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.

AMICI CURIAE BRIEF OF PENNSYLVANIA BUSINESS COUNCIL, PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, PENNSYLVANIA MANUFACTURERS' ASSOCIATION, INSURANCE FEDERATION OF PENNSYLVANIA, CITIZENS ALLIANCE OF PENNSYLVANIA, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER 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 SUBJECT MATTER AND APPELLATE JURISDICTION

Amici adopt Defendant-Appellant's Statement of Subject Matter and Jurisdiction.

STATEMENT OF THE ORDER IN QUESTION

Amici adopt Defendant-Appellant's statements of the order in question as relevant to the issues in this appeal.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amici adopt Defendant-Appellant's Statement of the Standard of Review.

STATEMENT OF QUESTIONS INVOLVED

The following questions were stated in this Court's order of March 26, 2013:

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

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

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

This question was not addressed by the Superior Court.

STATEMENT OF THE CASE AND FACTS

Amici adopt Defendant-Appellant's statements of the case and facts.

STATEMENT OF INTEREST

Amici's members include companies that make or sell products in Pennsylvania, and their insurers. *Amici* agree with those Justices of this Court who have observed that Pennsylvania's strict liability jurisprudence needs an overhaul to address "prevailing inconsistencies and ambiguities which have arisen out of Pennsylvania's unique approach to the subject." *Berrier v. Simplicity Mfg., Inc.*, 598 Pa. 594, 596, 959 A.2d 900, 901 (2008) (Saylor, J., concurring, joined

by Castille, C.J., concurring in denial of petition for certification); *see also Phillips v. Cricket Lighters,* 576 Pa. 644, 675-682, 841 A.2d 10007, 1018-23 (2003) (Saylor, J., joined by Castille and Eakin, JJ., concurring).

After almost four decades of experience it is clear that the effort launched by *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978), to try to completely separate negligence and strict liability concepts has become "confused and unworkable." James A. Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of a Emerging Consensus*, 63 Minn. L. Rev. 773, 801 (1979). Case-by-case responses to the attendant problems, such as carving out certain categories of cases from strict liability, have helped in some instances, but have also resulted in a patchwork quilt system that is confusing to litigants and daunting to lower courts. Pennsylvania's product liability law needs to be reformed at the foundational level to be more fair and more predictable. The Court should join the mainstream and adopt §§ 1-2 of the Restatement Third, Torts: Products Liability (1998).

SUMMARY OF THE ARGUMENT

Product liability claims have evolved and expanded in ways never expected by the authors of the Restatement (Second) of Torts § 402A (1965). The Reporters of § 402A were focused on manufacturing defects. In subsequent years, courts struggled to apply strict liability concepts to design defects and failure to warn claims. Moreover, Pennsylvania law does not apply § 402A as written. The result has been a confusing and contradictory body of products liability law. The Third Restatement puts an end to this doctrinal disorder. This Court should reverse the ruling of the Superior Court, adopt §§ 1-2 of the Third Restatement, apply the decision retrospectively, and remand the case for a new trial.

ARGUMENT

I. PENNSYLVANIA'S UNIQUE STRICT PRODUCTS LIABILTY JURISPRUDENCE IS UNWORKABLE AND NEEDS TO BE REPLACED WITH A MODERN, MAINSTREAM APPROACH

A. The Evolution of Product Liability Law

At the turn of the twentieth century, product users faced distinct challenges trying to recover for injuries from unsafe products. Under established common law, an injured person could not hold a manufacturer liable in negligence for putting a dangerous product on the market if he or she did not directly purchase the product from the manufacturer. *Winterbottom v. Wright,* 152 Eng. Rep. 402 (Exch. 1842), had made privity in contract a condition precedent to liability grounded in negligence. This position was first altered in cases involving products that were considered imminently dangerous to human life. *See Thomas v. Winchester*, 6 N.Y. 397 (1852). Then, in the landmark case of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), Justice Cardozo eliminated the privity rule in negligence cases. The court held: "If [the manufacturer] is negligent where danger is to be foreseen, a liability will follow." *Id.* at 1053.

Even after abandonment of the privity requirement in negligence cases, plaintiffs faced other hurdles proving that the manufacturer failed to exercise reasonable care to avoid unintended dangers in the process of manufacturing or constructing its product. *See* W. Page Keeton et al., *Prosser & Keeton on Torts* 685 (5th ed. 1984). Thus, many plaintiffs relied on a breach of warranty theory.

