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PRODUCT LIABILITY

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Christopher Scott D'Angelo reports on the current confused state of products liability law in Pennsylvania and a missed opportunity to bring Pennsylvania product liability law from its current idiosyncratic form to the more mainstream Restatement (Third) reasoned and reasonableness-based approach.

Pennsylvania Products Liability Law Remains in Limbo

ABOUT THE AUTHOR

Christopher Scott D'Angelo is a partner at Montgomery, McCracken, Walker & Rhoads, LLP, based in Philadelphia, PA, and is Chairman of its Products Liability & Risk Management Section and Vice Chairman of its Sports, Entertainment & Amusements Law Practice. His practice emphasizes litigation and preventive counseling in the fields of business and business torts, intellectual property, class actions, and products liability, including in his role as national counsel for several major U.S. clients and his representation of foreign concerns in the United States and United States concerns abroad.

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Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Jennifer Haltom Doan
Vice Chair of Newsletters
Haltom & Doan
(903) 255-1000
jdoan@haltomdoan.com

On June 16, 2009, the Pennsylvania Supreme Court dismissed an appeal "as improvidently granted" in a widely watched case that the Court had taken expressly to address whether to bring Pennsylvania product liability law from its current idiosyncratic form to the more mainstream Restatement (Third) reasoned and reasonableness-based approach. *Bugosh v. I.U. North America, Inc.*, No. 7 WAP 2008.

This result leaves Pennsylvania law more confused than ever, as the Third Circuit recently predicted that Pennsylvania would adopt *Restatement Third, Torts: Products Liability*. *Berrier v. Simplicity Manufacturing, Inc.*, 563 F.3d 38 (3d Cir. 2009). Thus, in state court, the old *Azzarello*-based form of strict liability prevails, while the federal courts are bound by *Berrier* to apply the Third Restatement in diversity cases based upon Pennsylvania law.

I. Pennsylvania's Unique Strict Liability

Since the 1970s, Pennsylvania has had its own brand of strict liability under § 402A of Restatement (Second) of Torts and has doggedly hung onto its mantra of keeping strict liability from being contaminated with what it views as negligence concepts – often epitomizing the square peg in a round hole euphemism. See *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (Pa. 1978); *Pavlik v. Lane, Ltd. v. Tobacco Exporters Int'l*, 135 F.3d 876, 881 (3d Cir. 1998). Unlike states where the question of whether a product is "unreasonably dangerous" is reserved for jury determination, Pennsylvania views this question as a matter of law to be decided by the judge. *Azzarello*, 480 Pa. at 555-56 & n.9. *Azzarello* established that in the application of § 402A, the concept of "unreasonably dangerous" is a matter of law to be decided by the court prior to the claim being given to a jury. The trial court – in theory, at least – is to make the threshold determination as to whether *as a matter of social policy* the case is appropriate for treatment under the rubric of strict products liability. It is the court's "function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this determination is made in the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint." *Azzarello*, 480 Pa. at 555-5. The only question left to the jury is whether the product was "defective" but the only definition of defective given to the jury is that the product is defective if it "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." Pennsylvania Standard Jury Instructions; *Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co.*, 898 A.2d 590, 616 (Pa. 2006); *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000, 1005 (2003). It is an absolute; there is no definition of "safe" and concepts of "reasonably" safe or "unreasonably" unsafe are simply absent. To ask a jury, posits Pennsylvania, whether a product is "unreasonably dangerous" is to insert negligence concepts – reasonableness – into strict liability.

The decisions that followed *Azzarello* continued to reiterate that "strict liability affords no latitude for the utilization of foreseeability concepts" that are relegated to negligence theory. *Phillips*, 576 Pa. at 655; see also *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 515 Pa. 334, 528 A.2d 590, 593 (Pa. 1987) ("negligence concepts have no place in cases based on strict liability"). Although the goal of consumer protection drove the *Azzarello* decision in theory, the reality of *Azzarello* has represented an illogical and irreconcilable disconnect from

the start, especially in the areas of product design and product warning, and this was made all the more so by subsequent, almost blind adherence to the mantra: judges and juries are not to consider any elements that spring from negligence theories. See, *e.g.*, *Phillips*, *supra*; *Mineral Prods.*, 898 A.2d at 603 (rejecting foreseeability concepts in strict liability).

