility balancing in Azzarello. Id. at 223.

"For better or worse, this Court's decisions have relegated our trial courts in the unenviable position of 'social philosopher' and 'risk-utility economic analyst'." Beard v. Johnson &

Johnson, Inc., 41 A.3d 823, 836 (Pa. 2012) (citation and quotation marks omitted). This "relegation" began with Azzarello. There, the Court held that the question "When does the utility of a product outweigh the unavoidable danger it may pose?" is a "question of law" that "[i]t is a judicial function to decide." 480 Pa. at 558, 391 A.2d at 1026. From that statement, the Superior Court has created an elaborate "threshold" seven-factor risk/utility inquiry that only courts – and not juries – may conduct. See, e.g., Riley v. Warren Manufacturing, Inc., 455 Pa. Super. 384, 391-92, 688 A.2d 221, 225 (1997); Fitzpatrick v. Madonna, 424 Pa. Super. 473, 475-80, 623 A.2d 322, 324-26 (1993); Dambacher, 336 Pa. Super. at 50-51 & n.5, 485 A.2d at 423 & n.5. Because Azzarello declared design defect to be a "question of law," the Superior Court has sometimes decided that issue as a matter of law, thereby depriving defendants of **any** opportunity to contest defect. See Moore v. Ericsson, Inc., 7 A.3d 820, 826 (Pa. Super. 2010) (asbestos held defective as a matter of law), allocatur denied, 610 Pa. 622, 21 A.3d 1194 (2011).

Under this procedure, defendants who wish to argue that the utility of a challenged design outweigh its risks or that the overall safety of the plaintiff's alternative design is less than the current product's design are required to file a dispositive pretrial motion, typically for summary judgment (as in this case), addressing the seven so-called "Wade factors"[13]:

> (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 a 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.

[13]These factors originate in an article by Dean John Wade of Vanderbilt University, "On the Nature of Strict Tort Liability for Products," 44 MISS. L.J. 825, 837-38 (1973). This "seminal article . . . highlighted the marked similarities between negligence and strict liability in defective design cases." Phillips, 576 Pa. at 668, 841 A.2d at 1014 (Saylor, J. concurring).

(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 loss or setting the price of the product or carrying liability insurance.

E.g., Riley, 455 Pa. Super. at 391-92, 688 A.2d at 225; Fitzpatrick, 424 Pa. Super. at 476, 623 A.2d at 324-25; Dambacher, 336 Pa. Super. at 50 n.5, 485 A.2d at 423 n.5; see also Surace v. Caterpillar, Inc., 111 F.3d 1039, 1044-48 (3d. Cir. 1997) (detailed description of federal version of preliminary judicial risk/utility balancing) (Pennsylvania law).

Plainly, risk/utility balancing retains an "integral role" in strict liability in Pennsylvania. Phillips, 576 Pa. at 667, 841 A.2d at 1013 (Saylor, J. concurring). However, contrary to every other state,[14] Pennsylvania law divests the jury of any risk-utility balancing role and instead requires trial judges to decide as a matter of law whether product design risks outweigh their benefits. Pennsylvania courts musts make "a social policy determination. . .acting as a social philosopher and a risk-utility economic analyst." Fitzpatrick, 424 Pa. Super. at 476, 623 A.2d at 324. "The court . . . must balance the utility of the product against the seriousness and likelihood

[14]See James A. Henderson, Jr., & Aaron D. Twerski, "Achieving Consensus on Defective Product Design," 83 CORNELL L. REV. 867, 897 (1998) ("Pennsylvania stands alone in its view that risk-utility balancing is never properly a jury function."); Richard J. Hunter, Jr. & Melissa A. Montuori, "The Hand That Truly Rocks the Cradle: A Reprise of Infant Crib Safety, Lawsuits & Regulation from 2007-2012," 25 LOYOLA CONSUMER L. REV. 229, 242 n.51 (2013) ("no other state has adopted the Azzarello approach") (citation and quotation marks omitted); Moyer, 473 F.3d at 538, 540-41 n.4 (collecting cases from 29 jurisdictions that, unlike Pennsylvania, explicitly allow the jury to conduct risk/utility balancing).

of the injury and the availability of precautions that, though not foolproof, might prevent the injury." Burch v. Sears, Roebuck & Co., 320 Pa. Super. 444, 450, 467 A.2d 615, 618 (1983).

Having risk/utility balancing decided by preliminary pretrial motion is contrary to this Court's repeated holdings that plaintiffs have the burden of proving product defect. "The plaintiff must prove that there was a defect in the product." General Services, 587 Pa. at 264, 898 A.2d at 607 (quoting Berkebile); accord, e.g., Spino, 548 Pa. at 293, 696 A.2d at 1172; Walton v. Avco Corp., 530 Pa. 568, 576, 610 A.2d 454, 458 (1992). But when risk/utility balancing requires a preliminary motion, the plaintiff is **never** put to that burden of proof.[15] In this peculiar procedural posture, "the judge makes the [Azzarello] determination under a weighted view of the evidence, considering the facts in the light most favorable to the plaintiff." Moyer, 473 F.3d at 538 (citation omitted). In other words, at the pre-trial stage, the defendant bears the burden.

Once a plaintiff satisfies a minimal pretrial burden of simply making out a jury submissible case of design defect – then Azzarello (as construed by the lower courts) bars the jury from deciding risk/utility issues as such:

> If the judge concludes that a product is "unreasonably dangerous" the case is submitted to the jury. . . . [H]owever, **the jury does not balance the risk-utility factors, even though the judge has only done so as a threshold matter**. Instead, the jury considers whether 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."

[15]The summary judgment standard is heavily weighted against the moving party. "[I]f there are any material facts in dispute. . ., or if the facts can support conflicting inferences, the case is not free from doubt, and therefore, summary judgment is inappropriate." Weaver v. Lancaster Newspapers, Inc., 592 Pa. 458, 464, 926 A.2d 899, 902 (2007) (citation omitted). "In considering the merits of a motion for summary judgment, a trial court views the record in the light most favorable to the non-moving party. . ., and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Id. at 465, 926 A.2d at 902 (citation omitted).

Moyer, 473 F.3d at 538-39 (quoting Azzarello; other citations omitted) (emphasis added). In sum, under Azzarello, as currently interpreted, the plaintiff **never** has to meet his or her ostensible burden of proving that the risks of a product's design outweigh its utility:

> [N]either the court nor the jury has the authority to actually decide whether the true benefits of the proposed alternative design outweigh the true costs. In other words, under this view of the division of decisional power, neither the court nor the jury determines whether the product is in fact unreasonably dangerous or defective.
>
> That result cannot be right. If . . . Azzarello requires a cost-benefit analysis, then either the jury or the court must have the authority to decide the cost-benefit issue based on an independent evaluation of the evidence. Otherwise, **the fundamental issue of whether the incremental societal benefits of the proposed alternative design outweigh the incremental societal costs remains forever in a sort of legal limbo**; trial courts are permitted to decide only whether the evidence is sufficient to submit that issue to the jury, but they are prohibited from actually submitting it.

Thomas, "Defining Design Defect," 71 TEMP. L. REV. at 223 (emphasis added); accord Phillips, 576 Pa. at 672-73, 841 A.2d at 1017 (Saylor, J. concurring).

"Legal limbo" is an apt description of risk/benefit analysis in Pennsylvania. In Brandimarti v. Caterpillar Tractor Co., 364 Pa. Super. 26, 527 A.2d 134 (1987), allocatur denied, 517 Pa. 629, 539 A.2d 810 (1988), the trial court sought to give the jury guidance by instructing it on the seven Wade factors. Id. at 31, 527 A.2d at 136-37. Reading Azzarello as prohibiting the jury from even considering risk/utility balancing, the court reversed that instruction as improper:

> The factors listed [in Dambacher] are strikingly similar to those mentioned herein by the trial court in its charge on defective condition. We agree . . . that it is for the court to balance these social policy factors when making its threshold inquiry determination that the case presents a jury question. The jury is not to be presented with the factors.

Id. at 33, 527 A.2d at 138.

Thirteen years later, in Phatak, the same court, employing the same Wade factors, held that juries should be presented with extensive **evidence** concerning the relative risks and benefits of claimed alternative designs:

> Thus in determining whether the design of a product is "defective" or "unreasonably dangerous," or whether a product could have been designed "more safely," many factors could seemingly be weighed by the jury in reaching the ultimate conclusion whether a product was defective or not. The question before us, as we see it, is whether an assertion that a design change would make a product "unbelievably hazardous" to other persons enters into the equation of whether the product is "defective" for products liability purposes. We think the answer is yes.

Phatak, 756 A.2d at 695. In Gaudio, the court reaffirmed "that evidence of the risks and benefits of the allegedly defective product may be relevant in a design defect case." 976 A.2d at 548 (risk/benefit "critique" of plaintiff's proposed alternative design was admissible).

The net result of the prohibition of risk/benefit jury instructions in Brandimarti, together with the admissibility of risk/utility evidence under Phatak and Gaudio, is to leave the jury entirely at sea. Under Phatak and Gaudio the jury may – indeed, should – be presented with considerable evidence relevant to risk/utility balancing. But under Brandimarti the jury cannot be told what to do with this evidence, save the bare bones Azzarello "any element" charge. See 480 Pa. at 559-60 & n.12, 391 A.2d at 1027 & n. 12.[16]

This is the first time since Azzarello that the Court has undertaken to re-examine its fundamental premise – that negligence and strict liability are so different that legal principles drawn from the former have "no place" in the latter. 480 Pa. at 559, 391 A.2d at 1027. The experience of the past thirty-five years demonstrates that such review is long overdue. On issue after issue, the negligence/strict liability dichotomy imposed by Azzarello has engendered sub-

[16]The Azzarello jury instructions were rightly criticized as inadequate by the concurring opinion in Phillips. 576 Pa. at 672, 841 A.2d at 1017. In order "to insulate the jury from negligence terminology," Azzarello provided only "minimalistic jury instructions. . .which lack essential guidance concerning the nature of the central conception of product defect." Id.

stantial confusion. Pennsylvania law has reached the point where Azzarello's truncated version of §402A has outlived its usefulness. The Restatement (Second) "is not to be considered controlling in the manner of a statute." Coyle v. Richardson-Merrell, Inc., 526 Pa. 208, 212, 584 A.2d 1383, 1385 (1991). Where, as here "the facts of a case demonstrate that the rule outruns the reason, the court has the power, indeed the obligation, to refuse to apply the rule." Id.

