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Juries Must Know About Products' Standards Compliance

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Law360, New York (May 31, 2017, 10:56 AM EDT) --


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In Tincher v. Omega Flex Inc., 104 A.3d 328 (Pa. 2014), the Pennsylvania Supreme Court reversed course by overruling its longstanding decision in Azzarello v. Black Bros. Co., 391 A.2d 1020 (Pa. 1978), and holding, in a strict product liability design defect case, that it should be the jury as the finder of fact — not the judge ruling as a matter of law (as Azzarello had required) — that resolves the threshold question of whether a product is "unreasonably dangerous." Tincher, 104 A.3d at 406-07. The Tincher court anticipated that the ramifications of its decision would develop on a case-by-case basis. Id. at 410.

Although trial evidence that a defendant's product complies with regulatory or industry standards would not constitute conclusive proof that the defendant's product was safe as a matter of law, such evidence is useful to the defendant in proving that its product was not defective or unreasonably dangerous, and it is probative on that point. But, in Azzarello and its progeny, there was a conscious effort on the part of Pennsylvania courts to remove all negligence concepts from the jury's consideration in a strict product liability case.

As part of that effort, the Pennsylvania Supreme Court decided in Lewis v. Coffing Hoist Div., Duff-Norton Inc., 528 A.2d 590 (Pa. 1987), a strict product liability design defect case, that defense evidence of a product's compliance with regulatory and industry standards was generally inadmissible at trial because it would incorporate negligence theories into the trial of a strict product liability claim. Id. at 594.

Moreover, in Lewis, the court prohibited the introduction of such evidence at trial because "it is the product itself which is on trial, and not the [reasonableness of the] manufacturer's conduct," id. at 593, and because evidence of industry standards "improperly focuses on the quality of the defendant's conduct in making its design choice, and not on the attributes of the product itself." Id. at 594.

The Tincher court did not explicitly overrule Lewis or its progeny, but it explicitly recognized that Lewis is a case in harmony with Azzarello, which Tincher did overrule. Tincher, 104 A.3d at 368. And it recognized that its Tincher decision may have an impact regarding the availability of negligence-derived defenses that were previously unavailable in the strict product liability context. Id. at 409.

Recently, in Renninger v. A&R Machine Shop, No. 1896 WDA 2015, 2017 WL 1326515 (Pa. Super. Ct. April 11, 2017), a three-judge panel of the Pennsylvania Superior Court raised, but did not resolve, the

question of whether Lewis survives Tincher, and whether, post-Tincher, defense evidence of a product's compliance with regulatory and industry standards should be admissible at the trial of a strict product liability design defect case. However, Renninger clearly acknowledged that Tincher created uncertainty about the survival of Lewis and its progeny post-Tincher. Id., 2017 WL 1326515 at *6-*11.

Yet, even more recently and in the face of Tincher and Renninger's observations about Tincher, in American Honda Motor Co. v. Martinez, No. 445 EDA 2015, 2017 WL 1400968 (Pa. Super. Ct. April 19, 2017), also a post-Tincher strict product liability design defect case, a different three-judge panel of the Superior Court simply adhered to Lewis and its exclusion of defense evidence of regulatory and industry standards because, according to this panel, the Supreme Court's ruling in Lewis was binding precedent. Id., 2017 WL 1400968 at *4.

Remarkably, the Superior Court did not engage in the post-Tincher analysis that the Supreme Court itself seemed to anticipate in view of its overruling of Azzarello and its discussion of the possible availability of negligence-based defenses in a post-Tincher strict product liability action.

In fact, not only did the American Honda court affirm the exclusion of trial evidence that the defendant's product complied with regulatory standards, but it did so despite the defendant's strong argument that the alternative design that the plaintiff's expert had proposed in his opinion testimony was unlawful under federal regulations. Id., 2017 WL 1400968 at *4, *7-*8.

The American Honda court's post-Tincher adherence to Lewis raises another complication. As stated, when Azzarello was the law, it was the judge who was tasked with the resolution of the threshold question of whether a product was reasonably safe as a matter of law or, on the other hand, was unreasonably dangerous. Azzarello, 391 A.2d at 1026.

In view of Azzarello, the Superior Court subsequently adopted an analysis designed to address that threshold question. In a series of decisions starting with Dambacher v. Mallis, 485 A.2d 408 (Pa. Super. Ct. 1984), the Superior Court identified a list of seven factors, borrowed from Dean John Wade, for a judge's consideration.

The first factor was "[t]he usefulness and desirability of the product — its utility to the user and to the public as a whole." Id. at 423 n.5. The second factor was "[t]he safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury." Id.

At least some courts have explicitly referenced regulatory or industry standards in evaluating the product at issue under these Dambacher factors. For example, in Martinez v. Skirmish U.S.A. Inc., No. 07-5003, 2009 WL 1676144 (E.D. Pa. June 15, 2009), a pre-Tincher decision, the court considered ASTM standards in its evaluation of the safety of the product. Id., 2009 WL 1676144 at *18-*19. And, in Sliker v. National Feeding Systems, Inc., No. 282 CD 2010, 2015 WL 6735548 (Pa. Com. Pl. Clarion Cty. Oct. 19, 2015), a post-Tincher decision that discussed the pre-Tincher Dambacher factors, the court explained that "[w]hether a product comport[ed] with industry standards [was] particularly relevant to [Dambacher] factor (2)." Id., 2009 WL 1676144 at *7.

The court also referenced the Lewis dissent's position that "industry standards may make the likelihood that a manufacturer acted reasonably more probable by showing that those actions were endorsed by 'specialized individuals with knowledge of product design superior to that of courts.'" Id.

Thus, if as some courts have acknowledged, regulatory and industry standards could have been

considered by a judge in his or her determination of whether a product was unreasonably dangerous under the Dambacher seven-factor test, it appears inconsistent to conclude that the jury as the finder of fact should not be permitted to consider regulatory and industry standards now that Tincher has tasked the jury with the threshold "reasonableness" determination that previously was within the province of the judge.

It is doubtful that the Superior Court's opinion in the American Honda case will be the last word on this issue. Trial evidence of a product's compliance with regulatory and industry standards is central to the issue of whether or not a product is unreasonably dangerous — and because, under Tincher, the jury as the finder of fact is now tasked with resolving that issue, the exclusion of such evidence of reasonableness on the basis of precedent that has been questioned by the very court that issued that precedent makes little sense.

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