# In the Supreme Court of Pennsylvania

No. 18 EAP 2022

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MICHAEL and MELISSA SULLIVAN, h/w

v.

WERNER COMPANY and LOWE'S COMPANIES, INC., and MIDDLETOWN TOWNSHIP LOWE'S STORE #1572

Appeal of: Werner Company and Lowe's Companies, Inc.

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BRIEF OF *AMICI CURIAE*, AMERICAN ASSOCIATION FOR JUSTICE, PENNSYLVANIA ASSOCIATION FOR JUSTICE, CRYSTAL and TIMOTHY GROSS; LAURA MAIETTA and WESLEY WILSON, III; NORTH CENTRAL PENNSYLVANIA TRIAL LAWYERS ASSOCIATION; MADRIS (TOMES) KINARD, MBA; MARY ELLEN MANNIX

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On Appeal from the Judgment of Superior Court entered April 15, 2021 at No. 3086 EDA 2019 (reargument denied June 23, 2021), affirming the Judgment entered on November 19, 2019 in the Court of Common Pleas, Philadelphia County, Civil Division at No. 161003086

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# 1. STATEMENT OF INTEREST

## 1.1 The American Association For Justice

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including discrimination cases. Throughout its over 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

## 1.2 The Pennsylvania Association for Justice

The Pennsylvania Association for Justice (hereinafter "PAJ") (formerly known as the Pennsylvania Trial Lawyers Association) is a non-profit organization whose members are attorneys of the trial bar of the Commonwealth of Pennsylvania. The mission of PAJ is to promote a fair and effective justice system, and to support attorneys as they work to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in

Pennsylvania's courtrooms, even when challenging the most powerful interests. Established in 1968, for over 45 years PAJ has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. PAJ has been actively involved in recent years in advocating for a proper calibration of the law of products liability to provide for a fair and just system to adjudicate the rights of individuals injured by defective products.

1.3 Crystal and Timothy Gross

Crystal Gross and Timothy Gross are Plaintiffs in the product liability case of *Crystal Gross and Timothy Gross v. Coloplast Corp*., United States District Court for the Eastern District of Pennsylvania, Case No. 19-CV-4385, and prevailed in a Motion for Summary Judgment filed by Defendants. Crystal and Timothy Gross, whose case is ongoing, have a significant interest in the outcome of the decision in this Court.

1.4 Laura Maietta and Wesley Wilson, III

Laura Maietta and Wesley Wilson, III have an ongoing case involving a fractured and migrated IVC filter, in which they have asserted claims of strict

liability and negligent design. *See Laura Maietta, et al. v. C. R. Bard, Inc., et al.*, No. 19-CV-04170.

1.5 North Central Pennsylvania Trial Lawyers Association

The North Central Pennsylvania Trial Lawyers Association is a non-profit organization with a membership of approximately 100 men and women of the trial bar of North Central Pennsylvania. For nearly 40 years, the Association has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The North Central Pennsylvania Trial Lawyers Association strives to promote, through advocacy, the rights of individuals and the goals of its membership in both the Commonwealth and federal courts. The organization is involved in continuing legal education, meetings of its members, interface with legislators, and development of important legal issues with the courts.

1.6. Madris (Tomes) Kinard, MB

Madris (Tomes) Kinard, MBA, is Founder and CEO of Device Events. She is a former Unique Device Identification (UDI) External Program Manager for the FDA. She is a former adverse events Senior Management Executive for devices (FDA Adverse Event Reporting System/Manufacturer and User Device Experience

- FAERS/MAUDE) for the FDA. She is a Key Member, Medical Device Epidemiology Network (MDEpiNet) UDI Think Tank. She is a member, MDEpiNet National Medical Device Registry Task Force. Ms. Kinard is co-author of UDI Demonstration abstract (cardiac stents) with Mercy, Mayo, Boston Scientific, Duke, Medtronic, Abbott, and the FDA. Ms. Kinard's list of published works is extensive and she has been a leader in concern with respect to the safety of medical devices. Her most recently published article is "*Is the FDA Failing Women?*", AMA Journal of Ethics, September 2021. *See* https://journalofethics.ama-assn.org/article/fda-failing-women/2021-09.

