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* ATLANTIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT

Appeal from Order of the Court of the Superior Court of Pennsylvania, 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

Atlantic Legal Foundation ("ALF") is a Pennsylvania non-profit corporation and a nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished legal scholars, active and retired general counsels of corporations, and practitioners from across the legal community, including members of leading Pennsylvania law firms. In pursuit of its mandate, the Foundation has served as counsel for numerous distinguished scientists, including almost two dozen Nobel Prize winners in Chemistry, Medicine or Physiology and Physics with the goal of educating judges about the correct scientific principles and methods as applied to specific issues of causation in tort cases, including numerous cases in Pennsylvania courts. ALF has a strong interest in a rational and consistent legal principles in product liability cases.

This *amicus curiae* brief is respectfully submitted to the Court to address an issue of public importance. It does not represent or advocate for the specific interests of any party to this case.

ALF urges this Court to overrule *Azzarello v. Black Brothers Co.*, 480 Pa. 547, 391 A.2d 1020 (1978) and to adopt the Restatement (Third) Section 2.

## BRIEF OF *AMICUS CURIAE* ATLANTIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT

### STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

ALF adopts the statement of jurisdiction of Defendant-Appellant Omega Flex, Inc.

### 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.

"[W]hether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively." *Tincher v. Omega Flex, Inc.*, No. 842 MAL 2012, 2013 WL 1222123 (Pa. March 26, 2013).

This question was not addressed by the Superior Court.

### STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

ALF adopts Defendant's statement of the scope and standard of review.

## STATEMENT OF THE CASE, FACTS, AND ORDER IN QUESTION

ALF adopts Defendant's statement of the case, the facts, and the order in question.

Under Pennsylvania's current strict liability/negligence dichotomy, only "intended" product uses give rise to strict liability, whereas "foreseeable unintended uses" do not.

Since 1977, in Pennsylvania the court decides as a matter of law whether the product could be considered "unreasonably dangerous" in light of available alternative designs. This determination is made on a dispositive motion (such as here a motion for summary judgment) on which the burden of proof is usually shifted to defendant as the moving party. This procedure shifts the burden of proof to defendants to establish a favorable balance of product utility over risks.

"TracPipe," the product in this case, is corrugated stainless steel pipe that was buried underground and used to transport natural gas. "Black" pipe, which Plaintiff proffered as an alternative design,[1] is solid cast iron pipe which has been used for decades. Defendant Omega Flex asserts that corrugated stainless steel piping has advantages over cast iron pipe: corrugated stainless steel is lighter, more flexible, less subject to corrosion, more resistant to earthquakes, and has a higher melting point; stainless steel can be thinner while still being as strong as cast iron. However, a lightning strike, could, in some rare circumstances, result in electrical "arcing" that can penetrate the thinner stainless steel pipe.[2]

After Plaintiffs rested, Defendant moved for nonsuit, asserting risk/utility issues; the trial court denied the motion. At the end of all evidence, Plaintiffs voluntarily dismissed their

[1] Current Pennsylvania law, like the Restatement (Third), requires an alternative design as an "essential element" in defective design cases.

[2] This case arises out of a fire caused by a lightning strike, a proverbial "Act of God." *See McKinley v. C. Jutte & Co.*, 230 Pa. 122, 125, 79 A.2d 244, 245 (1911).

warning-based claims. Defendant moved for a directed verdict on "risk/utility" balance; that motion was denied.

The case went to the jury on strict liability design defect and negligent design claims. As to strict liability, the trial court gave the jury an "any element" defect charge as articulated in *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.
>
> ***
>
> When we talk about strict liability, the product must be provided with every element necessary to make it safe for its intended use. And without any condition that makes it unsafe for its intended use. If you find that the product in this case, the TracPipe, at the time it left the defendants' control, lacked any elements necessary to make it safe for its intended use, or contained any condition that made it unsafe for its intended use, and there was an alternative more practical design, more safer design, than the product is considered defective and the defendant is liable for the harm, if you find that defect caused the harm was the proximate cause of the harm to the plaintiffs.

R. 493-495a.[3]

[3] The trial court also gave an "all the circumstances" instruction on industry standards as to negligent design:

> 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.