It is anomalous for two product liability theories – negligence and strict liability – arising from the same facts and the same alleged defect, to have wildly differing results based only upon the name given the cause of action. Cases should be decided on their merits, not on the basis of captions. In re Tax Claim Bureau, German Township, 496 Pa. 46, 49-50, 436 A.2d 144, 146-47 (1981); Pomerantz v. Goldstein, 479 Pa. 175, 178, 387 A.2d 1280, 1281 (1978). Review of Pennsylvania strict liability precedents demonstrates that the phraseology-based Azzarello approach to product liability become artificial and untenable.

Strict liability grew out of negligence; the theories involve the same facts, and thus cannot be rationally separated. "[P]articularly as relates to claims of defective design, relevant differences between negligence and strict liability at both the theoretical and practical levels are marginal." Duchess, 564 Pa. at 546, 769 A.2d at 1141 (citations omitted).

> Strict liability is something of a misnomer in products cases. There is liability only if a product is defective or unreasonably dangerous, and the concepts of "defect" and "unreasonableness" bring into play factors of cost and risk similar to those that determine negligence, an objective standard that is independent of what the particular defendant knew or could have done.

Id. at 546 n.14, 769 A.2d at 1141 n.14 (quoting Flamino v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984) (Illinois law)).

b. Courts Employ Negligence Concepts To Increase Liability In Substantial Change Cases.

Instances of continued explicit application of negligence concepts in Pennsylvania strict liability precedent abound – where defendants are disadvantaged. One area where the negligence/strict liability dichotomy has been ignored (since negligence concepts benefit plaintiffs) is evaluating whether a product was "substantially changed" prior to an accident. For years the Superior Court continued employing a pre-Azzarello reasonable foreseeability standard for substantial change first adopted in D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. 120, 125, 310 A.2d 307, 310 (1972) (the "test in such a situation is whether the manufacturer could have reasonably expected or foreseen such an alteration").[17] When the issue reached this Court, it too adopted the "reasonable foreseeability" standard in Davis v. Berwind Corp.:

> The seller is not liable if a safe product is made unsafe by subsequent changes. Where the product reached the user or consumer with substantial change, the question becomes whether the manufacturer could **reasonably have expected or foreseen** such an alteration of its product.

547 Pa. 260, 267, 690 A.2d 186, 190 (1997) (citations omitted) (emphasis added). In Phillips, the Court conceded that Davis had "muddied the waters . . . with the careless use of negligence terms in the strict liability arena." 576 Pa. at 655-56, 841 A.2d at 1006-07. Then, in General Services, the Court suggested that Davis might be a "limited, targeted exception" to the negligence/strict liability dichotomy. 587 Pa. 254 n.10, 898 A.2d at 601 n.10.[18]

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[17] See, e.g., Myers v. Triad Controls, Inc., 720 A.2d 134, 135 (Pa. Super. 1998), allocatur denied, 559 Pa. 707, 740 A.2d 234 (1999); Steinhouse v. Herman Miller, Inc., 443 Pa. Super. 395, 402, 661 A.2d 1379, 1383 (1995); Sweitzer v. Dempster Systems, 372 Pa. Super. 449, 453, 539 A.2d 880, 882 (1988); Eck v. Powermatic Houdaille, Division of Houdaille Industries, Inc., 364 Pa. Super. 178, 190-91, 527 A.2d 1012, 1018-19 (1987).

[18] Following this footnote in General Services, courts have continued to use the Davis reasonably foreseeable standard for substantial change. McGonigal v. Sears Roebuck & Co., 2009 WL 2137210, at *5 (E.D. Pa. July 16, 2009); Makadji v. GPI Division of Harmony Enterprises, Inc., 2007 WL 1521221, at *3 n.5 (E.D. Pa. May 23, 2007).

Unfortunately, Davis is anything but a "limited, targeted exception." Rather, judicial reliance upon negligence concepts such as "reasonableness" and "foreseeability" has been – and remains – widespread in Pennsylvania precedent involving strict liability.

c. Courts Employ Negligence Concepts To Create Liability For Post-Sale Duty To Warn.

In Walton, the majority stated that the "Court has continually fortified the theoretical dam between the notions of negligence and strict 'no fault' liability." 530 Pa. 568, 584, 610 A.2d 454, 462 (1992) (citations omitted). However the Court breached that "dam" in the very same case – because a viable cause of action for post-sale duty to warn cannot be fashioned without considering what it is "reasonable" for a manufacturer to do:

> Because of the likelihood that a purchaser will have a product serviced by its own technicians or by an unaffiliated service center, or possibly not serviced at all, sellers must make **reasonable** efforts to warn the user or consumer directly.

Id. at 578, 610 A.2d at 459 (citations omitted) (emphasis added). Nor did Walton make the post-sale warning obligation universal. Rather this duty was limited to what was reasonable, given the "peculiarities of the industry," and did not apply at all to "mass-produced or mass-marketed products" that "becom[e] impossible to track or difficult to locate." Id.[19]

By virtue of its "post-sale" nature, a duty to provide product warnings after sale necessarily cannot involve the product's condition at sale, as §402A strict liability requires. Whether a post-sale warning is required necessarily involves the knowledge and conduct of the manufac-

[19]Under the negligence/strict liability dichotomy, the concept of post-sale duty to warn does not really belong in strict liability. Strict liability concerns the "condition of the product" at the time of sale, "and not the reasonableness of the manufacturer's conduct." Lewis. 515 Pa. at 334, 528 A.2d at 593. A post-sale duty to warn, by contrast, has everything to do with the manufacturer's conduct is deciding whether and how to warn, and by definition does not depend upon the condition of the product at sale. See Restatement (Third) of Torts, Products Liability §10 (1998) (recognizing "reasonable person" standard for post-sale duty to warn).

turer in the future. Thus Walton's resort to negligence concepts is perfectly understandable. Calling post-sale warnings a "strict liability" duty is not.

d. Courts Employ Negligence Concepts To Create Crashworthiness Liability.

Negligence concepts also abound in crashworthiness cases. As interpreted by the lower appellate courts, "[t]he basis of th[is] doctrine is that the manufacturer must design his product so that it is safe for any reasonably foreseeable use." Harsh, 840 A.2d at 417. Therefore, the "focus in crashworthiness cases is on the capacity of [an] automobile to respond to a foreseeable hazardous situation." Colville v. Crown Equipment Corp., 809 A.2d 916, 924 (Pa. Super. 2002), allocatur denied, 574 Pa. 742, 829 A.2d 310 (2003); see also Kupetz v. Deere & Co., 435 Pa. Super. 16, 27, 644 A.2d 1213, 1218 ("[t]he effect of the crashworthiness doctrine is that a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy"), allocatur denied, 539 Pa. 693, 653 A.2d 1232 (1994). Nevertheless, despite defining crashworthiness expressly in terms of both reasonableness and foreseeability, the doctrine remains classified as a "subset" of strict liability. Gaudio, 976 A.2d at 532.[20] In Gaudio the court refused to recognize crashworthiness as a type of negligence − where it must belong if the negligence/strict liability dichotomy means anything − given its undeniable underpinnings in negligence concepts:

> Although the Supreme Court refused to extend the rationale of the crashworthiness doctrine to other products, it clearly recognized the continued viability of the doctrine as a targeted exception to the prohibition against utilizing an analysis of the foreseeability of an intended use in strict liability law in Pennsylvania.

976 A.2d 534 (distinguishing General Services). In Gaudio crashworthiness became another supposedly "targeted" exception to the negligence/strict liability dichotomy (see above, at p.26).

[20] See also Hutchinson v. Penske Truck Leasing Co., 876 A.2d 978, 983 (2005), aff'd without op., 592 Pa. 38, 922 A.2d 890 (2007); Colville, 809 A.2d at 922; Kupetz, 435 Pa. Super. at 26, 644 A.2d at 1218.

Such "targeted" exceptions, however, inevitably seem to operate in a manner that expands the scope of liability.

e. Courts Employ Negligence Concepts To Create Bystander Liability.

Another active battleground over use of negligence concepts to expand the scope of strict liability is bystander liability – when a product may foreseeably injure someone who is not an intended user or consumer of the product. In a non-precedential 3-3 decision, the Superior Court affirmed bystander liability where a thief was injured by a stolen product in Pegg v. General Motors Corp., 258 Pa. Super. 59, 70-71, 391 A.2d 1074, 1070 (1978). Pegg was decided several months before Azzarello.

In Berrier v. Simplicity Manufacturing, Inc., 563 F.3d 38 (3d Cir.), cert. denied, 558 U.S. 1011 (2009), the Third Circuit recognized that every jurisdiction recognizing bystander strict liability had done so "using the very negligence concepts and foreseeability analysis that the majority opinion in Phillips[21] rejected." 563 F.3d at 55. The Azzarello negligence/strict liability dichotomy prevented bystanders from pursuing strict liability. Id. at 59 ("that is the result of artificially restricting strict products liability to 'intended users' based upon concerns of contaminating a strict liability claim with considerations of foreseeability"). Berrier predicted that this Court would adopt the "more progressive" standard of the Restatement (Third). Id. at 60. Since Berrier, bystander liability cases have become common in Pennsylvania federal courts and are routinely decided under the Restatement (Third)'s "foreseeability" rationale.[22]

[21] See Phillips, 576 Pa. at 656-57, 841 A.2d at 1007.

[22] Punch v. Dollar Tree Stores, Inc., 2013 WL 1421514, at *5 (Mag. W.D. Pa. Jan. 24, 2013), adopted, 2013 WL 1788063 (W.D. Pa. April 8, 2013); Giehl v. Terex Utilities, 2012 WL 1183719, at *9-10 (M.D. Pa. April 9, 2012); Hoffman v. Paper Converting Machine Co., 694 F. Supp. 2d 359, 365-67 (E.D. Pa. 2010).