In warranty cases, the rule of privity again came into play. *See* David Owen, *Product Liability Law Restated*, 49 S.C. L. Rev. 273, 275 (1998). For a period of time, courts developed innovations allowing plaintiffs to recover in warranty actions against manufacturers even without privity, particularly in cases involving contaminated food, *see* Victor E. Schwartz et al., *Prosser,*

Wade & Schwartz's Torts 758 (12th ed. 2010), such as broken glass in a beverage bottle. *See Coca-Cola Bottling Works v. Lyons*, 111 So. 305 (Miss. 1927); *see also Mazetti v. Amour & Co.*, 135 P. 633, 633 (Wash. 1913) ("foul, filthy, nauseating, and poisonous substance" in carton of cooked tongue). By 1960, courts had established this strict liability rule – warranty liability without privity – in flawed food cases. *See Prosser & Keeton on Torts*, *supra*, at 690.

A key turning point in product liability law was the New Jersey Supreme Court's decision in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), which extended the implied warranty of fitness to certain products beyond food without the need for privity. In *Henningsen*, the purchaser's wife was driving an almost new car when she suddenly lost control after hearing a cracking noise from under the hood. The car veered into a wall and was totaled, making it impossible to determine the cause of the accident. The court concluded, "under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase to the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser." *Id.* at 83-84.

Concepts of implied warranty, however, continued to be a source of considerable uncertainty in the courts. While courts had relaxed the privity requirement, other elements of contract law still came into play, such as the applicability of defenses including disclaimers and the buyer's duty to notify the seller promptly of a breach under the Uniform Sales Act and its successor, the Uniform Commercial Code. *See Prosser & Keeton on Torts*, *supra*, at 691. The implied warranty theory was viewed by some commentators as having "far too much luggage in the way of undesired complications," being "more troublesome than it is worth." *Id.*

To address these issues, Chief Justice Roger Traynor of the California Supreme Court in *Greenman v. Yuba Power Products Inc.*, 377 P.2d 897 (Cal. 1963), cast aside the doctrinal mix

of negligence, privity, and warranty, and endorsed a new tort theory of strict liability for defective products. The *Greenman* court stated:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

377 P.2d. at 901 (internal citations omitted).

Soon thereafter, the American Law Institute (ALI) adopted the Restatement (Second) of Torts § 402A (1965). Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Although restatements ordinarily state "black letter" law *as it exists*, the ALI took a different approach when it adopted § 402A in 1964 and published the new section in 1965. At the time, *Greenman* was the only decision of its kind; it was not the majority approach. Section 402A represented an advancement in tort law, not a true "restatement" of generally accepted doctrine. Moreover, § 402A went further than *Greenman*, applying not only to manufacturers, but to any commercial seller in the chain of distribution of the defective product. *See* Restatement (Second) of Torts § 402A(1). It took twenty years following publication of § 402A, from the mid-1960s to

mid-1980s, for most courts, and the occasional state legislature, to adopt some version of this strict tort product liability. *See* Owen, *supra*, at 277.

The Pennsylvania Supreme Court adopted § 402A in *Webb v. Zern,* 422 Pa. 424, 427, 220 A.2d 853, 854 (1966), explaining that the Restatement (Second) reflected the "modern attitude" at the time. *Id.* The Court applied this new rule retroactively.

B. Section 402A of the Restatement (Second)

Issues of manufacturing defects were well known to courts when § 402A was published and then adopted by this Court in *Webb*, but little case law existed with respect to the application of strict liability in design defect or failure to warn actions. The Reporters of § 402A, Deans Wade and Prosser, were focused on mismanufactured products - a bicycle that had a missing spoke, a cosmetic that contained glass, or a beverage containing a foreign object. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 825 (1973) ("The prototype case was that in which something went wrong in the manufacturing process, so that the product had a screw loose or a defective or missing part or a deleterious element, and was not the safe product it was intended to be."); *see also* U.S. Dept. of Commerce, Model Uniform Product Liability Act, 44 Fed. Reg. 62714, 62722 (Oct. 31, 1979) ("the authors of Section 402A...were focusing on problems relating to product mismanufacture or defective construction, and not on problems relating to defective design or the duty to warn.").[1]

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[1] *See also* James A. Henderson, Jr., *A Discussion and a Defense of the Restatement (Third) of Torts: Products Liability*, 8-Fall Kan. J.L. & Pub. Pol'y 18, 41 (1998) ("the drafters back then almost certainly were thinking of manufacturing defect liability. They just hadn't focused on design liability."); Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U.L. Rev. 874, 890 (2002) ("Most of the early cases did not entail claims of defectiveness that could even in retrospect, be classified as design claims.").

The shift to strict liability went smoothly in manufacturing defect cases. "[S]ocietal expectations are fairly well established with regard to such defects, and a ready gauge of acceptability exits by reference to like products that are non-defective." Jerry J. Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. Cin. L. Rev. 101, 104-05 (1977). Furthermore, the cost of strict liability for manufacturing defects was predictable and could be added to the price of products. As Brooklyn Law School Professor Aaron Twerski, co-reporter for the Third Restatement explains, "Manufacturing defects are rare events, and the implications for imposing strict liability were not serious." Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 Marq. L. Rev. 7, 17 (2006).