R. 499-500a.

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

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

The Superior Court affirmed the trial court verdict. It did not apply the Restatement (Third) of Torts, as Defendant had urged.

## SUMMARY OF ARGUMENT

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 place in strict liability cases. *Azzarello*, 391 A.2d at 1027. Since *Azzarello*, however, this Court and other courts have analyzed many strict liability issues in light of "reasonableness" or "foreseeability." Distinctions between negligence and strict liability have been inconsistent and contradictory, and Pennsylvania law on strict liability has become confusing.

Pennsylvania law has already eliminated critical portions of the Restatement (Second) in *Azzarello* and other strict liability decisions. Pennsylvania law and the Restatement are already in accord on two critical elements of the Restatement (Third)'s application of a risk/utility test for defective goods and the need for an alternative feasible design before a plaintiff can go to the jury. Pennsylvania courts should explicitly recognize that the *Azzarello* negligence/strict liability dichotomy is unworkable and should adopt the more consistent standard of the Restatement (Third) of Torts: Products Liability (1998), which this Court has cited with approval since *Duchess v. Langston Corp.*, 564 Pa. 529, 769 A.2d 1131 (2001).

If this Court does adopt the Restatement (Third), the change from Restatement (Second) of Torts Section 402A (1965) to the Restatement (Third) would come as no surprise. In 2003,

three members of this Court advocated such a change, *Phillips v. Cricket Lighters*, 576 Pa. 644, 655, 841 A.2d 1000, 1012 (2003), and the Court has expressed the view that a fundamental reexamination of Pennsylvania product liability doctrine is needed. *See Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co.*, 587 Pa. 236, 898 A.2d 590 (2006). Four years ago the United States Court of Appeals for the Third Circuit predicted that this Court would adopt the Restatement (Third), *Berrier v. Simplicity Mfg., Inc*., 563 F.3d 38 (3d Cir. 2009), and federal courts in the Third Circuit, applying Pennsylvania law, have been relying on the Restatement (Third) Section 2. *See, e.g., Covell v. Bell Sports, Inc.*, 651 F.3d 357 (3d Cir. 2011), *cert. denied,* 132 S.Ct. 1541 (2012)*; Sikkelee v. Precision Airmotive Corporation,* No. 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012).

The Restatement (Third) approach reflects the evolution of product liability case law by defining a defect in terms of whether it is a manufacturing defect, a design defect, or a warning defect. The Restatement (Third) applies strict liability in cases where the plaintiff alleges a manufacturing defect and principles of negligence where the plaintiff alleges a defect in design or inadequate warnings.

## ARGUMENT

### I. THIS COURT SHOULD ADOPT THE RESTATEMENT OF TORTS (THIRD) ON STRICT PRODUCT LIABILITY

#### A. The Restatement (Second) of Torts, Section 402A and Pennsylvania's Application of It.

The Restatement (Second) of Torts, Section 402A (1965) provides in pertinent part:

> (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 relationship with the seller.

Section 402A of the Restatement (Second) of Torts, as originally drafted and adopted by Pennsylvania in 1966, imposes strict liability on sellers of defective products, and limited liability on products that were not "unreasonably" dangerous. *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966).

In *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020, 1027 (1978), which is the seminal Pennsylvania product liability case discussing strict liability under Section 402A, this Court held that "negligence" has no place in a products liability case, that the jury charge should avoid reference to negligence terms while still providing a clear definition of "defect" and that "[i]t is clear that the term 'unreasonably dangerous' has no place in the instructions to a jury as to the question of 'defect' in this type of case." *Azzarello*, 391 A.2d at 1027.