In state court bystander strict liability remains unresolved. In a reprise of Pegg, a 3-3 split in this Court allowed a "bystander" to recover in strict liability for purely emotional distress. Schmidt v. Boardman Co., 608 Pa. 327, 11 A.3d 924 (2011). While the majority in Schmidt castigated "core negligence concepts − such as foreseeability – [being] used to expand the scope of manufacturer liability," id. at 353, 11 A.3d at 940, on the precise bystander liability issue, the Court split evenly.[23] Whether "foreseeable" bystanders who are not "intended users" of products can recover under existing strict liability principles is completely unsettled.

f. Courts Employ Negligence Concepts In Many Other Strict Liability Situations.

In addition to the above examples, courts applying Pennsylvania law have deviated from Azzarello's prohibition against resort to concepts "ringing of negligence" in numerous other strict liability situations.

- **Malfunction theory:** Barnish v. KWI Building Co., 602 Pa. 402, 412, 980 A.2d 535, 541 (2009) (plaintiff must "eliminate . . . reasonable, secondary causes" for product malfunction to prove a strict liability defect by circumstantial evidence).

- **Component part liability:** Jacobini v. V. & O. Press Co., 527 Pa. 32, 40, 588 A.2d 476, 480 (1991) (component part manufacturer "cannot be expected to foresee every possible risk that might be associated with use of the completed product"); Stephens v. Paris Cleaners, Inc., 885 A.2d 59, 69 (Pa. Super. 2005) ("where a component part manufacturer can foresee a use of its product that will create a certain danger, the manufacturer has a duty to warn of that danger") (quoting Colegrove v. Cameron Machine Co., 172 F. Supp.2d 611, 625 (W.D. Pa. 2001)), allocatur denied, 587 Pa. 699, 897 A.2d 460 (2006).

- **Product misuse:** Dougherty v. Edward J. Meloney, Inc., 443 Pa. Super. 201, 224, 661 A.2d 375, 386 (1995) (adopting foreseeability standard), allocatur denied, 544 Pa. 698, 674 A.2d 1072 (1996); Burch, 320 Pa. Super. at 452, 467 A.2d at 619 (adopting reasonable foreseeability standard); Kagan v. Harley Davidson,

[23] Compare Schmidt, 608 Pa. at 364-74, 11 A.3d at 947-53 ("the bystander rule . . . derives its justification from the core negligence principle of foreseeability") (opinion opposing strict liability), with id. at 375-83, 11 A.3d at 953-59 (not mentioning foreseeability; allowing strict liability) (opinion supporting strict liability).

Inc., 2008 WL 1815308, at *6 & n.10 (E.D. Pa. April 22, 2008) (adopting "reasonably obvious" standard).

- **Duty to warn:** Ellis v. Chicago Bridge & Iron Co., 376 Pa. Super. 220, 232, 545 A.2d 906, 912 (1988) ("emphasis [in warning cases] is upon the consumer's reasonable expectation of buying a product that is reasonably safe"), allocatur denied, 524 Pa. 620, 571 A.2d 383 (1989); Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1309 (3d Cir. 1995) (warning duty exists when it was "reasonably foreseeable" that "failure to affix warning devices to [a] product would lead to an injury") (Pennsylvania law); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 120 (3d Cir. 1992) (warning defect liability "necessarily involves negligence principles such as reasonableness and foreseeability") (citation and quotation marks omitted) (Pennsylvania law); Fisher v. Walsh Parts & Service Co., 296 F. Supp.2d 551, 567 (E.D. Pa. 2003) (duty to warn extends to "any dangers that were reasonably foreseeable").

- **Assumption of the Risk:** Hadar v. AVCO Corp., 886 A.2d 225, 230 (Pa. Super. 2005) (whether plaintiff "knew of the specific danger in light of his experience and assumed the risk or whether he acted as a reasonable person under the facts of this case is a jury question"), allocatur denied, 586 Pa. 758, 895 A.2d 550 (2006).

- **Heeding presumption:** Gigus, 868 A.2d at 463 ("a seller may reasonably assume its warning will be read and heeded"); Coward v. Owens-Corning Fiberglas Corp., 729 A.2d 614, 619 (Pa. Super.) (manufacturer "may reasonably assume that [a warning] has been read and heeded"), appeal granted, 560 Pa. 705, 743 A.2d 920 (1999) (both citing Restatement (Second) of Torts §402A, comment j (1965)).

- **Allergic Reactions:** Morris v. Pathmark Corp., 405 Pa. Super. 274, 279, 592 A.2d 331, 334 (1991) (no strict liability for an idiosyncratic reaction that "could not reasonably have been foreseen") (citation omitted), appeal dismissed, 536 Pa. 104, 638 A.2d 193 (1994).

- **Evidence of defect:** Diehl v. Blaw-Knox, 360 F.3d 426, 432-33 (3d Cir. 2004) (admitting evidence that product "lacked a feature reasonably necessary to make [it] safe") (Pennsylvania law).

- **Evidence of a plaintiff's careless conduct:** Both courts admitting and excluding such evidence in strict liability actions, see, above at pp. 13-15, resort to negligence concepts. E.g., Clark, 763 A.2d at 925 (admissible where "unforeseeable" or "outrageous"); Parks v. Allied Signal, Inc., 113 F.3d 1327, 1336 (3d Cir. 1997) (only admissible if "not reasonably foreseeable" by the manufacturer) (Pennsylvania law).

B. On Several Occasions The Court, Or Members Of It, Have Recognized That The Azzarello Negligence/Strict Liability Dichotomy Has Failed And Is Unworkable.

As the above examples demonstrate, the Azzarello ideal of a sharp divide between negligence and strict liability was unraveling by the time this Court decided in Duchess that distinctions between negligence and strict liability did not warrant admission of subsequent remedial measures in strict liability despite the well-established negligence rule excluding such evidence. Cutting through yet another Gordian knot of conflicting Superior Court opinions,[24] this Court unanimously held that exclusion of subsequent remedial measures evidence applied equally to both negligence and strict liability actions:

> [W]e hold that the general proscription against the admission of evidence of subsequent remedial measures embodied in Pennsylvania Rule of Evidence 407 and its common law antecedent extends to preclude use of a subsequent design change as substantive evidence of a product defect in a strict products liability case.

Duchess, 564 Pa. at 553, 769 A.2d at 1145.[25]

In Duchess the Court was "unable to meaningfully distinguish claims asserting negligent design from those asserting a design defect in terms of their effect on the implementation of subsequent remedial measures." Id. at 549, 769 A.2d at 1143. The doctrinal differences were "marginal" because both theories employ "similar" forms of risk/utility balancing, and because in either case the threat of damages acts as a "deterrent." Id. at 546-47, 769 A.2d at 1141.

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[24]This conflict was noted by the drafters of the Pennsylvania Rules of Evidence, who left the issue open for the Court to resolve. Official Comment to Pa. R. Evid. 407 (1988).

[25]The Duchess dissenters agreed that subsequent remedial measures are inadmissible in negligence and strict liability. See id. at 561, 769 A.2d at 1150 ("I agree with the majority that evidence of subsequent design change is inadmissible") (Zappala, J., dissenting), id. at 563, 769 A.2d at 1151 ("I agree with the conclusion of the Majority that evidence of a subsequent design change is irrelevant in a strict liability products liability action") (Newman, J., dissenting).

Duchess recognized the "analytical similarities between strict liability and negligence in relation to claims of defective design" and "agree[d] with those courts that have concluded that no distinction between the two [theories of liability] justifies differential treatment" of subsequent remedial measures evidence. Id. at 550, 769 A.2d at 1144 (referencing cases cited in footnotes 13-14). The cases with which the Court "agreed" in Duchess held that "distinction between negligence and strict liability" is "purely semantic." Id. at 546, 769 A.2d at 1141 (quoting Flamino, 733 F.2d at 469).[26]

The Duchess Court was also unimpressed with the social policy excuse for divergence between strict liability and negligence – that "recovery without proof of fault" was intended "in

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[26] See 564 Pa. at 546-47 n.14, 769 A.2d at 1141 n.14 (quoting Flamino, 733 F.2d at 470):

> The analysis is not fundamentally affected by whether the basis of liability is the defendant's negligence or his product's defectiveness or inherent dangerousness.

564 Pa. at 547 n.14, 764 A.2d at 1141 n.14 (quoting Krause v. American Aerolights, Inc., 762 P.2d 1011, 1013 (Or. 1988)):

> [T]he difference between negligence and the fault at issue in a products liability case is not so significant as to call for a different interpretation.

564 Pa. at 547 n.14, 764 A.2d at 1141 n.14 (quoting Gauthier v. AMF, Inc., 788 F.2d 634, 636-37, amended, 805 F.2d 337 (9th Cir. 1986) (Montana law)):

> [T]here is no practical difference between strict liability and negligence in defective design cases and the public policy rationale to encourage remedial measures remains the same.

564 Pa. at 546, 764 A.2d at 1141 (quoting Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (New York law)):

> [A]lthough negligence and strict products liability causes of action are distinguishable, no distinction between the two justifies the admission of evidence of subsequent remedial measures in strict liability.

The only caveat to the Duchess Court's agreement with these cases was that doctrinal similarities were "perhaps overstated in some decisions." 564 Pa. at 550, 769 A.2d at 1144.

part, to alleviate the burden on injured plaintiffs and to provide a mechanism to achieve loss spreading." Id. at 552, 769 A.2d at 1145. The Court responded:

> Such policies, however, have not been, and cannot be, applied to remove all forms of restriction imposed upon plaintiffs' proofs in products liability actions. . . . [P]laintiffs will generally remain free to present expert testimony to support the theory that a design change was necessary to render the product safe.

Id. Accord Cafazzo v. Central Medical Health Services, Inc., 542 Pa. 526, 535, 668 A.2d 521, 526 (1995) ("[t]o assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence") (citation omitted); Coyle, 526 Pa. at 217, 584 A.2d at 1387 ("[r]eliance on cost-shifting as the only factor to be considered in whether a given party should be exposed to liability" held insufficient because it "would result in absolute liability rather than strict liability").

Azzarello was thus in tatters when the Court decided Phillips. Three concurring justices in Phillips recognized that the Azzarello negligence/strict liability dichotomy is beset by "pervasive ambiguities and inconsistencies." Phillips, 576 Pa. at 664-65, 841 A.2d at 1012. Although not willing to jettison Azzarello, the lead opinion in Phillips conceded how murky the dichotomy had become. 576 Pa. at 655-56, 841 A.2d at 1006-07 (courts have "muddied the waters at times with the careless use of negligence terms in the strict liability arena").[27] Widespread judicial resort to negligence concepts in strict liability led the lead opinion to conclude "it would be imprudent of us to wholesale reverse all strict liability decisions which utilize negligence terms." Phillips, 576 Pa. at 656, 841 A.2d at 1007. But what is the status of this prior precedent? Are cases employing negligence principles viable, or not? Should they be followed, ignored, or modified in some unstated way? A decade after Phillips, these questions remain unanswered.