Courts, however, struggled with applying § 402A to very different claims involving defective design or failure to warn. *See* Restatement Third § 1 cmt. *a* ("it soon became evident that § 402A, created to deal with liability for manufacturing defects, could not appropriately be applied to cases of design defects or defects based on inadequate instructions or warnings."); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn,* 65 N.Y.U. L. Rev. 265, 270 (1990) ("doctrinal confusions...result from some courts' misguided attempts to distinguish (and apply) a strict liability cause of action for failure to warn").

If liability were truly "strict" in such cases then in theory liability could be imposed for failure to warn about a completely unknown and unknowable risk, or for failure to design a product incapable of causing injury. A few courts temporarily adopted this extreme view. *See Beshada v. Johns-Mansville Products Corporation*, 447 A.2d 539, 549 (N.J. 1982); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113-114 (La. 1986). The New Jersey Supreme

Court subsequently "restrict[ed] *Beshada* to the circumstances giving rise to its holding." *Feldman v. Lederle Labs*, 479 A.2d 374, 388 (N.J. 1984), and the Louisiana Supreme Court suggested the category of special products covered by its earlier holding was limited. *See Brown v. Sears, Roebuck & Co.*, 516 So. 2d 1154 (La. 1988). Legislative intervention eventually overruled the extreme approach, La. Rev. Stat. Ann. § 9:2800.59(1); N.J. Stat. Ann. § 2A:58C-3, and most courts did not embrace it. *See* Victor E. Schwartz, *The Death of "Super Strict": Common Sense Returns to Tort Law,* 27 Gonz. L. Rev. 179 (1991-92).

Instead, in "furtherance of establishing essential boundaries and reconciling strict liability doctrine with the historical grounding of tort law in notions of corrective justice, risk-utility balancing – an approach derived from negligence theory – attained wide-scale recognition as a rational limiting principle." *Bugosh v. I.U. N. Am., Inc.*, 601 Pa. 277, 288-90, 971 A.2d 1228, 1234-35 (2009) (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal); *see also* Model Uniform Product Liability Act, 44 Fed. Reg. at 62722 ("this Act places both design and duty-to-warn cases on a fault basis.").

C. The Court Has Recognized in a Number of Cases that the Current Approach is Unworkable and the Third Restatement is Superior

The few courts that persisted in struggling to apply strict liability to design defect and failure to warn claims "have been forced either to articulate outrageous positions that...deeply offend traditional notions of moral responsibility," such as in the discredited *Beshada* and *Halphen* decisions, "or to create verbal distinctions that have little practical consequence other than to confuse litigants and commentators." Henderson & Twerski, 65 N.Y.U. L. Rev. at 272-73. The latter problem has plagued Pennsylvania courts for more than thirty-five years.

In *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978), this Court attempted to draw a line between negligence and strict liability concepts. In the process, the

Court "developed a unique and, at times, almost unfathomable approach to products litigation." James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 897 (1998).

The Court in *Azzarello* appreciated that § 402A "was not intended to make [the manufacturer] an insurer of all injuries caused by the product." *Azzarello*, 480 Pa. at 553, 391 A.2d at 1024. To avoid such absolute liability, the Court created a framework whereby the initial decision to expose a defendant to strict liability rests with the trial judge and involves a version of the otherwise mainstream risk-utility balancing test. 480 Pa. at 558, 391 A.2d at 1026; *see also* John M. Thomas, *Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 Temp. L. Rev. 217, 225 (1998) ("*Azzarello* endorsed, and has been almost uniformly interpreted as having endorsed, cost-benefit analysis for purposes of limiting strict liability and preventing manufacturers from being held automatically liable for harm resulting from their product's use."). Unfortunately, in order to shield jurors from terminology that "rings of negligence," 480 Pa. at 555, 391 A.2d at 1025, the Court provided only minimalistic jury instructions. 480 Pa. at 559, 391 A.2d at 1027 (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.").[2]

Azzarello places trial judges in the dual roles of "'social philosopher' and 'risk-utility economic analyst.'" *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 836 (Pa. 2012) (internal citation omitted). Trial courts carry out this difficult task with reference to seven factors; these

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[2] *See also Berkebile v. Brantley Helicopter Corp.*, 462 Pa. 83, 100, 337 A.2d 893, 902 (1975) (plurality opinion) ("The seller must provide with the product every element to make it safe for use."), *abrogated on other grounds, Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012).

are often referred to as the "Wade factors." *See* Wade, 44 Miss. L.J. at 837-38.[3] Importantly, "Pennsylvania stands alone in its view that risk-utility balancing is never properly a jury function." Henderson & Twerski, 83 Cornell L. Rev. at 897.