While *Azzarello* prohibits jury consideration of negligence concepts such as "reasonableness" and "foreseeability,"[4] *Azzarello* did not completely eliminate the concept of "reasonableness." Instead, it held that "unreasonably dangerous" is a "question of law" for the judge to decide before strict liability claims are submitted to the jury. Under *Azzarello*, the trial judge determines whether the evidence of product defect is sufficient to allow the question to go to the jury. *See Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000, 1013-14 (Pa. 2003) (Saylor, J., concurring). In making this determination, the judge must perform a cost/benefit analysis, which generally involves a multitude of factors, including "'the gravity of the danger

[4] Reliance upon forseeability was rejected in *Phillips v. Cricket Lighters*, 576 Pa. 644, 655, 841 A.2d 1000, 1006 (2003).

posed by the challenged design; the likelihood that such danger would occur; the feasibility of a safer design; and the adverse consequences to the product and to the consumer that would result from the safer design.'" *Schindler v. Sofamor, Inc.*, 774 A.2d 765, 772 (Pa. Super. Ct. 2001), quoting *Dambacher v. Mallis*, 336 Pa. Super. 22, 485 A.2d 408, 423 (Pa. Super. Ct. 2001). Trial courts will generally consider a multitude of factors in addition to the four cited. As the Superior Court noted in *Schindler*, the gate keeping role of the trial court is a critical judicial function, one which gives the trial court an inherent "power to reject design defect claims as a matter of law, even where the plaintiff presents evidence tending to show that the product is defective." 774 A.2d at 773.

*Azzarello* made the judge a "gate keeper" in design defect cases. *See Schindler*, 774 A.2d at 773. Manufacturers and resellers can assert "reasonableness" and "forseeability" defenses and can avoid liability by making successful motions for summary judgment (*see, e.g., Jacobini v. V. & O. Press Co.*, 527 Pa. 32, 39-40, 588 A.2d 476, 480 (1991)), directed verdict (*see, e.g., Jordon v. K-Mart Corp.*, 417 Pa. Super. 186, 191-192, 611 A.2d 1328, 1331-32 (Pa. Super. Ct. 1992)), or judgment notwithstanding the verdict (*see, e.g., Fitzpatrick v. Madonna*, 424 Pa. Super. 473, 476, 623 A.2d 322, 324 (Pa. Super. Ct. 1993)), but all of these procedural mechanisms shift the burden to the defendant, contrary to the usual burden of proof in a tort case.[5]

Although lower Pennsylvania courts have attempted to adhere to the principle that product liability cases sounding in negligence and strict liability are wholly distinct causes of action, that has not always been the case, even by admission of the Court itself. For example,

[5] The summary judgment standard, for example, places a heavy burden on 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," and "[i]n 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. *Weaver v. Lancaster Newspapers, Inc.*, 592 Pa. 458, 464-65, 926 A.2d 899, 902 (2007).

the court in *Phillips* stated that "[w]hile we have remained steadfast in our proclamations that negligence concepts should not be imported into strict liability law, we have muddied the waters at times with the careless use of negligence terms in the strict liability arena." *Phillips*, 841 A.2d at 1006-07. The *Phillips* court cited, as an example, *Davis v. Berwind Corp*., 547 Pa. 260, 690 A.2d 186 (1997), in which this Court held that the manufacturer of a safe product could be held strictly liable for an injury caused by a subsequent change made to the product, even if the manufacturer was not responsible for the change, where the manufacturer "could have reasonably expected or foreseen such an alteration of its product." *Phillips*, 841 A.2d at 1007 (quoting *Davis*, 690 A.2d at 190).[6]

As the United States Court of Appeals for the Third Circuit has pointed out, the approach set forth in Restatement (Second) Section 402A has not been consistently applied and Pennsylvania courts have often employed negligence terminology in products liability cases. *Berrier v. Simplicity Mfg., Inc*., 563 F.3d 38, 52 (3d Cir. 2009) (citing and quoting *Phillips*, 841 A.2d at 1006-07).

In fact, negligence concepts are somewhat pervasive. One example is "assumption of the risk." In *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 541 (Pa. Super. Ct. 2009) the Superior Court held that in order to prove assumption of the risk, the defendant must prove "that the buyer knew of a defect and yet voluntarily and **unreasonably** proceeded to use the product." 976 A.2d 524, 541 (Pa. Super. Ct. 2009) (citing *Ferraro v. Ford Motor Co.*, Inc., 223 A.2d 746 (1966) (emphasis added)). Another example is "misuse." In Pennsylvania, to prove that a plaintiff misused the product, the defendant is required to provide evidence "that the use was 'unforeseeable or outrageous.'" *Gaudio*, 976 A.2d at 541 (quoting *Childers v. Power Line Equip.*

[6] Somewhat anomalously, the *Phillips* court also stated that it felt it would be "imprudent" to reverse previous strict liability decisions that had incorporated negligence terms, and instead simply chose to "reaffirm" that negligence concepts have no place in strict liability law. 841 A.2d at 1007.