[27] As already discussed, above at p. 26, the lead opinion criticized the "reasonably foreseeable" standard for product misuse employed in Davis, 547 Pa. 260, 690 A.2d 186.

The lead opinion's solution in Phillips was to carve out another exception to strict liability for unintended users. 576 Pa. at 657, 841 A.2d at 1007 (claims not involving an "intended" use cannot sound in strict liability). Phillips' resolution of the unintended user issue is the latest in a string of decisions in which the Court avoided the doctrinal problems of strict liability by exempting broad categories of claims from strict liability. See Redland Soccer Club, Inc. v. Dep't of the Army, 548 Pa. 178, 195, 696 A.2d 137, 145 (1997) (medical monitoring limited to negligence); Hahn v. Richter, 543 Pa. 558, 563, 673 A.2d 888, 891 (1996) (product liability cases targeting prescription medical products sound in negligence, not strict liability); Cafazzo, 542 Pa. at 536-38, 668 A.2d at 526-27 (hospitals not subject to strict liability for distributing prescription medical products); Coyle, 526 Pa. at 217, 584 A.2d at 1387 (pharmacists not subject to strict liability for distributing prescription medical products). Similar situations – crashworthiness, bystander liability − will undoubtedly confront the Court in the future.

At some point, however, this process of creating one exception after another to strict liability warrants reconsideration of first principles. The existence of so many exceptions calls the validity of the purported "rule" itself into question. As the Court observed in another context, judicial "recogni[tion of] so many exceptions that . . . the rule is so readily capable of avoidance" means that the rule "function[s] as no rule at all." Commonwealth v. Perez, 577 Pa. 360, 371, 845 A.2d 779, 785-86 (2004).[28] After three and a half decades, the Azzarello negligence-strict liability dichotomy has achieved a similarly dubious status.

For three justices, Phillips was that breaking point. Justice Saylor, joined by Justices Castille (now Chief Justice) and Eakin concluded that Azzarello's negligence-strict liability di-

[28]Perez abandoned a six-hour prompt arraignment rule so shot through with exceptions as to amount to a "totality of the circumstances" approach – which in turn became the new rule. 577 Pa. at 368-72, 845 A.2d at 784-87.

chotomy "cannot be justly sustained in theory in relation to strict products liability cases predicated on defective design," and was "demonstrably incongruent with design-defect strict liability doctrine as it is currently implemented in Pennsylvania." 576 Pa. at 664, 841 A.2d at 1014. These justices were ready to admit the obvious – that negligence and strict liability cannot be coherently separated – and to move "candidly" to a unitary standard reasonableness-based standard for product liability based upon risk/utility balancing:

> I believe that the time has come for this Court, in the manner of so many other jurisdictions, to expressly recognize the essential role of risk-utility balancing, a concept derived from negligence doctrine, in design defect litigation. In doing so, the Court should candidly address the ramifications, in particular, the overt, necessary, and proper incorporation of aspects of negligence theory into the equation. This Commonwealth's products liability jurisprudence is far too confusing for another opinion to be laid down that rhetorically eschews negligence concepts in the strict liability arena.

Id. at 670, 841 A.2d at 1015-16 (Saylor, J. concurring).

The Court pruned strict liability still further in General Services, while maintaining, for the time being, the "current law" incorporating the Azzarello negligence/strict liability dichotomy. General Services involved what may be described as "fireworthiness" – whether "foreseeable" destruction by fire constituted an "intended use" of a product so that strict liability would apply. The Court held as a matter of law that "reasonably foreseeable events" such as accidental fires were not "intended uses" of products. 587 Pa. at 253-54, 898 A.2d at 600-01.[29]

In definitively limiting strict liability to "intended uses," General Services also addressed the unsettled nature of strict liability generally. Conceding the "substantial deficiencies" in "current" law, the Court imposed a moratorium upon any additional strict liability, pending a reevalu-

[29] General Services abrogated the Third Circuit's reading of "intended use" as any use "reasonably foreseeable" to the manufacturer. Parks, 113 F.3d at 1331 (Pennsylvania law); see Pacheco v. Coats Co., 26 F.3d 418, 422 (3d Cir. 1994) (intended use is "measured against an objective standard of reasonableness") (Pennsylvania law).

ation of whether, and upon what terms, strict liability of any sort should be retained as Pennsylvania law:

> As directed to the strict liability arena, however, such an argument contravenes the strong admonition . . . in Phillips. . .that there are substantial deficiencies in present strict liability doctrine, [and] **it should be closely limited pending an overhaul by the Court**.

General Services, 587 Pa. at 254, 898 A.2d at 601 (citation and footnote omitted) (emphasis added). In other words, "the prevailing consensus in Phillips was that there would be no further expansions under existing strict liability doctrine." 587 Pa. at 254 n.10, 898 A.2d at 601 n.10. General Services acknowledged that a plurality of the Court in Phillips desired a thoroughgoing overhaul of strict liability:

> [I]n Phillips, a plurality of the Court, viewing the condition of Pennsylvania strict liability doctrine as impaired, advocated reform. . . . The rationale of this concurrence was . . . that such clear precedent [that negligence concepts have no place in strict liability] was in tension with other aspects of Pennsylvania strict liability doctrine.

587 Pa. at 256 n.15, 898 A.2d at 602 n.15.

The shoddy state of Pennsylvania product liability law has surfaced several times since General Services, but until now the existential question addressed by the Phillips concurrence and mentioned by the majority in General Services has not returned to the Court. See Beard, 41 A.3d at 836 ("we again recognize the continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law"). In Schmidt, 608 Pa. 327, 11 A.3d 924, the Court criticized the "no-negligence-in-strict-liability rubric" for "resulting in material ambiguities and inconsistency in Pennsylvania's procedure." Id. at 353, 11 A.3d at 940. The Azzarello negligence/strict liability dichotomy is faulty for applying "risk-utility balancing . . . on facts most favorable to the plaintiff," and for "yield[ing] minimalistic jury instructions . . . which lack essential guidance

concerning the key conception of product defect." Id. Most importantly, it is fundamentally unfair to utilize negligence concepts as a one-way street devoted to expanding liability:

> [We] commented on the fundamental imbalance, dissymmetry, and injustice of utilizing the no-negligence-in-strict-liability rubric to stifle manufacturer defenses, while at the same time relying on negligence concepts to expand the scope of manufacturer liability.

Id. at 354 11 A.3d at 940.[30] Nonetheless, Schmidt was "not selected to address the foundational concerns." Id.

The present case comes to the Court with the Azzarello ideal of absolute separation between negligence and strict liability having failed. Azzarello's edict banishing "reasonableness" and "foreseeability" from strict liability is riddled with exceptions. The drawbacks of the negligence/strict liability dichotomy mean that large segments or product liability claims are exempt from strict liability. In strict liability cases, courts cannot agree on what improperly "rings of negligence" and what does not. After thirty-five years, the boundary between "unreasonably dangerous" strict liability defects and failure to exercise "reasonable care" remains elusive.

By offering no guidance on whether and how to follow dozens of older cases employing "reasonableness" and "foreseeability" standards in so-called "strict liability," General Services and Phillips have left core principles of Pennsylvania product liability law profoundly unsettled. Where as here "the practical application of [a] doctrine has become enigmatic," and there exists "a lack of consistency in the lower courts" – "[t]his indicates to us that the application of the [doctrine] has proved to be unworkable." Jacobs v. Halloran, 551 Pa. 350, 358, 710 A.2d 1098, 1102-03 (1998). When fine lines drawn between related doctrines give rise to a "labyrinth of

[30] As *amicus curiae* in Berrier, the Pennsylvania Trial Lawyers Association advocated resort to negligence principles in strict liability – where the result would be to expand liability. See Brief of Amicus Curiae Pennsylvania Trial Lawyers Ass'n, Berrier v. Simplicity Corp., No. 05-3621, 2006 WL 7090599, at *11 (3d Cir. filed Feb. 8, 2006) ("PaTLA maintains that foreseeable unintended users also should be permitted to recover in strict liability").

formal distinctions" and to the "unnecessary befuddlement of [] simple legal proposition[s]," the time has come to seek another way. Gilbert v. Korvette, Inc., 457 Pa. 602, 609, 611, 327 A.2d 94, 99 (1974) (abolishing three variants of circumstantial proof; adopting unitary Restatement approach). Like the precedent overruled in Gilbert, Azzarello has been criticized by many commentators[31] – most notably by Dean John Wade, who was quoted extensively in Azzarello.[32] As mentioned, above at p.7, no other state follows an Azzarello model of strict product liability.

The practical need for extreme strict liability has also fallen by the wayside. The "nearly impossible burden of proving negligence," Berkebile, 462 Pa. at 93, 337 A.2d at 898, has lessened considerably. Beginning with Commonwealth v. Thomas, 444 Pa. 436, 445, 282 A.2d 693, 698-99 (1971), experts were allowed to base opinions upon what is "customarily relie[d]

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[31]E.g., Erin L. Ginsberg, "Revisiting Restatement Second or Third?: The Uncertain Status of Product Liability Law in Pennsylvania," 81 PA. B. ASS'N QUARTERLY 139, 142 (2010) (describing Azzarello as an "unworkable construct"); Henderson & Twerski, "Achieving Consensus on Defective Product Design," 83 CORNELL L. REV. at 897 (1998) (describing Azzarello as "unique and almost unfathomable"); John H. Chun, Note, "The New Citadel: A Reasonably Designed Products Liability Restatement," 79 CORNELL L. REV. 1654, 1667-68 (1994) ("unique and widely criticized"); Comment, "Returning the 'Balance' to Design Defect Litigation in Pennsylvania: A Critique of Azzarello v. Black Brothers Company," 89 DICK. L. REV. 149, 172-73 (1984) (Azzarello's legacy has been an "unacceptable and unnecessary level of confusion"); John L. Diamond, "Eliminating The 'Defect' in Design Strict Products Liability Theory," 34 HASTINGS L.J. 529, 545 (1983) (Azzarello "failed to clearly articulate a meaningful standard for determining when a design is defective"); Sheila L. Birnbaum, "Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence," 33 VAND. L. REV. 593, 637-639 (1980) (Azzarello defect test "call[s] forth fantastic cartoon images of products"); James A. Henderson, Jr., "Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus," 63 MINN. L. REV. 773, 801 (1979) (finding Azzarello rationale "confused and unworkable"). See Phillips, 576 Pa. at 671-72, 841 A.2d 1016-17 (discussing and agreeing with several of these articles) (Saylor, J. concurring)..