1.7 Mary Ellen Mannix

Mary Ellen Mannix is a former member of Pennsylvania's Patient Safety Authority, the first such authority established in the country by virtue of legislation signed by Governor Mark Schweiker in 2002. Ms. Mannix was specifically appointed to the Patient Safety Authority as a citizen representative who not only

as a personal interest in medical safety and efficacy, but also has served in a number of capacities with respect to Patient Safety.

No one other than the *amici curiae*, their members or counsel paid in whole or in part for the preparation of the *amicus curiae* brief or authored in whole or in part the amicus curiae brief.

## 2. SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), overruling *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), represents a reaffirmation and re-calibration of the strict liability principles in place since the adoption of Restatement (Second) of Torts §402A. A careful reading of the *Tincher* opinion reveals this Honorable Court's clear recognition that the "roots" of the strict liability action under Section 402A lay in the distinction between the duty of due care in negligence, and the duty to sell a product free from a defective condition. In reaching its decision that the *Azzarello* bifurcation of the functions of judge and jury in strict liability claims should no longer be applied, the Supreme Court did not repudiate the social policy underpinnings of *Azzarello*. Rather, the Court reaffirmed the viability of those policies. The focus of a strict liability claim continues to be on the nature of the product and the consumer's reasonable expectations with respect to the product, rather than upon the conduct of either the manufacturer or the person injured.

In light of *Tincher's* reaffirmation of the substantive law and policy considerations underlying Section 402A, the decision of the Superior Court should be affirmed. *Tincher* did not reverse the bar to admission of governmental and industry standards in strict liability cases, but explicitly indicated that it had not

considered that issue. The opinion also ***rejected*** the Restatement Third's approach, which would have specifically allowed the admission of evidence of compliance and noncompliance with safety statutes and regulations.

The public policy pronouncements in *Tincher* support the continued exclusion of such evidence. Reliance on regulatory and industry standards to establish appropriate levels of safety with respect to a consumer product is problematic at best. Regulatory agencies often possess limited resources and such enactments tend to set a floor, not a ceiling, for product safety. A focus upon industry standards would lead to a situation where the conduct of the manufacturer is judged by reference to other manufacturers, and tend to lead to a "least common denominator approach." It would also be contrary to the theory of strict liability reaffirmed in *Tincher*, that the focus should be upon whether the particular product is defective, and would distract the jury from their proper inquiry, the quality of the design. Further, allowing evidence of industry custom would provide a disincentive to manufacturers to seek out safer design alternatives, a social policy objective in Pennsylvania strict liability theory recognized in *Tincher*. The admission of industry custom and governmental regulation as relevant to the risk-utility analysis, as urged by Appellants, represents an attempt to insert through the back door the concepts of negligence law that *Tincher* rejected when it refused to adopt the principles of the Restatement Third. The "proper calibration" of the

Restatement (Second) Section 402A at the heart of the *Tincher* decision will only be achieved by the continued exclusion of governmental and industry standard evidence.

## 3. ARGUMENT

### 3.1 *TINCHER'S* RE-CALIBRATION OF PENNSYLVANIA'S PRODUCTS LIABILITY LAW IS CONSISTENT WITH LIABILITY WITHOUT FAULT PRINCIPLES UNDERLYING *LEWIS*

The Supreme Court's decision in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), altered the landscape of products liability law in Pennsylvania, but it is erroneous to view it as a reinsertion of negligence principles into claims under Section 402A of the Restatement (Second) of Torts. That is the logical conclusion from the arguments made by Appellants Werner Company and Lowe's Companies, Inc. (hereinafter collectively "Werner" or "Appellants"). On the contrary, the *Tincher* decision recognized and reiterated the distinction between negligence and strict liability claims, and rejected the Restatement Third's approach that would have blurred that distinction. The majority opinion in *Tincher* is clear that the law of strict liability for defective products in Pennsylvania is directed at "tortious conduct… ***not the same as that found in traditional claims of negligence*** and commonly associated with the more colloquial notion of 'fault.' " *Tincher*, 104 A.3d at 400 (emphasis added)[1].In an opinion authored by then Chief Justice Castille, the majority in *Tincher* rejected the approach of the Restatement (Third) of Torts-Product Liability and reconfirmed that Section 402A of the Restatement

[1] All emphases supplied unless otherwise noted.