*Rentals, Inc.*, 452 Pa. Super. 94, 108, 681 A.2d 201, 208 (Pa. Super. 1996)). In *Phillips*, the Court created an exception to strict liability for "unintended user" cases. 841 A.2d at 1007 (claims not involving an "intended" use cannot sound in strict liability). The three concurring justices in *Phillips* opined that the *Azzarello* negligence/strict liability dichotomy is beset by "pervasive ambiguities and inconsistencies." *Phillips*, 841 A.2d at 1012 (Saylor, J., concurring). The majority in *Phillips* conceded the *Azzarello* dichotomy had become unclear and confusing. 841 A.2d at 1006. Frequent judicial invocation of negligence concepts in strict liability cases led the majority in *Phillips* to conclude that "it would be imprudent of us to wholesale reverse all strict liability decisions which utilize negligence terms." *Phillips*, 841 A.2d at 1007.

Foreseeability is also negligence concept. In *Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co.*, 587 Pa. 236, 898 A.2d 590 (2006), this Court again addressed the "substantial deficiencies in present strict liability doctrine" and the unsettled nature of strict liability in Pennsylvania. 898 A.2d at 601. The Court, while maintaining (as a temporizing measure) the "current law" incorporating the *Azzarello* negligence/strict liability distinction, held that strict liability "should be closely limited pending an overhaul by the Court" because "the prevailing consensus in *Phillips* was that there would be no further expansions under existing strict liability doctrine." 898 A.2d at 601 & n.10.

The United States Court of Appeals for the Third Circuit, while acknowledging this Court's holding in *Phillips*, pointed out that negligence concepts had, at times, been applied in products liability cases.[7] As Justice Saylor pointed out in *Phillips*, Pennsylvania courts have not

[7] In July 2011, the Third Circuit reaffirmed its prediction that Pennsylvania would adopt the Restatement (Third) of Torts. *Covell v. Bell Sports, Inc.*, 651 F.3d 357 (3d Cir. 2011), *cert. denied,* 132 S.Ct. 1541 (2012). That court disagreed with the plaintiffs' assertion "that the dismissal of *Bugosh* indicates the Supreme Court of Pennsylvania's contentment with the Restatement (Second) of Torts," instead stating that "[r]eading the tea leaves of a certiorari or allocatur dismissal is risky business; one could just as reasonably conclude that the dismissal here indicates the Court's approval of *Berrier* as much as it indicates its approval of section 402A." *Id.* at 364. *See also*, (continued...)

only used negligence terminology in deciding strict liability cases, but negligence concepts have actually played a pivotal role in design defect cases. 841 A.2d 1000, 1012; *see also* Arthur L. Bugay, *Pa. Prods. Liab. at the Crossroads: Bugosh, Berrier and the Restatement (Third) of Torts*, 81 Pa. Bar Ass'n Q. 1, 5-6 (2010) ("Pennsylvania has made foreseeability an indelible part of strict products liability claims.").

Thus, while Pennsylvania state courts are nominally bound to apply Section 402A of the Restatement (Second), there has been no express declaration to that effect, *see Phillips*, 841 A.2d at 1012 (Saylor, J., concurring), and negligence concepts still (or again) have assumed a significant role.[8]

As this Court acknowledged in *Phillips*, the current state of Pennsylvania products liability law is more "muddied" than ever. Pennsylvania state courts are notionally committed to Section 402A of the Restatement (Second), but there have been so many exceptions that manufacturers, sellers, users, and the bar cannot predict whether trial or appellate courts will decide similar cases similarly. These may "swallow the rule." *See, e.g., Commonwealth v. Perez*, 577 Pa. 360, 371, 845 A.2d 779, 785-86 (2004) (the "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.").

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[7](...continued)
*Sikkelee v. Precision Airmotive Corp.,* No. 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012), the Third Circuit confirmed its previous holdings that a federal court sitting in diversity, and applying Pennsylvania law, should apply Sections 1 and 2 of the Restatement (Third) to product liability cases, absent a contrary holding from the Pennsylvania Supreme Court.