[32]See 480 Pa. at 554-55 nn.5,6,6a, 556 nn.8,9,10, 557-58, 391 A.2d at 1024 nn.5,6,6a, 1025 nn.8,9,10, 1026. Dean Wade concluded that Azzarello adopted a "test. . .likely to confuse trial court and jury," John W. Wade, "On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing," 58 N.Y.U. L. REV. 734, 744 (1983), and that Azzarello's vague formulation potentially makes "any design" actionable. John W. Wade, "On Product 'Design Defects' and Their Actionability," 33 VAND. L. REV. 551, 567-68 (1980).

upon in the[ir] profession" – a trend completed by adoption of Pa. R. Evid. 703 in 2003. In Gilbert, 457 Pa. at 612-13, 327 A.2d at 100, the Court simplified circumstantial proof of negligence by adopting Restatement (Second) of Torts §328D (1965). Of equal importance, in 1978 discovery in civil cases was greatly broadened in both scope and methods. See 9 Goodrich Amram 2d at pp. 107-09 (West 2000) (Civil Procedural Rules Committee Explanatory Comment to 1978 Amendments to Rules 4001-4025). Proof of negligence in product liability cases is no longer "impossible," if it ever was.[33]

Azzarello has not succeeded in separating negligence and strict liability because these theories involve parallel claims against products on identical facts. Thirty-five years after Azzarello, the relationship of negligence and strict liability in product liability litigation remains rife with confusion, obscure notions, and legalistic distinctions that do "not. . .comport with common experience and understanding," and which fully justify "overrul[ing] that decision."[34]

C. The Azzarello Negligence/Strict Liability Dichotomy Should Be Replaced By The Unitary Defect Standard Of The Restatement (Third) Of Torts.

1. Relevant Provisions Of The Restatement (Third) Of Torts.

As members of this Court have recognized in Duchess, Phillips, General Services, Schmidt, and Beard, there is now a readily available alternative to Azzarello – "the more progressive approach adopted by the Third Restatement."[35] On May 27, 1997 the ALI completed a five-year undertaking and adopted a revised and updated Restatement (Third) of common-law

[33]Plaintiffs have no trouble litigating product liability cases involving prescription medical products in Pennsylvania, although this Court exempted them from strict liability in 1996. See Hahn, supra. Nor is there any shortage of medical monitoring litigation although, from its inception, medical monitoring has sounded solely in negligence. Redland Soccer, supra.

[34]Banks Engineering Co. v. Polons, 561 Pa. 638, 643, 752 A.2d 883, 886 (2000).

[35]General Services, 587 Pa. at 279 n.2, 898 A.2d at 616 n.2 (Newman & Baer, JJ. concurring and dissenting).

tort principles concerning product liability. See Restatement (Third) of Torts, Products Liability, pp. xv-xvii (1998). Assisting the Reporters were 19 formal "advisors" – judges, law professors and lawyers from both the plaintiff and defense bars, and a nationwide 297-member "Members Consultative Group." Id. at pp. vii-xiii.[36]

Reflecting the law of a large majority of states, Section 2 of the Restatement (Third) adopts a unitary standard for design and warning defect claims based upon "reasonable" designs and warnings and "foreseeable" risks. Restatement (Third) §2 retains "liability without fault" only for manufacturing defects:

> **§2. Categories of Product Defect**
>
> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) 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 . . ., and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . ., and the omission of the instructions or warnings renders the product not reasonably safe.

Restatement (Third) of Torts, Products Liability §2 (1998).

Because Restatement (Third) §2 expressly defines the design and warning defect standard in terms of what is "reasonable" and "foreseeable," and not in terms of "all possible care," under

[36] 27 Group members were from Pennsylvania, including Hon. Murray Goldman of the Philadelphia County Court of Common Pleas and Hon. Anthony Scirica of the United States Court of Appeals for the Third Circuit. Id.

the phraseology of Azzarello, it would be considered to impose a "negligence" standard. Comment d to §2 expressly confirms this confluence with negligence:

> Subsection (b) adopts a reasonableness ("risk-utility balancing") test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design . . . rendered the product not reasonably safe. . . .
>
> Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence. The policy reasons that support the use of a reasonable-person perspective in connection with the general negligence standard also support its use in the products liability context.

(Citation omitted). As federal courts utilizing the Restatement (Third) since Berrier understand, section 2 "abandons the negligence versus strict liability distinction" so that "the trier of fact must consider traditional negligence concepts, such as foreseeable risk and reasonable care." Spowal v. ITW Food Equipment Group LLC, ___ F. Supp.2d ___, 2013 WL 1871267, at *3 (W.D. Pa. May 3, 2013); accord Lynn v. Yamaha Golf-Car Co., 894 F. Supp.2d 606, 625 (W.D. Pa. 2012) ("the Restatement (Third) differs notably from its predecessor by integrating certain negligence-based foreseeability concepts into its analysis").

Even before Phillips, the Court looked with favor upon §2. In Duchess the Court acknowledged that §2 measures defect "as of the time that [the product] left the manufacturer's hands," 564 Pa. at 544 & n.12, 769 A.2d at 1140 & n.12, and confirmed that Pennsylvania law followed this "Restatement approach." Id. at 458, 769 A.2d at 1142 (citing Davis, 547 Pa. at 267, 690 A.2d at 190). Duchess returned to §2 in its discussion of the alternative design requirement in design defect cases:

> [W]e have not ignored the fact that [plaintiffs] offered evidence of the feasibility of interlocks on [the product] in their liability case. . . . Significantly, such evidence is an **essential element** of the plaintiff's liability case predicated on a

> theory of design defect based upon the availability of an alternate, safer design. See generally . . . RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY §2(b) & comment d (1998).

564 Pa. at 559 n.24, 769 A.2d at 1149 n.24 (other citations omitted) (emphasis added). Thus, in this respect as well, Restatement (Third) §2 is congruent with Pennsylvania law − the only difference being the division of labor between judge and jury.[37]

The Restatement (Third) also provides answers to the other recurrent problems discussed above, at pp. 15-19. Under the Restatement (Third) framework, compliance or noncompliance with voluntary industry standards (or a manufacturer's own procedures) is relevant evidence that the jury may consider with respect to balancing of product risks and utility:

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[37] See Schroeder v. Commonwealth, DOT, 551 Pa. 243, 252 n.8, 710 A.2d 23, 27 n.8 (Pa. 1998) (imposing "alternative, safer, practicable design" requirement); Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 589-90 (Pa. Super. 2004) (reaffirming "refusal to embrace the risk-utility analysis" absent "technically feasible" alternative designs); Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 539 (Pa. Super. 2003) ("[w]ithout this [alternative design] evidence, [plaintiff] could not carry his burden of proof"), aff'd without op., 584 Pa. 120, 881 A.2d 1262 (2005); Hite v. R.J. Reynolds Tobacco Co., 396 Pa. Super. 82, 90, 578 A.2d 417, 421 (1990) (no defect as a matter of law; plaintiff "d[id] not contend that a better design is available"), allocatur denied, 527 Pa. 666, 593 A.2d 842 (1991); Habecker v. Clark Equipment Co., 942 F.2d 210, 215 (3d Cir. 1991) (if no "alternative feasible, safer design existed when the product was manufactured, then the design cannot be said to be 'defective'") (Pennsylvania law); Hollinger v. Wagner Mining Equipment Co., 667 F.2d 402, 409 (3d Cir. 1981) ("in establishing that the design in question is defective, the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances") (citation and quotation marks omitted) (Pennsylvania law); McAndrew v. Garlock Equipment Co., 537 F. Supp.2d 731, 735 (M.D. Pa. 2008) (expert precluded "from expressing any opinion with respect to design defect" where "an alternative, safer design would not be presented"); Jeter v. Brown & Williamson Tobacco Corp., 294 F. Supp. 2d 681, 686 (W.D. Pa. 2003) ("a feasible alternative design . . . is an indispensable factor when determining whether the product is unreasonably dangerous") (citation and quotation marks omitted), aff'd, 113 Fed. Appx. 465 (3d Cir. 2004); Short v. WCI Outdoor Products, Inc., 2000 WL 1659938, at *3 (E.D. Pa. Nov. 2, 2000) ("to set forth a prima facie case for design defect, the Plaintiffs must provide an alternative feasible design"); Rivera v. Mossberg Industries, Inc., 2000 WL 464058, at *9-10 (E.D. Pa. April 20, 2000) (preliminary risk/utility analysis failed without alternative design); Rodgers v. Harris Graphics Corp., 1991 WL 80006, at *4 (E.D. Pa. May 16, 1991) ("plaintiff, had the burden of establishing that there was an alternative safer design"), aff'd without op., 950 F.2d 723 (2d Cir. 1991).

> A defendant is . . . allowed to introduce evidence with regard to industry practice that bears on whether an alternative design was practicable. Industry practice may also be relevant to whether the omission of an alternative design rendered the product not reasonably safe. While such evidence is admissible, it is not necessarily dispositive.

Restatement (Third) of Torts, Products Liability §2, comment d (1998).[38]

Further, unlike the 1965 vintage Restatement (Second) §402A, the products liability chapter of the Restatement (Third) consists of twenty-one coordinated sections addressing many issues, from circumstantial proof of defect,[39] to the learned intermediary rule,[40] to the economic loss doctrine.[41] This black-letter law will be of invaluable assistance to Pennsylvania courts confronted with any number of recurring product liability issues.