In *Phillips v. Cricket Lighters,* 576 Pa. 644, 841 A.2d 10007 (2003) (plurality), the Court had an opportunity to repair the *Azzarello* Court's unsuccessful attempt to entirely separate negligence and strict liability concepts in design defect cases. *Phillips* involved a strict liability design defect claim for harm to an unintended user (a child who died playing with a cigarette lighter). The lead opinion strongly adhered to the broad proclamation that "negligence concepts should not be imported into strict liability law" – while admitting the Court had already "muddied the waters at times." 576 Pa. at 655, 841 A.2d at 1006-07. As an example, the lead opinion cited *Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186 (1997), which held that a manufacturer may be liable for a third-party's post-sale alteration that renders its product unsafe if the "manufacturer could have reasonably expected or foreseen such an alteration of its product." 547 Pa. at 267, 690 A.2d at 190. The lead opinion in *Phillips* candidly noted that "such a negligence-based test, which focuses on the due care exercised by the manufacturer, is in

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[3] The seven Wade factors are: (1) the usefulness and desirability of the product, in other words, its utility to the user and to the public as a whole; (2) the safety aspects of the product, meaning 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; (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 instruction; and (7) the feasibility, on the part of the manufacturer, of spreading the loss by adjusting the price of the product or carrying liability insurance. *See id.*

tension with our firm and repeated pronouncements that negligence concepts have no place in strict liability law." 576 Pa. at 656, 841 A.2d at 1007.

Without having a clear majority willing to abandon the increasingly unworkable dichotomy created by *Azzarello* but recognizing the difficulty of reversing all strict liability decisions utilizing any negligence terms or concepts, the Court settled on a carve-out approach. The Court held that strict liability does not apply in cases involving unintended users. 576 Pa. at 656-57, 841 A.2d at 1007 (plurality opinion by Cappy, C.J., with Castille, Newman, Saylor, and Eakin, JJ., concurring on this point); *accord* 576 Pa. at 674-75, 841 A.2d at 1018 (Saylor, J., concurring, joined by Castille and Eakin, JJ.); 576 Pa. at 682-83, 841 A.2d at 1023 (Newman, J., concurring and dissenting).

A concurring opinion in *Phillips* by Justice Saylor, joined by Justices Castille and Eakin, argued for the Court to adopt § 2 of the Third Restatement as the "clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme." 576 Pa. at 679, 841 A.2d at 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring). The concurrence showed how Pennsylvania's strict liability law had already imported negligence concepts in several circumstances, including with respect to post-sale alterations (as noted by the lead opinion) and in the risk-utility balancing performed by trial courts under *Azzarello.*[4]

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[4] *See also Phillips*, 576 Pa. at 667 n.5, 841 A.2d at 1014 n.5; *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 450, 467 A.2d 615, 618 (1983) ("The finding of a defect requires a balancing of the utility of the product against the seriousness and likelihood of the injury and the availability of precautions that, though not foolproof, might prevent the injury."); Thomas, 71 Temp. L. Rev. at 223 ("Pennsylvania appellate courts following *Azzarello* have concluded, almost uniformly, that a cost-benefit analysis must be used in determining whether a product is 'defective' or 'unreasonably dangerous.'").

The concurrence also noted that while strict liability is said to focus on the product while negligence focuses on conduct, "most courts and commentators have come to realize that in design cases the character of the product and the conduct of the manufacturer are largely inseparable." 576 Pa. at 669, 841 A.2d at 1015 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring).[5] For example, Dean Wade, whose views were highly influential on the Court in *Azzarello*, "highlighted the marked similarities between negligence and strict liability in defective design cases...as well as the direct derivation of strict liability risk-utility balancing from negligence doctrine." 576 Pa. at 668, 841 A.2d at 1014 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring) (internal citation omitted).[6] This point was made forcefully by the Reporters for the Third Restatement:

> [T]o condemn a design for being unreasonably dangerous is inescapably to condemn the designer for having been negligent. To insist otherwise would be akin to a professor telling a law student that, while the brief the student wrote is awful, the professor is not passing judgment on the student's skill in writing it. Similarly,..insistence that strict liability is somehow being imposed if the court assesses the reasonableness of the design and not the reasonableness of the designer's conduct is purest sophistry.

Henderson & Twerski, 83 Cornell L. Rev. at 919.

Additionally, the *Phillips* concurrence highlighted the "pervasive ambiguities and inconsistencies" in Pennsylvania's attempt to separate negligence and strict liability concepts by preventing the jury from considering risk-utility while still allowing such balancing to be made

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[5] *See also Duchess v. Langston Corp.*, 564 Pa. 529, 550, 769 A.2d 1131, 1144 (2001) ("there are analytical similarities between strict liability and negligence in relation to claims of defective design....").