[8] Some experienced, accomplished and knowledgable practitioners in Pennsylvania argue that the Restatement (Second) itself incorporates the negligence concept of "reasonableness" as articulated in various comments to Section 402A, and that Pennsylvania court decisions have made the law in Pennsylvania more onerous on manufacturers that the Restatement (Second) warrants.

When, four years ago, this Court agreed to hear *Bugosh v. I.U. North America, Inc.*, 601 Pa. 277, 971 A.2d 1228 (2009), it seemed possible that Pennsylvania would adopt the Restatement (Third). However, the Court, per curiam, and without a written opinion, dismissed the appeal as having been improvidently granted. *Id*. at 1229. Justice Saylor, joined by Chief Justice Castille, dissented, and criticized the Court's failure to adopt the Restatement (Third). *Id*. (Saylor, J., dissenting).

The current state of Pennsylvania products liability law is, we believe, more confused than ever.[9]

B. The Restatement (Third).

The Restatement (Third) of Torts: Prod. Liab. (1998) Sections 1 and 2 provide:

> Section 1. Liability Of Commercial Seller or Distributor For Harm Caused By Defective Products.
>
> 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. 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:
>
> 1. 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;

[9] This Court has acknowledged as much very recently. *See Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 836 (2012) ("We again recognize the continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law"). The decision in *Beard* continues to leave the question of Restatement (Third) adoption in limbo. Justice Saylor, writing for the Court, once again criticized the "disrepair" of Pennsylvania's strict liability design defect law, and, now joined in that sentiment by Chief Justice Castille and Justices Eakin and Orie Melvin, argued for a revamping of its "foundational principles." In *Schmidt v. Boardman Co.*, 608 Pa. 327, 353, 11 A.3d 924, 940 (2011), the Court criticized the "no-negligence-in-strict-liability rubric" for "resulting in material ambiguities and inconsistency in Pennsylvania's procedure."

> 2. 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;
>
> 3. 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 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 1 makes sellers liable only for the sale of products that are "defective," and Section 2 provides that a product may qualify as "defective" if it meets one of three sets of criteria. The criteria, which incorporate negligence concepts such as Aforeseeable risk" and "care" directly into the definition of "defective," diverge from the "no negligence in products liability" approach in *Azzarello* and its progeny.

Under the Restatement (Second), there are three categories of defective products: "manufacturing defects, design defects, and defects arising from inadequate warnings or instructions." *Phillips*, 841 A.2d at 1019 (Saylor, J., concurring) (citing Restatement (Second) of Torts Section 402A). In the Restatement (Third), those categories are retained and liability in manufacturing defect cases is still determined on a strict liability standard. The rule makes clear that traditional strict liability only applies to cases involving manufacturing defects – those defects in which a product departs from design specifications. In other words, the court must consider whether the allegedly defective product conforms to its intended design. *Id*. (citing Restatement (Third) of Torts: Prod. Liab. Section 2(a)).

In defective manufacturing cases, Section 2(a) of the Restatement (Third) specifically permits imposition of liability "even though all possible care was exercised in the preparation and marketing of the product." Likewise, evidence of a plaintiff's own negligence should remain inadmissible for purposes of establishing liability or apportioning fault because the central

determination in a clam based in strict liability – product defect – remains unchanged. Thus, as is currently the standard under Pennsylvania law, the Restatement (Third) omits the "reasonable person" standard and considerations of "due care" from the analysis and instead focuses on the product itself.

Design and warning defect cases, however, are treated differently under the Restatement (Third): the design of a product is defective "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.'"*Id.* (citing Restatement (Third) of Torts: Prod. Liab. Section 2(b)). Warning defect cases also incorporate foreseeability, imposing liability "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings." *Id*. (citing Restatement (Third) of Torts: Prod. Liab. Section 2(c)).

"Reasonableness" and risk-utility tests apply under the Restatement (Third) to determine whether a design is defective. The new approach reflects an awareness that no design is totally risk free, and recognizes that trade-offs are made to accommodate practical realities such as cost, consumer preferences, marketability, and safety. The Restatement (Third) also reflects the general policy that sellers should be held liable for a defective design only when the harm from the design was reasonably preventable by adopting an alternative design that was practical and available at the time of sale.