For instance, the factual relevance of a product's compliance with mandatory governmental standards (statutory or regulatory) is undeniable – as such regulations frequently establish "the characteristics of the end product." Cave v. Wampler Foods, Inc., 961 A.2d 864, 869 (Pa. Super. 2008) (admitting FDA food purity standard). Nonetheless, as discussed above at pp. 17-18, Pennsylvania courts have applied the negligence/strict liability dichotomy like a meat axe to

[38]Nationwide precedent supporting admissibility of industry standards "as relevant in a design defect case, but not as determinative" is gathered at Restatement (Third) of Torts, Products Liability §2, Reporters' Notes, at pp. 81-82 ("The Concept of 'State of the Art'") (1998).

[39]Restatement (Third) §3 ("Circumstantial Evidence Supporting Inference of Product Defect"); see Barnish, 602 Pa. at 412, 980 A.2d at 541 (employing similar "malfunction theory" of circumstantial proof utilizing "reasonableness" criteria).

[40]Restatement (Third) §6(c) ("Liability of Commercial Seller or Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices"); see Hahn, 543 Pa. at 562, 673 A.2d at 891 (the Court's most recent discussion of learned intermediary rule).

[41]Restatement (Third) §21 ("Definition of 'Harm to Persons or Property': Recovery for Economic Loss"); see Excavation Technologies, Inc. v. Columbia Gas Co., 604 Pa. 50, 54-55, 985 A.2d 840, 842-43 (2009) (recognizing economic loss rule).

preclude the jury from hearing any evidence that a product complies with mandatory governmental requirements. See Hicks, at 984 A.2d at 968 n.11 (disapproving of Cave).

The Restatement (Third) addresses admissibility of a defendant's compliance − or non-compliance − with mandatory governmental regulations. Compliance evidence is affirmatively admissible (but not conclusive) under Restatement (Third) §4(b):

> [A] product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether a product is defective with respect to the risks sought to be reduced by the statute or regulation. . . .

See Id. at comment e ("[t]he overwhelming majority of jurisdictions hold that compliance with product safety regulation is relevant and admissible on the question of defectiveness, but is not necessarily controlling") (collecting cases). Thus, the Restatement (Third) eliminates the peculiar evidentiary exclusions that have arisen under the Azzarello negligence/strict liability dichotomy, facilitates the admission of plainly relevant product-related compliance evidence, and would return Pennsylvania to the mainstream of American product liability jurisprudence.

Because the Restatement (Third) addresses most, if not all, of the "numerous unsettled issues of product liability law"[42] that have been vexed the Pennsylvania bench and bar for decades under prior law, the Court should abandon Azzarello in favor of the Restatement (Third).

2. The Restatement (Third) Of Torts Has Been Widely Followed By Courts Around The Country.

There is "a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement." Phillips, 576 Pa. at 675, 841 A.2d at 1019 (Saylor, J. concurring). Like Duchess and the concurrence in Phillips, most jurisdictions have found the unitary defect standard of Restatement (Third) §2 consistent with their law. In Hyun-

[42] Bugosh v. I.U. North America, Inc., 601 Pa. 277, 287, 971 A.2d 1228, 1234 (2009) (Saylor, J. & Castille, C.J. dissenting from dismissal of appeal as improvidently granted).

dai Motor Co. v. Rodriguez, the Texas Supreme Court agreed with the Restatement (Third) that a unitary defect standard was easier for juries to understand:

> [T]wo or more factually identical defective design claims should not be submitted to the trier of fact in the same case under different doctrinal labels. Regardless of the doctrinal label attached to a particular claim, design claims rest on a risk-utility assessment. To allow two or more factually identical risk-utility claims to go to a jury under different labels, whether "strict liability," "negligence," or "implied warranty of merchantability," would generate confusion and may well result in inconsistent verdicts."

995 S.W.2d 661, 667 (Tex. 1999) (quoting Restatement (Third) §2, comment n).

Likewise, in Massachusetts, the Supreme Judicial Court adopted Restatement (Third) §2 to unify a separate liability standard that had previously existed in that commonwealth for warranty claims. Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 923-24 (Mass. 1998). The New York Court of Appeals followed Restatement (Third) §2 in Scarangella v. Thomas Built Buses, Inc., 717 N.E.2d 679, 681-82 (N.Y. 1999), with respect to both risk/utility and alternative designs.[43] Another neighboring state, New Jersey, "generally follows the rule of Section 2 of the Restatement (Third) of Torts." Indian Brand Farms, Inc. v. Novartis Crop Protection, Inc., 617 F.3d 207, 228 n.2 (3d Cir. 2010) (New Jersey law). New Jersey adopted Restatement (Third) §2 to impose risk/utility analysis of all design defect claims. Cavanaugh v. Skil Corp., 751 A.2d 564, 580 (N.J. Super. App. Div. 1999) ("recogniz[ing] this Restatement [(Third) §2] design defect theory"); see Cavanaugh v. Skil Corp., 751 A.2d 518, 519 (N.J. 2000) (affirming "for the reasons expressed in the opinion below").[44] Georgia has also adopted Restatement (Third) §2 to

[43]See also Tomasino v. American Tobacco Co., 807 N.Y.S.2d 603, 605 (N.Y.A.D. 2005) (following Restatement's risk/utility and alternative design requirements); Miele v. American Tobacco Co., 770 N.Y.S.2d 386, 391 (N.Y.A.D. 2003) (following Restatement (Third) §2, comment g).

[44]The New Jersey Supreme Court modified only the lower court's discussion of the state-of-the-art defense, in light of a state statute. 751 A.2d at 520-21.

unify strict liability, negligence, and failure to warn under a one risk/utility standard. Jones v. NordicTrack, Inc., 550 S.E.2d 101, 103-04 (Ga. 2001).

In Branham v. Ford Motor Co., 701 S.E.2d 5 (S.C. 2010), the South Carolina Supreme Court adopted Restatement (Third) §2, abandoning the state's prior "consumer expectation" test. Id. at 16. Branham agreed (id.) with commentators and courts that risk/utility balancing in the context of alternative designs was "congruent with the basic issue that in most [product liability] cases must be proved."

> In every design defect case the central recurring fact will be a product that failed causing damage to a person or his property. Consequently, the focus will be whether the product was made safe enough. This inquiry is the core of the risk-utility balancing test in design defect cases. . . . [I]n a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous.

Id. (citations and quotation marks omitted).

The Supreme Court of Nebraska stated that "a majority of jurisdictions have merged theories of recovery" for design defects in Freeman v. Hoffman-La Roche, Inc., 618 N.W.2d 827, 842 (Neb. 2000) (citations omitted). Adopting Restatement (Third) §2, the court held that "a well-coordinated body of law governing liability for harm to persons or property arising out of the sale of defective products requires a consistent definition of defect." 618 N.W.2d at 843 (quoting Restatement (Third) §2, comment n). Like the Texas court in Hyundai Motor, Freeman found "persuasive" the Restatement's creation of a unitary defect standard. 618 N.W.2d at 843.

Florida Courts of Appeals have recognized that design and warning defect claims under Restatement (Third) §2 "achieve the same general objectives as does liability predicated on negligence." Warren v. K-Mart Corp., 765 So. 2d 235, 238 (Fla. App. 2000) (quoting Restatement (Third) §2, comment a). Therefore:

> The major emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. **Most would agree that society does not benefit from products that are excessively safe** . . . . The instant case is one, as suggested by the Restatement, where fairness requires the consumer to bear appropriate responsibility for improper product use, in order to prevent careless users and consumers from being subsidized by more careful users.

Id. (citation and quotation marks omitted) (emphasis original). See Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., 48 So.3d 976 (Fla. App. 2010) (reversible error under Restatement (Third) §2 to charge jury on consumer expectations as an "independent basis" of liability), review denied, 69 So.3d 277 (Fla. 2011); Kohler Co. v. Marcotte, 907 So.2d 596, 598-601 (Fla. App.) (quoting and following Restatement (Third) §2), review denied, 917 So.2d 194 (Fla. 2005).

Other states in which courts have followed Restatement (Third) §2 are:

- **Arizona:** Powers v. Taser International, Inc., 174 P.3d 777, 781-82 (Ariz. App. 2007) (adopting Restatement (Third) §2(c) regarding warnings; "[a]bsent controlling Arizona law to the contrary, we generally follow the Restatement"), review denied (Ariz. June 3, 2008); Marquez v. City of Phoenix, 693 F.3d 1167, 1173 (9th Cir. 2012) (applying Restatement (Third) §2 as Arizona law under Powers), cert. denied, 133 S.Ct. 1468 (2013).

- **California:** Bell v. Bayerische Motoren Werke Aktiengesellschaft, 105 Cal. Rptr.3d 485, 504 (App. 2010); Morson v. Superior Court, 109 Cal. Rptr.2d 343, 351-52 (App. 2001), review denied (Cal. Oct. 10, 2001).

- **District of Columbia:** Mills v. Giant of Maryland, LLC, 508 F.3d 11, 13-14 (D.C. Cir. 2007); Rogers v. Ingersoll-Rand Co., 144 F.3d 841, 844-45 (D.C. Cir. 1999).

- **Iowa:** Scott v. Dutton-Lainson Co., 774 N.W.2d 501, 504 (Iowa 2009) ("adopt-[ing] a standard of risk-utility analysis, which incorporates a consideration of reasonableness, for design defect claims"); Parish v. Jumpking, Inc., 719 N.W.2d 540, 543-45 (Iowa 2006) (same).

- **Kentucky:** Toyota Motor Corp. v. Gregory, 136 S.W.3d 35, 42 (Ky. 2004) (noting agreement with alternative design requirement; reserving question of adoption of rest of Restatement (Third) §2).

- **Louisiana:** Krummel v. Bombardier Corp., 206 F.3d 548, 552 (5th Cir. 2000); Kampen v. American Isuzu Motors, 157 F.3d 306, 314-15 n.6 (5th Cir. 1998).

- **Michigan:** Swix v. Daisy Manufacturing Co., 373 F.3d 678, 682, 687 (6th Cir. 2004); Fleck v. Titan Tire Corp., 177 F. Supp. 2d 605, 613 (E.D. Mich. 2001); Hollister v. Dayton Hudson Corp., 5 F. Supp. 2d 530, 533 (E.D. Mich. 1998), aff'd in pertinent part, 201 F.3d 731 (6th Cir.), cert. denied, 531 U.S. 819 (2000).

- **Minnesota:** Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 387 (Minn. App. 2004) ("Since its publication, we have relied on Restatement (Third) of Torts when considering the law of products liability"), review denied (Minn. Aug. 25, 2004).