(Second) of Torts remains the law of Pennsylvania. *Id.* at 335, 399. In so doing the Court did not repudiate the social policy underpinnings of *Azzarello,* but rather stated:

> We agree that reconsideration of *Azzarello* is necessary and appropriate, ***and to the extent that*** the pronouncements in *Azzarello* are in tension with the principles articulated in this Opinion, the decision in *Azzarello* is overruled.

*Tincher*, 104 A.3d at 376.

It is critical to a proper understanding of *Tincher* to examine the holding in *Azzarello.* The precise issue decided by the court in *Azzarello* was whether, in a design defect case under the Restatement (Second) of Torts §402A, the trial judge should instruct the jury that the plaintiff must prove that the product was both "defective" and "unreasonably dangerous." *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1024 (Pa. 1978)("It is the propriety of instructing the jury using the term of 'unreasonably dangerous' which forms the basis of appellee's objection to the jury instructions given below"). The court in *Azzarello* recognized that "the critical factor under this formulation [the Restatement (Second) Section 402A] is whether the product is 'unreasonably dangerous' " because it "'serve[d] the beneficial purpose of preventing the seller from being treated as the insurer of its products.' " *Id*. at 1025-26 (internal citations omitted). The Court's concern was with the effect this language might have upon a jury because, "the term, 'unreasonably dangerous' tends to suggest considerations which are usually identified with the law of

negligence." *Azzarello*, 391 A.2d at 1025. *Azzarello* resolved this dilemma by assigning to the judge the function of determining whether a product was "unreasonably dangerous," and assigning to the jury the task of considering whether the product was in a defective condition. *Id.* at 1025-27.

As one commentator has observed, the Court in *Azzarello*

> …did not relieve plaintiffs in strict liability cases of the substantive burden of proving that the product in fact was unreasonably dangerous....the holding in ***Azzarello was not intended to alter the underlying substantive law of strict liability.*** Rather, the holding was based on the court's belief that use of the specific term "unreasonably dangerous" in jury instructions would be "misleading" to lay jurors unfamiliar with the nuances of strict liability and negligence law.

John M. Thomas, *Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 TEMP. L. REV. 217, 219-20 (1998).

The *Tincher* opinion clearly recognized the narrow basis of the *Azzarello* holding. Its conclusion that *Azzarello* should be overruled was likewise a carefully focused and limited decision. Chief Justice Castille's opinion reviewed the history and development of strict liability, including its underlying social policy. He examined the foundational principles in order to reach the conclusion that the Second Restatement "properly calibrated" should remain the law of Pennsylvania. *Tincher*, 103 A.3d at 399.

The Court noted that the strict liability cause of action sounds in tort, which implicates duties "imposed by law as a matter of social policy", rather than in contract, which involves duties imposed by mutual agreement between particular individuals. *Id.* at 400. Chief Justice Castille wrote:

> Strict liability in tort for product defects is a cause of action which implicates the social and economic policy of this Commonwealth…. ***The policy*** was ***articulated*** by the concurring and dissenting opinion of Justice Jones in *Miller,* upon which the *Webb* Court relied ***in "adopting" the strict liability theory as a distinct cause of action in tort: those who sell a product*** (*i.e.,* profit from making and putting a product in the stream of commerce) ***are held responsible for damage caused to a consumer by the reasonable use of the product.*** *See Miller,* 221 A.2d at 334–35 (Jones, J., concurring and dissenting). ***The risk of injury is placed, therefore, upon the supplier of products.***

*Tincher,* 104 A.3d at 381-382.

These policies embodied in Pennsylvania's approach to products liability, specifically, that the risk of loss should be placed upon those who profit from making and putting a product in the stream of commerce, as articulated in *Miller v. Preitz,* 221 A.2d 320 (Pa. 1966), upon which *Webb v. Zern*, 220 A.2d 853 (Pa. 1966) relied, were derived from the Restatement (Second) approach. *Tincher*, 104 A.3d at 381-82. "Incorporating the strict liability cause of action into Pennsylvania common law, the *Webb* court expressly relied upon the Second Restatement and relevant scholarly commentary to supply its justification." *Id.* at 383.