To establish liability under new Section 2(b), a plaintiff must now show that (1) an alternative design; (2) which is reasonable; (3) and which was available at the time of sale of the product in question; (4) would have reduced the foreseeable risk of injury; (5) without affecting the overall safety of the product; and (6) the decision by the manufacturer not to use the

alternative design made the product unreasonably safe. *See* Restatement (Third) of Torts: Prod. Liab. Section 2(b) cmts. d, f (1998).[10]

Various factors can be considered to determine whether an alternative design is reasonable, and whether the decision not to use the alternative design made the product not reasonably safe. *See id.* Section 2(b) cmt. f. These factors include, for example: What risks of harm does the product present, as compared to the alternative design? How likely is it that a user (or passerby) will be injured, and how serious an injury is likely? How well do instructions and warnings aid in reducing the risk of injury? How would the alternative design affect production costs, product durability, ease of maintenance or repair, and design esthetics? How is consumer choice affected? These criteria are similar to those considered by the manufacturer when designing a product.

The Restatement (Third) reflects a presumption that the manufacturer made a reasonable choice in choosing a particular design. Plaintiffs now have the burden to show, on an objective basis, that the manufacturer's choice was unreasonable. The Reporters' Note at 103 confirms that plaintiffs have the burden of proving a product design failed to meet risk-utility standards. However, the Reporters also point out that as a matter of practice, once the plaintiff makes a prima facie showing of a technologically feasible alternative design, the defendant will have to show why the alternative design was not reasonable. Restatement (Third) of Torts: Prod. Liab., n. 3, Reporters' Note, at 103.

[10] As noted *supra*, under *Azzarello*, the trial judge already acts as a gatekeeper in strict product liability cases, and is responsible for determining whether the evidence of product defect is sufficient to allow the question to go to the jury. In making this determination, the trial judge must carry out a cost/benefit analysis, which generally involves a multitude of factors not unlike those enumerated above.

While the Restatement avoids the terminology of "strict" and "negligence" liability, its standard makes clear that something very close to conventional negligence principles underlie the new standards.

C. The Restatement (Third) Should Be Adopted Explicitly

The Restatement (Third) takes into account the subtleties and factual nuances of each case. The comments to Section 2 of the Restatement (Third) explain the changes from the Restatement (Second). Strict liability was retained for manufacturing defects to encourage manufacturers to invest in safety measures, while liability premised on negligence may allow manufacturers to "escape their appropriate share of responsibility." Restatement (Third) of Torts: Prod. Liab. Section 2 cmt. a (1998). On the other hand, "forseeability" is appropriate with respect to design and warnings defects, because "[p]roducts are not generically defective merely because they are dangerous." The risk presented by a product must be balanced against its utility. *Id*.

Rather than separating causes of action sounding in strict liability and negligence, the Restatement (Third) approach reflects the evolution of product liability case law by defining a defect in terms of whether it is a manufacturing defect, a design defect, or a warning defect. The Restatement (Third) applies strict liability in cases where the plaintiff alleges a manufacturing defect and principles of negligence where the plaintiff alleges a defect in design or inadequate warnings. Restatement (Third) of Torts: Prod. Liab. §§ 1 and 2 (1998).

Justice Saylor explained in his concurring opinion in *Phillips* that the difficulty faced by Pennsylvania courts in attempting to distinguish between negligence and strict liability in product liability cases "demonstrate[d] a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement." 841 A.2d at 1018-1019.

In *Phillips*, Justice Saylor, joined by Justice (now Chief Justice) Castille and Justice Eakin concluded that *Azzarello*'s negligence/strict liability dichotomy "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." *Id.* at 1012 (Saylor, J., concurring). These justices were ready to recognize that negligence and strict liability cannot be coherently separated and to move "candidly" to a unitary 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 1015-16.

The Third Circuit, citing Justice Saylor's concurrence, stated its belief that his opinion "foreshadow[ed]" the Pennsylvania Supreme Court's eventual adoption of Sections 1 and 2 of the Restatement (Third). *Berrier,* 563 F.3d at 53.

