

2018 PA Super 33

TERENCE D. TINCHER AND JUDITH	:	IN THE SUPERIOR COURT OF
R. TINCHER	:	PENNSYLVANIA
	:	
	:	
v.	:	
	:	
	:	
OMEGA FLEX, INC.	:	
	:	No. 1285 EDA 2016
Appellant	:	

Appeal from the Judgment Entered May 3, 2016  
 In the Court of Common Pleas of Chester County Civil Division at No(s):  
 June Term, 2008 No. 08-00974

BEFORE: LAZARUS, J., PLATT\*, J., and STRASSBURGER\*, J.

OPINION BY LAZARUS, J.: **FILED FEBRUARY 16, 2018**

Omega Flex, Inc., appeals from the judgment entered in favor of Terence D. and Judith R. Tincher following a jury trial and the denial of its post-trial motions. Omega Flex contends that it is entitled to a new trial because the Pennsylvania Supreme Court has determined that the trial court’s jury instruction contained a fundamental misstatement of the governing law. We agree and vacate the judgment, reverse the order denying post-trial relief, and remand for a new trial.

We draw our summary of the facts and much of the procedural history of the case from the Supreme Court’s decision, *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335–36 (Pa. 2014). The Tinchers lived in the central unit of a two-story triplex in Downingtown, Chester County, which they purchased in 2005. Early in the morning of June 20, 2007, a fire erupted in their home.

Investigators later determined that a nearby lightning strike caused a small puncture in corrugated stainless steel tubing (“CSST”) that transported natural gas to a fireplace located on the first floor of the residence. Heat attending the melting of the CSST caused by the lightning strike ignited the natural gas and fueled a fire estimated to have burned for over an hour before it was discovered. No one was injured in the fire, but the fire caused significant damage to the Tinchers’ home and belongings.

The CSST installed in the Tinchers’ home was manufactured and sold by Omega Flex as part of a gas transportation system marketed as the “TracPipe System.” In January 2008, the Tinchers sued Omega Flex, asserting claims premised on theories of strict liability, negligence, and breach of warranty.<sup>1</sup> The strict liability claim was based on section 402A of the American Law Institute’s Restatement (Second) of Torts (1965), as adopted, followed, and construed in Pennsylvania. Section 402A of the Restatement (Second) of Torts provides:

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

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<sup>1</sup> The Tinchers also made a fire claim to their home insurer, United Services Automobile Association (“USAA”). USAA compensated the Tinchers for their loss up to the limit of their policy and received an assignment of liability claims. USAA prosecuted the claims against Omega Flex in the name of the Tinchers to obtain reimbursement of the insurance proceeds payout, but the Tinchers retained an interest in the litigation to recover the amount of their losses that exceeded their insurance coverage.

(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.

Restatement (Second) of Torts § 402A(1).<sup>2</sup> The Tinchers alleged that “the CSST incorporated into the TracPipe System is defective, and unreasonably dangerous to intended users, because its walls are too thin to withstand the effects of lightning.” *Tincher*, 104 A.3d at 336.

Prior to trial, Omega Flex moved to have the trial court apply Sections 1 and 2 of the Third Restatement of Torts: Products Liability (1998) and to deliver jury instructions based on the Third Restatement, rather than the Restatement (Second) of Torts.<sup>3</sup> The Tinchers responded that the Second

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<sup>2</sup> Section 402A(2) provides:

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.

<sup>3</sup> Sections 1 and 2 of the Third Restatement provide:

**§ 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.

Restatement remained the law of Pennsylvania and the court, therefore, should base its jury instructions on the Second Restatement and the Supreme Court's decisions under that Restatement, including ***Azzarello v. Black Bros. Co.***, 391 A.2d 1020 (Pa. 1978). In ***Azzarello***, the Court had held that: it was improper to introduce negligence concepts into a strict liability case; it was for the court, not a jury, to determine whether a product was "unreasonably dangerous" under the Second Restatement; the dispositive

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## § 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 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.

Restatement (Third) of Torts: Products Liability §§ 1-2.

question in a case alleging that there was a defective design was whether the product is safe for its intended use; and in such a case, “the seller is the ‘guarantor’ of the product, and a jury could 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 its intended use.’” **Tincher**, 104 A.3d at 367, quoting **Azzarello**, 391 A.2d at 1025-27. The trial court did not immediately rule on Omega Flex’s motion.

During their case in chief, the Tinchers introduced evidence that, on the night of the fire, lightning transferred an electrical charge to the TracPipe System and that heat from the lightning punctured the CSST and ignited the natural gas. Their experts testified that the CSST was susceptible to perforation because it is very thin (1/100 of an inch in thickness) and it withstands the transfer of much less electrical energy than would an alternative material, such as cast iron pipe.

After the Tinchers rested, Omega Flex moved for a nonsuit under the Restatement (Second) and **Azzarello**, assuming the court had denied its request to apply the Restatement (Third). The trial court denied the nonsuit, and Omega Flex then introduced its own evidence that the TracPipe System was not defective or unreasonably dangerous. Among other things, Omega Flex offered evidence of the utility of CSST as compared to cast iron pipe, noting such things as its resistance to corrosion and ruptures, ease of

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