Significantly, those same policies were also articulated in *Azzarello:*

> The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business. …Courts have increasingly adopted the position that the risk of loss must be placed upon the supplier of the defective product without regard to fault or privity of contract.

*Azzarello*, *supra*, 391 A.2d at 1023-1024.

Unquestionably, this Honorable Court in *Tincher* held that those policies remain, ***regardless of the overruling of Azzarello***, and concluded that a departure from the approach of the Second Restatement, which focuses upon the nature of the product and the consumer's reasonable expectations with respect to the product, rather than upon the conduct of either the manufacturer or the person injured, was not warranted. *Tincher*, *supra*, at 369, 381-82, 399-400. *See also* Lindsey E. Buckley, *Recreational UAVs: Going Rogue with Pennsylvania's Strict Products Liability Law Post-Tincher,"* 15 PGH. J. TECH. L. & POL'Y 243, 264 (Spring 2015)("Although that opinion [*Azzarello*] is no longer authoritative, the palpable public policy backing strict products liability survives.") In a telling footnote, Justice Castille declared: "While the Second Restatement formulation of the principles governing the strict liability cause of action in tort may have proven substantially less than clear, the policy that formulation embodies has not been challenged here and has largely remained uncontroverted." *Id.* at 400 n. 25.

Thus, the principles underlying *Azzarello* have not been changed by

*Tincher*. The decision in *Tincher* simply altered the way *Azzarello* is applied. Instead of a bifurcation of functions between the judge and the jury, the court will exercise its "traditional role" of determining issues of law, by ruling on dispositive motions, and articulating the law through jury instructions. *Id.* at 407. The jury, as fact-finder, will then determine the credibility of witnesses and testimony offered, the weight of evidence relevant to the risk-utility calculus or consumer expectation test, and whether a party has met the burden to prove the elements of the strict liability cause of action. *Id.* at 406-407.

Post-*Tincher*, Pennsylvania courts will continue to require that a plaintiff prove that the seller, manufacturer or distributor placed a product on the market in a "defective condition," but do not require proof of conduct under a negligence-based rubric. Under *Tincher*, the focus of the cause of action continues to be on the product, rather than conduct.

The word "defective" was added to the section 402A language "to ensure that it was understood that something had to be wrong with the ***product***." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830 (1973). "The term "unreasonably dangerous" was included in §402A specifically to obviate any contention that a manufacturer of a product with inherent possibilities of harm would become automatically responsible for every harm that could conceivably happen from the use of the product." *Riley v. Warren Mfg., Inc.*,

688 A.2d 221, 228 (Pa Super. 1997). "The words 'unreasonably dangerous' limit liability and signal that a seller is not an insurer but a guarantor of the product." *Tincher*, 104 A.3d at 367. The "unreasonably dangerous" terminology was intended to apply to the ***nature of the product*** and was not meant to focus upon whether the supplier of the product acted "unreasonably," *i.e.*, negligently. This approach is contrary to that argued for by Appellants, who seek to have this Court invoke a "negligence-friendly" product liability regime, *see* Brief of Appellants, at 23 n. 9, in which *conduct*,– conformance with custom or industry standards – bears upon the issue of whether the product was unreasonably dangerous and defectively designed.

Although "[s]trict liability arose in part because of a basic presumption that persons not abusing products are not usually injured unless the manufacturer failed in some respect in designing, manufacturing or marketing the product....strict liability theory was designed to facilitate redress for the injured user or consumer because of the difficulty in proving negligence." *O'Brien v. Muskin Corp.*, 463 A.2d 298, 312 (N.J. 1983). The opinion in *Tincher* demonstrates the Court's understanding that the "roots" of the strict liability action under Section 402A lay in this distinction, acknowledging

> ….the policy of those jurisdictions that have incorporated the Second Restatement into their common law is that those who engage in the business of selling a product are subject ***both*** to a duty of care in manufacturing and selling the

> product and a duty to sell a product free from a defective condition. ***The duty spoken of in strict liability is intended to be distinct from the duty of due care in negligence.*** RESTATEMENT (SECOND) OF TORTS § 402A(2).