- **Mississippi:** A.K.W. v. Easton Bell Sports, Inc., 454 F. Appx. 244, 248 (5th Cir. 2011) (alternative design statute was equivalent of Restatement (Third) §2).

- **Nevada:** Rivera v. Philip Morris, Inc., 209 P.3d 271, 277 (Nev. 2009) (relying on Restatement (Third) §2, comment l).

- **New Mexico:** Brooks v. Beech Aircraft Corp., 902 P.2d 54, 62-63 (N.M. 1995) (adopting draft formulation of Restatement (Third) §2); Chairez v. James Hamilton Construction Co., 215 P.3d 732, 737 (N.M. App.) (following final version of Restatement (Third) §2), cert. denied, 223 P.3d 359 (N.M. 2009); Morales v. E.D. Etnyre & Co., 382 F. Supp.2d 1278, 1282-83 (D.N.M. 2005) (same).

- **South Dakota:** Robinson v. Brandtjen & Kluge, Inc., 500 F.3d 691, 697 (8th Cir. 2007).

- **Utah:** Bishop v. GenTec Inc., 48 P.3d 218, 225-26 (Utah 2002).

- **Virginia:** Musick v. Dorel Juvenile Group, Inc., 847 F. Supp.2d 887, 901 (W.D. Va. 2012) (agreeing with Restatement (Third) §2 as to unitary theory of product liability), aff'd, ___ Fed. Appx. ___, 2013 WL 1189248 (4th Cir. March 25, 2013).

- **Washington:** Ruiz-Guzman v. Amvac Chemical Corp., 7 P.3d 795, 800 (Wash. 2000).

- **Wyoming:** Loredo v. Solvay America, Inc., 212 P.3d 614, 630 (Wyo. 2009).[45]

[45] See also Oswalt v. Resolute Industries, Inc., 642 F.3d 856, 860 (9th Cir. 2011) (applying Restatement (Third) §2 to maritime law); Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 72 (1st Cir. 2002) (Puerto Rico law); Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1157 (9th Cir. 2000) (assuming Northern Mariana Islands follows Restatement (Third) §2(b)).

Moreover, none of the states that decline to follow Restatement (Third) §2 do so in disagreement with this section's unitary, negligence-based defect standard. Rather, judicial controversy over §2 largely involves two areas in which the Restatement (Third) and Pennsylvania law already largely agree – adoption of a risk/utility defect test over the consumer expectation test, and the Restatement's alternative design requirement. See Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329, 345 (Ill. 2008) (alternative design);[46] Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 751-52 (Wis. 2001) (consumer expectation test and alternative design);[47] Delaney v. Deere & Co., 999 P.2d 930, 944-45 (Kan. 2000) (consumer expectation test); Vautour v. Body Masters Sports Industries, Inc., 784 A.2d 1178, 1182-84 (N.H. 2001) (alternative design); Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331-32 (Conn. 1997) (alternative design).[48]

As discussed, above at pp. 42-43, Duchess expressly agreed with the Restatement (Third) that alternative design is an "essential element," 564 Pa. at 558-60 & n.24, 768 A.2d at 1148-50 & n.24, and also stated that "design defect cases employ risk-utility balancing similar to that utilized in negligence." Id. at 547, 769 A.2d at 1141. The only issue is who decides: the jury (in

[46]Although it rejected the alternative design requirement of Restatement (Third) §2, the Illinois Supreme Court follows that section's risk/utility balancing test. Jablonski v. Ford Motor Co., 955 N.E.2d 1138, 1154-55 (Ill. 2011); Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 260-61 (Ill. 2007).

[47]In 2011 the Wisconsin legislature abrogated Green and adopted the design defect test of Restatement (Third) §2 almost verbatim. See Wis. Stat. Ann. §895.047(a) ("A product is defective in design if 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 manufacturer and the omission of the alternative design renders the product not reasonably safe").

[48]A few jurisdictions cannot adopt Restatement (Third) §2 because state statutes mandate other standards. See, Estate of Pinkham v. Cargill, Inc., 55 A.3d 1, 5-6 (Me. 2012) (statute adopted Restatement (Second) §402A); TRW Vehicle Safety Sytems, Inc. v. Moore, 936 N.E.2d 201, 209 n.2 (Ind. 2010) (statute adopted pure negligence); Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 64-65 (Mo. 1999) (statute adopted Restatement (Second) §402A). There are no statutory restraints on this Court under Pennsylvania law.

the Restatement Third), or the judge as a preliminary matter (under Azzarello). Thus, "with respect to the substantive law of strict liability in design defect cases, there appears to be no difference between Pennsylvania law and the Restatement Third; both require proof of a reasonable alternative design, and both utilize a cost-benefit balancing test to determine if a product is defective."[49] Since Pennsylvania law already accords with Restatement (Third) §2 in both areas other courts have found controversial, the only impediment is the Azzarello negligence/strict liability dichotomy. The Restatement (Third) assures juries of their traditional role of balancing product risks and benefits and – unlike Pennsylvania's unique judicial balancing test – requires plaintiffs to meet the customary burden of proving risk/utility by a fair preponderance of the evidence:

> It may be cogently argued that risk-utility balancing is more legitimately assigned to a jury, acting in its role as a voice for the community and with the power to decide facts, rather than to a trial judge acting on a summary record. Indeed, such is the approach of the Restatement Third.

Beard, 41 A.3d at 838 n.18.

For many of these reasons, the three-justice concurring plurality opinion in Phillips concluded that the Restatement (Third)'s unitary approach was far preferable to the jargon-filled and exception-riddled legal landscape that currently exists under the Azzarello negligence/strict liability dichotomy:

> I believe that the time has come for this Court, in the manner of so many other jurisdictions, to expressly recognize the essential role of risk-utility balancing, a concept derived from negligence doctrine, in design defect litigation. In doing so, the Court should candidly address the ramifications, in particular, the overt, necessary, and proper incorporation of aspects of negligence theory into the equation. This Commonwealth's products liability jurisprudence is far too confusing for another opinion to be laid down that rhetorically eschews negligence concepts in the strict liability arena, while the Court nevertheless continues to abide and/or endorse their actual use in the liability assessment.

[49]Thomas, "Defining 'Design Defect' in Pennsylvania," 71 TEMP. L. REV. at 231 (parenthetical omitted).

576 Pa. at 670-71, 841 A.2d at 1015-16 (Saylor, J. concurring) (citation omitted).

PLAC could not agree more. There is a crying need for the Court to recognize that the present system of multiple, parallel (yet ostensibly independent) product liability causes of action is broken. Adoption of the Restatement (Third)'s unitary defect standard will eliminate doctrinal confusion, and create a system where juries receive adequate instructions and are not confused by redundant theories of liability. See Restatement (Third) §2, comment n. In Cafazzo, the Court decided that strict liability should not be imposed upon hospitals because it was "not clear enough that strict liability has afforded the hoped for panacea in the conventional products area." 542 Pa. at 538, 668 A.2d at 527. The passage of eighteen more years has demonstrated that, far from a panacea, Azzarello-style strict liability is a Pandora's box – confusing, rife with exceptions, and elevating form over substance.

PLAC's view of the Restatement (Third) is shared by the Third Circuit, which found the Phillips concurrence persuasive in Berrier, 563 F.3d 38. Berrier concluded that "[if] the Pennsylvania Supreme Court were confronted with [the] issue, it would adopt the Restatement (Third) of Torts." Id. at 40. It read the concurrence in Phillips as "foreshadow[ing] the Pennsylvania Supreme Court's adoption of §§1 and 2 of the Restatement (Third)'s definition of a cause of action for strict products liability." 563 F.3d at 53.

> The change in the Restatement (Third) of Torts is consistent with the law in many states. . . . The Third Restatement . . . eliminates much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims.

Id. at 54-55 (citations omitted). After quoting extensively from the Phillips concurrence, the Third Circuit held:

> Our examination of appellate decisions in Pennsylvania that have discussed products liability convinces us that Justice Saylor was correct in recognizing that "[c]entral conceptions borrowed from negligence theory are embedded in strict products liability doctrine in Pennsylvania." . . . We agree that it is difficult (if

> not impossible) in practice to determine if a product is safe for an intended use by an intended user without any consideration of foreseeability. . . . The result achieved from the approach of the Third Restatement is consistent with the modern trend of law.

Id. at 56-57 (quotations and citations from Phillips concurrence omitted). Beyond following Restatement (Third) §2, Berrier predicted adoption of §1, and of the Restatement (Third) generally:

> [The Phillips concurrence] recognized that integrating negligence principles into a strict liability design defect claim, including the replacement of the intended user doctrine with a "reasonably foreseeable use" standard, "may reflect the greater consensus and better reasoned view." We think it highly likely that the Justices who would adopt section 2 would adopt as well as section 1 rather than trying to parse the applicable provisions of the Third Restatement and thereby supplant some of the provisions of the Second Restatement and not others.

563 F.3d at 60.[50]

Some Pennsylvania district courts, however, viewed Berrier as undercut by this Court's dismissal (as improvidently granted) of the appeal in Bugosh v. I.U. North America, Inc., 601 Pa. 277, 971 A.2d 1228 (2009), the pendency of which Berrier mentioned in a footnote.[51] The Third Circuit returned to the Restatement (Third) issue in Covell v. Bell Sports, Inc., 651 F.3d 357 (3d Cir. 2011). In Covell, the court reaffirmed its prediction in Berrier. It recognized the "core con-

[50]PLAC participated in Berrier. PLAC argued that, although it supports adoption of the Restatement (Third) in an appropriate case, such a momentous decision was properly the province of the Pennsylvania Supreme Court rather than a federal court predicting state law. Brief of Amicus Curiae Product Liability Advisory Council, Inc., in Support of Appellee, Berrier v. Simplicity Corp., No. 05-3621, 2006 WL 7089962, at *20-25 (3d Cir. filed March 23, 2006). The Third Circuit allowed certification, but this Court refused the petition. Berrier v. Simplicity Manufacturing, Inc., 598 Pa. 594, 959 A.2d 900 (2008). The Pennsylvania Trial Lawyers Association also appeared in Berrier, praising the position taken by the Restatement (Third). PaTLA Berrier Br., 2006 WL 7090599, at *4-5 ("The Third Restatement of Torts reflects the collective judgment of the courts and the collective wisdom of scholars").