[6] *See also* Henderson & Twerski, 83 Cornell L. Rev. at 897 ("Dean Prosser, the Reporter responsible for drafting section 402A, writing some seven years after its promulgation, made it clear that the standard for both design and failure-to-warn defects sounds in classic negligence.").

by the trial court. 576 Pa. at 664-65, 671-72, 841 A.2d at 1012, 1016 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring). The current approach also suffers from "minimalistic jury instructions (to insulate the jury from negligence terminology), which lack essential guidance concerning the nature of the central conception of product defect." *Id.* To remedy these problems, the concurrence recommended adoption of § 2 of the Third Restatement. 576 Pa. at 675-682, 851 A.2d at 1019-23 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring).

In 2006, the Court again acknowledged "substantial deficiencies" in Pennsylvania's strict liability doctrine and said the doctrine "should be closely limited pending an overhaul by the Court." *Pennsylvania Dept. of Gen. Servs. v. United States Mineral Prods.*, 587 Pa. 236, 254, 898 A.2d 590, 601 (2006).[7] *General Services* made clear that a plurality of the Court in *Phillips* supported reform of the current approach:

> [I]n *Phillips*, a plurality of the Court, viewing the condition of Pennsylvania strict liability doctrine as impaired, advocated reform.... [T]he reasoning was based on the belief that such clear precedent [for the proposition that negligence concepts have no place in the strict liability context] was in tension with other aspects of Pennsylvania strict liability doctrine, including the product alteration and crashworthiness cases.

587 Pa. at 256 n.15, 898 A.2d at 602 n.15. Additionally, the Court explained that "a majority of Justices in *Phillips* acknowledged that there were existing exceptions to the general rule against the importation of negligence concepts and affirmatively grounded their dispositive votes on the reasoning that there should be no further exceptions." 587 Pa. at 257, 898 A.2d at 603.[8]

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[7] *See also* 587 Pa. at 278, 898 A.2d at 615 (Newman, J., concurring and dissenting) ("the overriding principle set forth in *Phillips* is that strict liability should be limited to a very small range of cases.").

[8] The Court held that the incineration of building products was not a use intended by the manufacturer, so damages in strict liability were unavailable. 587 Pa. at 259, 898 A.2d at 604.

Since *General Services*, several Justices have continued to note the "prevailing inconsistencies and ambiguities which have arisen out of Pennsylvania's unique approach" to strict liability. *Berrier v. Simplicity Mfg., Inc.*, 598 Pa. 594, 596, 959 A.2d 900, 901 (2008) (Saylor, J., concurring, joined by Castille, C.J., concurring in denial of petition for certification). For example, in *Bugosh v. I.U. North America, Inc.*, 601 Pa. 277, 971 A.2d 1228 (2009), Justice Saylor, joined by Chief Justice Castille, dissented from the dismissal of an appeal that presented the Court with an opportunity to address the unworkable approach set forth in *Azzarello*. They explained, "*Phillips* amply demonstrates that the core problem in the application of prevailing Pennsylvania law lies in the insistence on maintaining a doctrinal assertion that there is no negligence in strict liability, when, functionally, the law of 'strict' products liability is infused with negligence concepts." 601 Pa. at 287, 971 A.2d at 1233 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal). Urging the Court to reform its approach, Justice Saylor and Chief Justice Castille observed: "The reality is that *Azzarello* simply was not well reasoned in its own time, and it certainly has not withstood the test of time.... This Court has lagged for too long in this essential recognition, and unfortunately, the ritualistic adherence to *Azzarello* has substantially impeded the progress of [Pennsylvania's] product liability jurisprudence." 601 Pa. at 295-96, 971 A.2d at 1239 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal). The dissent said that "the Court should no longer say negligence concepts have no place in 'strict-liability' doctrine in Pennsylvania, when this simply is not accurate in [Pennsylvania's] tort scheme, or in any scheme purporting to recognize that manufacturers and distributors are not outright insurers for all harm involving their products." 601 Pa. at 298, 971 A.2d at 1240 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal). Justice Saylor and

Chief Justice Castille called on the Court to adopt the Third Restatement position. 601 Pa. at 299, 971 A.2d at 1241 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal).