*Tincher*, 104 A.3d at 383.

Clearly, the essential theories and policy underpinnings of Restatement (Second) §402A have not been altered by the *Tincher* Court. The law of products liability developed in response to changing societal concerns over the relationship between the consumer and the seller of a product. *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa.1975). The courts recognized that "the increasing complexity of the manufacturing and distributional process placed upon the injured plaintiff a nearly impossible burden of proving negligence where, for policy reasons, it was felt that a seller should be responsible for injuries caused by defects in his products**."** *Id*.; *see also Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992)("[T]he circumstances behind some injuries would make negligence practically impossible for an injured plaintiff to prove"). The complexity of products and the marketing process has increased exponentially, not diminished, in intervening years. In an era that has seen the explosion of the global marketplace, this policy rationale would appear to be even more valid. Indeed, *Tincher* demonstrated a concern for the protection of consumer rights, *see Tincher, supra,* at 383, 387-88, and alterations to the fabric of Pennsylvania strict liability law as

urged by Appellants undercut that approach and are antithetical to the spirit of *Tincher*.

## 3.2 *TINCHER'S* LIMITED OVERRULING OF AZZARELLO DID NOT CHANGE THE LAW AS TO INDUSTRY STANDARDS

In spite of Werner's histrionics in its brief regarding the claimed seismic shift in viewpoint represented by *Tincher*, the fact of the matter is that *Tincher* ***did not*** overrule the cases that barred industry and government standards from being introduced into evidence.

In *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 528 A.2d 590 (Pa. 1987), the Pennsylvania Supreme ruled that evidence of industry standards and business custom is not admissible in defense of a strict liability action. The Court explained that " 'industry standards' go to the negligence concept of reasonable care, and…such a concept has no place in an action based on strict liability in tort." *Id.* at 594. In so holding, this Court stated:

> Having reached the conclusion that evidence of industry standards relating to the design of the control pendant involved in this case, and evidence of its widespread use in the industry, go to the reasonableness of the appellant's conduct in making its design choice, we further conclude that such evidence would have improperly brought into [this strict liability] case, concepts of negligence law.

*Lewis*, 528 A.2d at 594. S*ee also Majdic v. Cincinnati Machine Co.*, 537 A.2d 334, 339 (Pa. Super. 1988)(trial court's admission of evidence of compliance with

American National Standards Institute ("ANSI") safety standards was error warranting reversal and remand).

The Pennsylvania appellate courts pre-*Tincher* also consistently held that it is impermissible to show compliance with government standards as a defense to a strict liability claim because the manufacturer's conduct is irrelevant in strict liability. *See Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989)(relying on *Lewis*; OSHA standards ~~i~~nadmissible in a strict liability action). *Accord Harsh v. Petroll,* 840 A.2d 404, 425 (Pa.Commw.2003)(based upon *Lewis*, evidence of compliance with FMVSS standards is inadmissible in products liability actions).

It is clear that this Honorable Court in *Tincher* court did not mandate the admission of such evidence. Rather, the opinion explicitly indicated that it had ***not*** considered that question:

> Omega Flex notes that this approach [of assigning the risk-utility calculus to the judge under *Azzarello*] has the collateral effect of rendering, laws, regulations and industry standards irrelevant to the risk-utility inquiry, with deleterious and unpredictable consequences for plaintiffs and defendants. Omega Flex does not develop this assertion, and, as a result we do not address it in any detail.

*Tincher* at 345 n. 4.

Arthur Bugay provided his interpretation of the implications of *Tincher* in his article "A New Era in Pennsylvania Products Liability Law --- Tincher v.

Omega-Flex., Inc.: The Death of Azzarello", observing that

> Apart from overruling *Azzarello* and defining the standard for defect, ***Tincher preserves existing Pennsylvania products liability law*.** It cites prior Pennsylvania Supreme Court decisions in *McCown v. International Harvester Co. …* and *Lewis v. Coffing Hoist Div, Duff-Norton Co,…* noting that the *Lewis* Court "observed that jurisdictions with various approaches agreed that relevant at trial is the condition of the product rather than the reasonableness of the manufacturer's conduct."