[51]Berrier, 563 F.3d at 57 n.27. The Bugosh dismissal occurred after oral argument. PLAC participated in Bugosh and believes that at the Bugosh argument it became apparent that the defendant/appellant was an intermediate seller, not a product manufacturer. Under Restatement (Third) of Torts, Products Liability §2, comment o (1998), intermediate sellers are not subject to the general "due care" standard of §2.

flict in the structure of §402A,"[52] that while §402A 'instructs courts to ignore evidence that the seller 'exercised all possible care'," it "imposes liability only for products that are 'unreasonably dangerous'." 651 F.3d at 361.

> In many cases it is difficult or impossible to determine whether a product is "unreasonably dangerous" to consumers without reference to evidence that the seller did or did not exercise "care in the preparation" of the product.

Id. (citation omitted). The Restatement (Third) was preferable because it resolved this conflict:

> The American Law Institute responded to the core conflict in section 402A when it published the Restatement (Third) of Torts. Sections 1 and 2 of the Restatement (Third) of Torts abandon entirely the negligence-versus-strict-liability distinction that has caused so much trouble in Pennsylvania.

Id. See also Sikkelee v. Precision Airmotive Corp., 2012 WL 5077571 (3d Cir. Oct. 17, 2012) ("we will follow the precedent set out in Covell and Berrier") (unpublished en banc order).

Under the Restatement (Third) the sort of divergent verdict that occurred in this case – for Plaintiff on strict liability but for Defendant on negligence – would be impossible. See Vaskas v. Kenworth Truck Co., 2013 WL 1126022, *2 (M.D. Pa. March 18, 2013) ("inconsistent" with Restatement (Third) "to proceed to trial" on strict liability, but not negligence). As the concurring plurality recognized in Phillips, there is "a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement." 576 Pa. at 675, 841 A.2d at 1019. PLAC submits that it is time for Pennsylvania to join the growing majority of states that follow the Restatement (Third) approach to product liability.

D. Should The Court Adopt The Restatement (Third), Its Decision Should Apply Retroactively To All Pending Cases.

The Court's second question concerns retroactivity − whether replacing the Azzarello negligence/strict liability dichotomy with the Restatement (Third) of Torts, Products Liability

[52]This conflict was discussed, above at pp. 9-10.

should apply to pending cases. PLAC believes that this change should be retroactive to all pending cases in accordance with the general rule. See Blackwell v. Commonwealth, State Ethics Comm'n, 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991) (the "third" form of retroactivity).

Unlike statutes (1 Pa. C.S. §1926), the common law's default presumption is to "apply the law in effect at the time of the appellate decision." Blackwell, 527 Pa. at 182, 589 A.2d at 1099. "[T]he general rule is that all decisions are to be applied retroactively." Commonwealth v. Gray, 509 Pa. 476, 486, 503 A.2d 921, 926 (1985).

> [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.

McHugh v. Litvin, Blumberg, Matusow & Young, 525 Pa. 1, 10, 574 A.2d 1040, 1044 (1990). The bench, bar, and litigants "general[ly] understand[] that changes in the law are applied to cases in the system at the time the change is announced." Id. at 11, 574 A.2d at 1045.

A judicial decision is denied retroactive effect only when it "undermines a heretofore consistent body of law," and thus would surprise the bench and bar. Commonwealth v. McFeely, 509 Pa. 394, 399, 502 A.2d 167, 169 (1985). Whether to allow an exception to the general rule of retroactive application involves three factors: "(1) the purpose to be served by the new rule; (2) the extent of the reliance on the old rule; and (3) the effect on the administration of justice by the retroactive application of the new rule." Cleveland v. Johns-Manville Corp., 547 Pa. 402, 414, 690 A.2d 1146, 1152 (1997).

The reasons for abandoning the negligence/strict liability dichotomy have already been discussed at length. Current strict liability jurisprudence is riddled with exceptions. Exclusion of negligence concepts in strict liability is applied not only inconsistently, but unfairly, with "reasonableness" and "foreseeability" used to expand but not to contract liability. Plaintiffs evade

their burden of proof. Juries receive inadequate instructions. Relevant evidence is excluded. Thus, the fundamental purpose of adopting the Restatement (Third) is "to promote fairness in the adjudicative process" – a "factor [that] supports a retroactive application." Cleveland, 547 Pa. at 414, 690 A.2d at 1152.

Nor, unlike Cleveland, at this late date can there still be "considerable reliance" on the old Azzarello rule. Prospective application is warranted where a decision involves "an issue of first impression not clearly foreshadowed by precedent." Fiore v. White, 562 Pa. 634, 643, 757 A.2d 842, 847 (2000). No other major product liability issue in this Court's history has been more thoroughly "foreshadowed" than adoption of the Restatement (Third) − certainly not the 1966 adoption of Restatement (Second) §402A in Webb, which was retroactively applied.[53] For a full decade, since the 2003 three-justice concurrence in Phillips v. Cricket Lighters, the Court "laboriously . . . await[ed] 'the right case' in which to address the pervasive difficulties" created by Azzarello and its progeny. Freed v. Geisinger Medical Center, 607 Pa. 225, 245 n.11, 5 A.3d 212, 224 n.11 (2010) (Saylor, J. dissenting).

Undeniably, the presence of the Restatement (Third) on the Court's agenda has been common knowledge for ten years. PLAC has already discussed the repeated references, since Phillips, to the Restatement (Third) in this Court's opinions, concurrences, and dissents. See General Services (opinion); Bugosh (dissent); Schmidt (opinion); Beard (opinion and concur-

[53] Incollingo v. Ewing, 444 Pa. 263, 287, 282 A.2d 206, 219 (1971) (applying §402A retroactively to case filed in 1961); Burbage v. Boiler Engineering & Supply Co., 433 Pa. 319, 322-23, 249 A.2d 563, 565 (1969) (applying §402A retroactively to case filed in 1964); Kassab v. Central Soya, 432 Pa. 217, 229-31, 246 A.2d 848, 853-54 (1968) (applying §402A retroactively to case filed in 1963); Bialek, 430 Pa. at 185-88, 242 A.2d at 235-36 (applying §402A retroactively to case filed in 1964); Forry v. Gulf Oil Corp., 428 Pa. 334, 339-40, 237 A.2d 593, 596-97 (1968) (applying §402A retroactively to case filed in 1959); Ferraro v. Ford Motor Co., 423 Pa. 324, 327-28, 223 A.2d 746, 748 (1966) (applying §402A retroactively to case filed in 1962).

rence); Reott (concurrence). More than enough time has passed for all litigants to adjust their cases, engage necessary experts, and develop appropriate arguments in anticipation of the Restatement (Third) becoming the law of Pennsylvania.

Had the Restatement (Third) been adopted in Phillips, PLAC would have no quarrel with the sentiments of the Bugosh dissent, 601 Pa. at 301-04, 971 A.2d at 1242-44, concerning prospective application. But it is 2013, not 2009, and certainly not 2003. Adoption of the Restatement (Third) is no longer a bolt from the blue. Surely, a decade "afford[s] . . . adequate time for preparation and adjustment" to the new Restatement rule. Wexler v. Hecht, 593 Pa. 118, 128, 928 A.2d 973, 979 (2007). With the two-year tort statute of limitations, no litigant having a currently accrued claim can credibly argue surprise that the much-anticipated adoption of the Restatement (Third) finally came to pass. Indeed, since the Third Circuit's 2009 Berrier prediction – which was also retroactively applied − federal courts applying Pennsylvania law have been employing the Restatement (Third). Thus, in federal court, prospective application of the Restatement (Third) would perversely restore the abrogated Azzarello rule to many cases. Ordinary principles of common-law retroactivity work no unfairness here.

Finally, no jurisprudential obstacle to retroactive application exists. Parties have not taken significant detrimental actions in reliance on existing law. Cf. Oz Gas, Ltd. v. Warren Area School District, 595 Pa. 128, 143, 938 A.2d 274, 283 (2007) (collection and spending of taxes in reliance on prior rule), cert. denied, 553 U.S. 1065 (2008). New trials will occur only to the extent that litigants properly preserved Restatement (Third) issues. See Schmidt, 608 Pa. at 356, 11 A.3d at 942 (waiver applies to issues governed by "binding" precedent).[54] The Restatement

[54]Here, in light of Phillips, Defendant duly preserved the Restatement (Third) both at trial and on appeal. With the Restatement (Third) "foreshadowed, " Berrier, 563 F.3d at 53, for more than a decade, there is no reason to depart from usual waiver rules.

(Third) neither creates nor abolishes causes of action, nor does it change the statute of limitations. It simply alters the contours of existing tort theories. "[Defendant] had as much right to advocate for recognition of the elaboration as represented by [the restatement] as [plaintiff] had to urge that the tort should be deemed frozen in time." Walnut St. Associates, Inc. v. Brokerage Concepts, Inc., 610 Pa. 371, 391, 20 A.3d 468, 480 (2011) (applying adoption of other restatement section retroactively). None of the criteria for prospective application applies to adoption of the Restatement (Third) as Pennsylvania law in this case.

VII. CONCLUSION

For all of the reasons stated above, *amicus curiae* Product Liability Advisory Council, Inc. respectfully urges the Court to reverse the Superior Court, adopt the unitary, reasonableness and foreseeability-based form of product liability articulated by the Restatement (Third) of Torts, Products Liability §2 (1998), apply this decision retrospectively, and remand the case for a new trial.

CERTIFICATION OF IDENTITY

The undersigned hereby certifies that the paper copy of the foregoing Brief Of Amicus Curiae Product Liability Advisory Council, Inc. In Support Of Appellant is identical to the electronic filing that has been made the Court.

Dated: June 5, 2013

Respectfully submitted,

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TAB "A"

CORPORATE MEMBERS/PRODUCT LIABILITY ADVISORY COUNCIL, INC.

As of: May 15, 2013

3M
Altec Industries
Altria Client Services, Inc.
Anadarko Petroleum Corporation
AngioDynamics
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
Boeing Company, The
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas, Inc.
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
Dow Chemical Company, The
E.I. DuPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International, Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc
Panasonic Corporation of North America
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
RJ Reynolds Tobacco Company

SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
Sherwin-Williams Company, The
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
Viking Corporation, The
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

CERTIFICATE OF SERVICE

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