In *Schmidt v. Boardman Co.*, 608 Pa. 327, 11 A.3d 924 (2011), the Court again criticized Pennsylvania's "no negligence-in-strict-liability rubric" for "resulting in material ambiguities and inconsistencies." 608 Pa. at 353, 11 A.3d at 940. Echoing problems identified in the *Phillips* concurrence, the Court said its attempt "to isolate strict liability in its entirety from negligence theory has led to risk-utility balancing by trial courts on facts most favorable to the plaintiff (to avoid entangling the trial judge in determining factual questions assigned to the jury under *Azzarello*)." *Id.* "Further, the scheme has yielded minimalistic jury instructions (to insulate the jury from negligence terminology) which lack essential guidance concerning the key conception of producdt defect." *Id.* Finally, the Court noted that the Third Circuit has commented on the "confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims." 608 Pa. at 353, 11 A.3d at 940 (quoting *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 55 (3d Cir.), *cert. denied*, 558 U.S. 1011 (2009)).[9] The Court was unable to achieve consensus on adoption of the Third Restatement, so it applied the Restatement (Second) approach "subject to the admonition that there should be no further expansions of its scope under current strict liability doctrine. 608 Pa. at 354, 11 A.3d at 941.

In *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823 (Pa. 2012), the Court noted the "continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law." *Id.*

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[9] *See also Covell v. Bell Sports, Inc.*, 651 F.3d 357, 361 (3d Cir. 2011) (stating the Pennsylvania Supreme Court "has endeavored to segregate strict liability's 'product-oriented' analysis from the 'conduct-oriented' analysis of negligence" but "[t]hat endeavor has not always been successful."), *cert. denied*, 132 S. Ct. 1541 (2012); *Sweitzer v. Oxmaster, Inc.*, 2010 WL 5257226, *2 (E.D. Pa. Dec. 23, 2010) ("confusion has emerged as to the role negligence principles have in Pennsylvania strict liability cases.").

at 836. The Court suggested the Third Restatement offers a better approach: "It may be cogently argued that risk-utility balancing is more legitimately assigned to a jury, acting in its role as voice for the community and with the power to decide facts, rather than to a trial judge acting on a summary record. Indeed, this is the approach of the Restatement Third." *Id.* at 838 n.18.

Most recently, in *Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012), Justice Saylor highlighted the "idiosyncratic fashion in which strict liability jurisprudence has been applied in Pennsylvania." *Id.* at 1101 (Saylor, J., concurring). Justice Saylor also pointed out that "strict liability was originally fashioned with manufacturing defects in mind, and its uncritical extension to other areas, including the design-defect arena, has resulted in tremendous uncertainty, controversy, and instability, which continue to require the Court's attention to remediate beginning at a foundational level." *Id.* at 1102 (Saylor, J., concurring).

II. THIS COURT SHOULD ADOPT THE THIRD RESTATEMENT'S CLEAR AND FAIR APPROACH

A. The Third Restatement's Reasoned and Balanced Approach

As explained, "Section 402A and the scholars and courts that crafted it were concerned about easy cases in which products failed in performing at a minimum level of safety." Michael D. Green, *The Unappreciated Congruity of the Second and Third Restatements on Design Defects*, 74 Brook. L. Rev. 807, 836 (2009). Now almost fifty years later, there is a much better understanding that courts should decide design defect and failure to warn cases very differently than manufacturing defect cases. It is also clear that the unique approach in *Azzarello* to try to separate strict liability and negligence concepts is unworkable and has not stood the test of time.

The Third Restatement resolves the conflict and tension created by § 402A's approach. "The development of the [Third Restatement] was a slow, democratic, and fair process.... The

Reporters were assisted by a twenty-person 'advisory committee' comprised of distinguished judges, law professors, and experienced plaintiff and defense practitioners. The final result is analytic, well researched, and balanced. It is neither a 'pro-plaintiff' nor a 'pro-defendant' work." Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability: A Guide to its Highlights*, 34 Tort & Ins. L.J. 85, 85 (1998); *see also See* Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability – The American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743 (1998). This Court should adopt §§ 1-2 of the Third Restatement to replace § 402A/*Webb*/*Azzarello*.

Section 1 of the Third Restatement states "the general rule of tort liability applicable to commercial sellers and other distributors of products generally." Third Restatement § 1 cmt. 1. Section 1 provides:

> One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

Section 2 sets forth distinct principles of liability for the traditional three categories of product defect: manufacturing defect, design defect and inadequate warnings or instructions. Section 2 follows the approach of the U.S. Department of Commerce's Model Uniform Product Liability Act, 44 Fed. Reg. 62714 (Oct. 31, 1979), which was developed because courts had struggled to define standards of responsibility with respect to design and the duty to warn following the publication of § 402A. The Third Restatement's rules are stated functionally rather than in terms of traditional labels, such as negligence and strict liability. Section 2 states:

> §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 by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of the 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 by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Section 2 thus continues to apply classic strict liability to manufacturing defects, consistent with § 402A and the concerns of the Reporters. Manufacturing defects are determined according to a straightforward test: they are deemed present when a product fails to conform to its intended design. *See* Third Restatement § 2(a); *id.* at cmt. c. In these instances, liability is imposed without regard to whether the manufacturer's quality control efforts were reasonable. *See id.*

As a general rule, a product is deemed defective in design when the foreseeable risks could have been reduced or avoided by the use of a reasonable alternative design, and when the failure to utilize such a design has caused the product to be "not reasonably safe." Third Restatement § 2(b); *id.* at cmt. d. The Restatement utilizes a reasonableness-based, risk-utility balancing test as the standard for evaluating the defectiveness of product designs. *See id.* cmt. d. The cost-benefit test is to be applied by the jury where sufficient evidence has been presented to preclude summary judgment or a directed verdict. *See id.* cmt. f. "[I]n fashioning a risk-utility test for design defects while adopting a separate provision for products whose misperformance is sufficiently egregious for liability to be imposed, the Restatement (Third) brings us very close to where we were when section 402A was adopted." Green, 74 Brook. L. Rev. at 837.

A product is generally deemed to have 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 renders the product "not reasonably safe." Third Restatement § 2(c); *id.* at cmt. i.

The Reporters explained the need for a reasonableness-infused standard in design and warnings cases:

> In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label "risk-utility balancing" is necessary. Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by courts on product sellers.

Id. at cmt. a.

Adoption of § 2 of the Third Restatement's "closely reasoned and balanced approach...represents the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme." *Phillips*, 576 Pa. at 679, 841 A.2d at 1021 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring); *see also Covell v. Bell Sports, Inc.*, 651 F.3d 357, 361 (3d Cir. 2011) ("Sections 1 and 2 of the [Third Restatement] abandon entirely the negligence-versus-strict-liability distinction that has caused so much trouble in Pennsylvania."), *cert. denied*, 132 S. Ct. 1541 (2012).

As explained by Justices of this Court, the Third Restatement approach "illuminates the most viable route to providing essential clarification and remediation, by: preserving traditional

strict liability for manufacturing defects; endorsing a reasonableness-based, risk-utility balancing test as the standard for adjudging the defectiveness of product designs; and relegating the cost-benefit analysis to the jury, guided by appropriate instructions (where sufficient evidence has been presented to preclude summary judgment or a directed verdict)." *Bugosh*, 601 Pa. at 282-83, 971 A.2d at 1231 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal) (citing *Phillips*, 576 Pa. at 675-79, 841 A.2d at 1019-21 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring)).

B. Adoption of the Third Restatement Approach Would Promote Equity and Enhance the Commonwealth's Competitiveness

The *Phillips* concurrence observed that Pennsylvania's unique approach is highly unfair to defendants because the preliminary risk-utility decisions by trial courts must be done "on the facts most favorable to the plaintiff (to avoid entangling the trial judge in determining the factual questions assigned by *Azzarello* to the jury)." 576 Pa. at 672, 851 A.2d at 1017 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring). Accordingly, such decisions cannot reflect a fair or appropriate, that is, fact-based, balancing. Moreover, the no-negligence rubric has at times "been used to narrow the defenses available in strict liability actions." *Schmidt*, 608 Pa. at 353, 11 A.3d at 940 (citing *Kimco Dev. Corp. v. Michael D's Carpet Outlets*, 536 Pa. 1, 8, 637 A.2d 603, 606 (1993) (rejecting comparative negligence as a defense because "negligence concepts have no place in a strict liability action.")). The opinion in *Schmidt* remarked how in *General Services* the "Court 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." 608 Pa. at 354, 11 A.3d at 940 (citing *General Services,* 587 Pa. at 258, 898 A.2d at 603).

This recognized unfairness and Pennsylvania's status as an outlier on some of the crucial issues of product liability law have hampered the Commonwealth's economic competitiveness. As thoroughly researched and documented in the *amicus* brief of the Product Liability Advisory Council, Inc., adoption of the Third Restatement would be "consistent with the law in many states." *Berrier*, 563 F.3d at 541; *see also Bugosh*, 601 Pa. at 299, 971 A.2d at 1241 ("the Third Restatement's provisions are far more reasoned and balanced than *Azzarello*, and adoption would represent a substantial advancement of Pennsylvania law."); 601 Pa. at 304, 971 A.2d at 1244 ("the Court should disavow *Azzarello* now to permit the modernization of Pennsylvania's products liability jurisprudence to progress at long last.").