Arthur Bugay, *A New Era in Pennsylvania Products Liability Law --- Tincher v. Omega-Flex., Inc.: The Death of Azzarello,* 86 PA BAR ASSN. QUARTERLY 10, 14 n. 44 (Jan. 2015).

Furthermore, the opinion ***rejected*** the Restatement Third's "evidence based" approach, *Tincher,* at 385, 398-99, which would have specifically allowed the admission of evidence of compliance and noncompliance with safety statutes and regulations. *See* RESTATEMENT THIRD OF TORTS: PRODUCTS LIABILITY, §4. *See also* Ellen Wertheimer and M. Rahdert, *The Force Awakens: Tincher, Section 402A, and the Third Restatement in Pennsylvania*, 27 WIDENER COMMW. L. REV. 157, 186 (2018)("Beyond resisting a foundational shift from the Second to the Third Restatement, *Tincher* also specifically rejected the Third Restatement's formulation of requirements for proving that a product is defective in design.")

The Appellants would have this Court believe, however, that because *Tincher* erased the bright line rule of *Azzarello,* and acknowledged contributions of

negligence theory to Pennsylvania's strict liability jurisprudence, "concepts surrounding a product distributor's reasonable care in manufacturing and selling a product…" -- *i.e,* negligence principles-- "… should be given free rein in post-*Tincher* product liability litigation." *The Force Awakens*, *supra*, at 205-206.

This construct advanced by Werner and the defense bar is clearly inconsistent with the fundamental reasoning of this Honorable Court in reaching its decision in *Tincher*. The implications of the *Tincher* reasoning as it bears upon this issue are explained most cogently in the Article by Ellen Wertheimer and Mark Rahdert:

> It is true that *Tincher* recognized a negligence strand that contributed to product liability law's formation and continues to play a role in its development. ***But Tincher did not equate or align product liability law with negligence***. To the contrary, in examining the historical development of products law, the court emphasized significant ways in which product liability law in tort has always differed from other negligence-based causes of action. Beyond that, the court emphasized the independent and equally significant contributions of contract warranty law, which never had anything to do with negligence principles. By reaffirming Pennsylvania's commitment to the Second Restatement's combining of these strands in Section 402A, ***the court clearly signaled that product liability is and should remain*** what it has been since *Webb v. Zern*- ***a doctrine firmly founded on strict liability, where responsibility attaches for injury caused by a defective product even if a distributor exercised all possible care in its manufacture and sale***.
>
> ***Because Tincher reaffirmed the strict liability character of***

> ***product liability, it remains necessary to keep product liability separate from negligence.*** Although reasonableness and foreseeability can play a role in the administration of product liability, they cannot become dominant considerations. Courts must continue to guard against deployment of those concepts in ways that threaten to draw product liability litigation back into the environs of negligence. In particular, ***evidence bearing on the reasonableness of the manufacturer's or distributor's conduct, as opposed to the reasonableness of the product's safety, still falls outside the ambit of the product liability case***.

*The Force Awakens*, at 206-29.

## 3.3 FUNDAMENT SOCIAL POLICIES RECOGNIZED BY *TINCHER* SUPPORT CONTINUED EXCLUSION OF SUCH EVIDENCE

Following *Tincher*, in *Webb v. Volvo Cars of North America, LLC*, the Superior Court was faced with arguments that the Supreme Court's ruling in *Tincher* required the admission of government and industry standards. *Webb* recognized, however, that the decision in *Tincher* was a limited one and stated:

> We conclude that the overruling of *Azzarello* does not provide this panel with a sufficient basis for disregarding the evidentiary rule expressed in *Lewis* and *Gaudio*.… it is not clear that the prohibition on evidence of government or industry standards no longer applies. *Lewis*, in particular, noted that a defective design could be widespread in an industry. *Lewis*, 528 A.2d at 594. ***The Tincher opinion does not undermine that rationale for excluding governmental or industry standards evidence.***

*Webb v. Volvo Cars of N. Am., LLC*, 148 A.3d 473, 483 (Pa. Super. 2016).