Over the last thirty years, criticism has grown for *Azzarello*. Three Justices in a concurrence in *Phillips* noted the artificiality of attempts to push all negligence theory from strict liability. *Phillips*, 576 Pa. at 664 (Saylor, J., joined by Castille, J. and Eakin, J.). In particular, as the concept of strict liability has been applied, the principle of risk-utility has been necessarily incorporated, leading to an incongruence in the law of utilizing negligence concepts while attempting to sever anything that smacks of negligence concepts from § 402A actions. *Phillips*, 576 Pa. at 664, 667-68. Justice Saylor noted the growing recognition that the admonishment of utilizing negligence concepts in strict liability cases is not sustainable in cases predicated on defective design. The *Phillips* concurrence advocated for the Third Restatement approach as a "synthesis of law derived from reasoned, mainstream, modern consensus." *Phillips*, 576 Pa. at 664. Additionally, in *Mineral Prods.*, 587 Pa. 236, 898 A.2d 590 (Pa. 2006), the Court rejected the applicability of "foreseeability" in a jury instruction, but noted that there are significant deficiencies in the strict liability doctrine and should be overhauled by the Court. *Id.* at 601. Pennsylvania appeared poised to review the current application of Restatement (Second) when an appropriate case presented itself on appeal.

That opportunity was thought to be the *Bugosh* case.

II. Federal Application of Pennsylvania Law

To further complicate matters, the Third Circuit in *Berrier v. Simplicity Manufacturing, Inc.*, 536 F.3d 38 (3d Cir. 2009) was recently confronted with yet another challenge to Pennsylvania's approach to strict liability and § 402A. After a thorough evaluation of the evolution of product liability law in Pennsylvania, and especially in light of the growing self-doubt within the Pennsylvania Supreme Court such as that expressed in Justice Saylor's concurring opinion in *Phillips* and in the criticism in *Mineral Products*, the Third Circuit predicted that when presented with the opportunity to review the application of § 402A in Restatement (Second) of Torts, the Pennsylvania Supreme Court "would adopt the Restatement (Third) of Torts, §§ 1 and 2." *Berrier*, 536 F.3d at 40. This would bring Pennsylvania products liability law into alignment with most other states and would allow for a more rational and reasonable approach, allowing a jury to consider the totality of the circumstances, foreseeability and the reasonableness of a design or warning. *Berrier*, 536 F.3d at 54-55. As a result of *Berrier*, many expected the Supreme Court to utilize the opportunity to apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) in its recent review of *Bugosh v. I.U. North America, Inc.*, 596 Pa. 265, 942 A.2d 897 (Pa. 2008).

III. The Supreme Court Missed Their Opportunity

The Pennsylvania Supreme Court certified an appeal in *Bugosh*, presumably to answer the only question presented by the Appellants: Should § 402A of the Second Restatement or § 2 of the Third Restatement

govern strict liability in Pennsylvania? The trial court and the Superior Court both found for the appellee-plaintiff, with the Superior Court noting they were duty bound by precedent to adhere to the Second Restatement. *Bugosh v. Allen Refractories Co.*, 932 A.2d 901, 911 (Pa. Super. 2007) ("[U]nless our Supreme Court alters its approach to strict liability, we will continue to adhere to established principles"). It was speculated that in light of the growing criticism and convoluted application produced in the wake of *Azzarello*, the Court would alter its approach and adopt the Restatement (Third), § 2, bringing strict liability in Pennsylvania in line with many other states, as well as provide uniformity across both the state and federal levels.

The closely watched case resulted in an unexpected ending. On June 16, 2009, the Supreme Court dismissed the appeal with no explanation and left the critical question of which law was appropriate in strict liability to the *status quo*. Justice Saylor, who authored the concurrence in *Phillips*, penned a strong dissenting statement which was co-signed by Chief Justice Castille. The dissent left little clue as to the reason for the dismissal, but outlined the incongruence that resulted from attempting to sever negligence and strict liability claims. Justice Saylor stated that the "Third Restatement approach illuminates the most viable route to proving 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." *Bugosh*, No. 7 WAP 2008 (Pa. 2008). Currently, however, the Supreme Court has declined to adopt Justice Saylor's approach, and the Restatement (Second) continues to govern in strict liability cases in state courts.

IV. Conclusion

Strict liability law in Pennsylvania was poised for a radical change that was eagerly anticipated awaiting the decision in *Bugosh*. Alas, it was not to be, and Pennsylvania will have to wait for another day for a rational approach to product liability issues in Pennsylvania state courts. For now, in state courts, the old *Azzarello*-based form of strict liability continues, while the federal courts in Pennsylvania are bound by *Berrier* to apply the Restatement (Third).

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