III. THE THIRD RESTATEMENT SHOULD BE APPLIED RETROACTIVELY

The concurring Justices in *Phillips* advocated making the foundational movement away from § 402A on a purely prospective basis (new rule of law only applied to cases commenced thereafter and not the parties to this case). *See Phillips*, 576 Pa. at 665, 841 A.2d at 1012 (Saylor, J., joined by Castille and Eakin, JJ., concurring); *see also Bugosh*, 601 Pa. at 303, 971 A.2d at 1231 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal). *Amici* believe that adoption of §§1-2 of the Third Restatement should be retroactive to the parties in the case and applied to all pending cases in accordance with the general rule.

In *Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, 610 Pa. 371, 20 A.3d 468 (Pa. 2011), this Court retroactively adopted a section of the Restatement (Second) of Torts providing that the giving of truthful information cannot support a claim for tortious interference with contractual relations. The Court explained, "While retroactive application of new rule of law is a matter of juridical discretion usually exercised on a case-by-case basis, the general rule is that a decision announcing a new rule of law is applied retroactively so that a party whose case

is pending on direct appeal is entitled to the benefit of changes in the law." 610 Pa. at 390, 20 A.3d at 479 (quoting *Kituskie v. Corbman*, 552 Pa. 275, 283 n.5, 714 A.2d 1027, 1030 n.5 (Pa. 1998)); *see also McHugh v. Litvin, Blumberg, Matusow & Young*, 525 Pa. 1, 574 A.2d 1040 (1990).

"Courts will deviate from the general rule of retroactivity and apply a new rule of law prospectively where: (1) the decision to be applied non-retroactively established a new principle of law; (2) a retrospective application will retard application of the old rule of law; and (3) retroactive application will lead to an inequitable result which imposes an injustice or hardship." *Walnut St. Assocs.*, 610 Pa. at 390, 20 A.3d at 479 (citing *Kituskie*, 552 Pa. at 283 n.5, 714 A.2d at 1030 n.5). Here, these factors support following the general rule calling for retroactive application.

First, adoption of the Third Restatement should be viewed not as a "new principle of law" but as a refinement of tort law principles that have evolved steadily over decades. The movement began with the elimination of privity requirements in negligence and implied warranty cases, led to the *retroactive* adoption of § 402A in *Webb*, and then to the *retroactive* application of *Azzarello*, *see Leland v. J.T. Baker Chem. Co.*, 282 Pa. Super. 573, 423 A.2d 393, (1980). The Third Restatement – which is now fifteen years old – represents the latest point along the tort law evolutionary continuum.

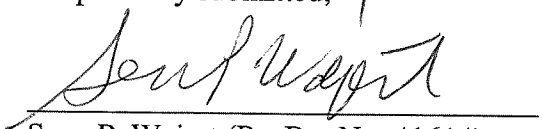
Second, federal courts applying Pennsylvania law have been employing the Third Restatement (albeit inconsistently), so the extent to which the "old rule" would be impaired is questionable. Compare *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir.), *cert. denied*, 558 U.S. 1011 (2009), and *Covell, supra,* with *Durkot v. Tesco Equip., LLC*, 654 F. Supp. 2d 295 (E.D. Pa. 2009) (applying § 402A).

Third, retroactive application of the Third Restatement would not lead to an inequitable result. In all likelihood, there has never been a development in Pennsylvania law that has been as foreshadowed as the adoption of §§ 1-2 of the Third Restatement. For at least a decade, Justices on this Court have consistently called for the adoption of the Third Restatement and criticized the *Azzarello* approach. *See, e.g., Phillips,* 576 Pa. at 675-682, 851 A.2d at 1019-23 1018 (Saylor, J., joined by Castille and Eakin, JJ., concurring); *Bugosh*, 601 Pa. at 299, 971 A.2d at 1241 (Saylor, J., joined by Castille, C.J., dissenting from dismissal of appeal). Strict liability has been "closely limited" by the Court because of "substantial deficiencies" in the present doctrine. *Pennsylvania Dept. of Gen. Servs.,* 587 Pa. at 254, 898 A.2d at 601. No plaintiff with a pending case can credibly claim to be surprised if the Court adopts the Third Restatement.

CONCLUSION

For these reasons, this Court should reverse the ruling of the Superior Court, adopt §§ 1-2 of the Restatement Third, Torts: Products Liability (1998), apply the decision retrospectively, and remand the case for a new trial.

Respectfully submitted,



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CERTIFICATE OF IDENTITY

I hereby certify that the paper copy of the foregoing Brief is identical to the electronic copy that is being simultaneously submitted to the Court.

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CERTIFICATE OF SERVICE

I certify that I served two copies of the foregoing Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service this 4th day of June, 2013, addressed as follows:

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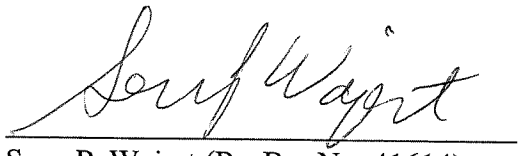

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