This Court's allowance of an appeal in *Bugosh v. I.U. North America*, 971 A.2d 1228 (Pa. 2009) to consider the issue of whether to adopt Sections 1 and 2 of the Restatement (Third) of Torts: Products Liability instead of Section 402A of the Restatement (Second) of Torts appeared to presage a transition from the older Restatement to the current one. However, instead of reaching the issue, the Court dismissed the case as being improvidently granted, after lengthy oral argument. Despite the somewhat unusual procedural nature of the Court's decision in *Bugash*, Justice Saylor (joined by Chief Justice Castille, who also joined Justice Saylor's

concurring opinion in *Phillips*) filed a strong dissent, reaffirming his support for adoption of the Restatement (Third).

Justice Saylor, in *Bugash*, reiterated his belief that "the Third Restatement's provisions are far more reasoned and balanced than *Azzarello,* and adoption would represent a substantial advancement in Pennsylvania law." 971 A.2d at 1241 (Saylor, J., dissenting). In Justice Saylor's view, Pennsylvania's continued adherence to *Azzarello* meant that the courts were "essentially thirty years behind" with respect to advancements in products liability. *Id.* Justice Saylor cited the Third Circuit's opinion in *Berrier,* in which the Third Circuit had based its prediction on Justice Saylor's concurring opinion in *Phillips*, and referred to the Third Circuit's belief that the Restatement (Third) eliminates the confusion that has arisen from attempting to keep separate actions sounding in negligence and products liability. Justice Saylor wrote that the Restatement (Third) "provides a suitable template for making up for lost time and moving forward." *Id*.

## II. Should a Decision to Adopt Restatement (Third) Apply Retroactively to All Pending Cases?

ALF takes no position on the Court's second question – whether replacing the *Azzarello* negligence/strict liability dichotomy with the Restatement (Third) of Torts: Products Liability should apply to pending cases.

We note, however, that under Pennsylvania law, the general rule is that court decisions apply retroactively to pending cases, *see Blackwell v. Commonwealth, State Ethics Comm'n*, 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991), unless it "undermines a heretofore consistent body of law." *Commonwealth v. McFeely*, 509 Pa. 394, 399, 502 A.2d 167, 169 (1985). But, as explained in Point I, *supra*, Pennsylvania's law as to strict liability is not congruent with the Restatement (Second), nor has it been consistently construed or applied.

Moreover, the possible adoption of the Restatement (Third) has been anticipated since the 2003 three-justice concurrence in *Phillips*. The concerns of this Court about *Azzarello* and

the state of Pennsylvania strict products liability law have been widely known among members of the tort bar for ten years. The federal courts in the Third Circuit, when applying Pennsylvania law, have been employing the Restatement (Third) since the Third Circuit's decision in *Berrier* in 2009, four years ago.

On the other hand, we acknowledge the concerns regarding retroactive application expressed in Justice Saylor's dissent in *Bugosh*. 601 Pa. at 301-04, 971 A.2d at 1242-44. However, in individual cases that have not yet gone to trial, we believe that such concerns can be alleviated by liberally allowing amendment of pleadings, allowing supplemental discovery, and permitting supplemental expert evidence.

## CONCLUSION

Since the adoption of the Restatement (Second) of Torts, Pennsylvania "strict liability" law has become a melange of negligence and strict liability concepts, even as courts attempted to distinguish "strict liability" from "negligence." In light of the confusion which has resulted from the application of negligence principles in strict liability claims, notwithstanding the asserted dichotomy between those concepts, we believe that it makes sense to adopt the Restatement (Third), which takes the subtleties and factual nuances of each case into account.

The Restatement (Third) of Torts: Products Liability retains true "strict liability" for manufacturing defects, is more logical, is fairer, and is easier to apply than the idiosyncratic approach Pennsylvania has taken.

We respectfully urge the Court to reverse the Superior Court, and to adopt the unitary "reasonableness" and "foreseeability" principles articulated in the Restatement (Third) of Torts: Products Liability, Section 2 (1998) in product liability cases.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Martin S. Kaufman, Esquire, hereby certifies that I am this day serving by first class mail, postage prepaid, one copy of the foregoing Brief of *Amicus Curiae* Atlantic Legal Foundation in Support of Appellant upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R.A.P. 121:

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