The Superior Court's opinion in the case at bar is consistent with this view. Since *Webb,* other courts have struggled with the extent to which *Tincher* modified *Azzarello* and impacted *Lewis*. Many have correctly concluded that *Tincher* did not abrogate the accepted notion that defective design can be widespread in an industry, ~~and~~ that compliance with industry standards is not proof of nondefectiveness and that evidence of compliance with government/industry standards introduced to show proof of nondefectiveness should not be admissible. *See Mercurio v. Louisville Ladder, Inc.*, 2019 U.S. Dist. LEXIS, 65560, at *20 (M.D. Pa. 2019). *See also Malcolm v. Regal Ideas, Inc*., 2021 U.S. Dist. LEXIS 132123, at *17 (E.D. Pa. 2021) ("A review of federal and state decisions from the lower courts indicates that most judges exclude evidence of industry standards in strict liability actions.").

Solid policy arguments, long recognized in Pennsylvania products liability jurisprudence support this conclusion. This type of evidence is sometimes referred to as "state of the art" evidence." "State of the art" is also sometimes used to refer to technological or scientific feasibility. In crashworthiness cases, feasibility of an alternative design is an element of a plaintiff's claim. Alternative designs may also be offered by a plaintiff in other product cases should the plaintiff choose to proceed utilizing the risk-utility test. ***A distinction must be made, however, between what is technically feasible with respect to particularized product***

***designs and what an industry customarily does.*** The latter type of evidence departs from strict liability theory in two important ways:

> First, the state of the art evidence approach focuses on the conduct of the manufacturer rather than on the product. The second departure is that such evidence measures the manufacturer's conduct against the conduct of others in the industry.

Ellen Wertheimer, *Azzarello Agonistes: Bucking the Strict Products Liability Tide*, 66 TEMP. L. REV. 419, 441 (1993). Allowing the admission of such evidence will force the plaintiff to shift from demonstrating the dangerous characteristics of the product to an attack on the entire "state of the art" of the defendants' industry, a nearly insurmountable task. It has been observed that "because of the complexity of the technology, and the intricacy of the issues, such cases tend to ***begin*** with a strong presumption in favor of the manufacturer." Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 691(1995). A significant effect of admitting evidence of industry and governmental standards will be to introduce an extra weight on the scale against design complaints. *Id.*

A focus upon industry standards would lead to a situation where the conduct of the manufacturer is judged by reference to other manufacturers, which is essentially a discussion of ***minimum*** standards. In the case at bar, Werner's expert Erick H. Knox, Phd, PE, referenced the ANSI standards covering scaffolds in his

report. R. 0262a (ANSI A10.8-2011 Scaffold Safety Requirements).[2] The mission of the American National Standards Institute is "[t]o enhance both the global competitiveness of U.S. business and the U.S. quality of life by promoting and facilitating voluntary ***consensus*** standards and conformity assessment systems, and safeguarding their integrity." "About ANSI," ANSI Introduction © 2022 American National Standards Institute (ANSI) (emphasis added). The Forward to the ANSI A10-.8-2011 standard explains:

> The use of American National Standards is completely voluntary; their existence does not in any respect preclude anyone, whether he/she has approved the standards or not, from manufacturing, marketing, purchasing, or using products, processes, or procedures not conforming to the standards.

Forward, *ANSI/ASSE A10.8 – 2011 Scaffolding Safety Requirements, American National Standard for Construction and Demolition Operations* (Copyright ©2011 American Society of Safety Engineers).

The ANSI standard A10.8-2019 revised and replaced the A10.8-2011 standard cited by the defense expert. ANSI has itself stated that "…A10.8-2019,

[2] Appellants' Brief does not direct the Court to the proffer of a specific standard that would be relevant to the claimed defect, and indeed it appears that none was offered. Rather the expert report on which Appellant Werner relied merely references the ANSI standard that covers scaffolds generally, with no discussion of compliance with a relevant specific requirement. *See* R. 0231a-0266a. The report states that "[t]his design is compliant with ANSI and OSHA safety standards…", but does not offer the facts supporting that conclusion. R.0259a. It is fundamental that an expert "must testify as to the facts or data on which the opinion or inference is based." Pa. R. Evid. 705. Appellants have not established on the record that the excluded evidence was in fact relevant to a risk utility analysis, or was otherwise relevant, as they claim and this Honorable Court could dismiss this appeal on that basis alone.

*like its predecessor,* establishes *guidelines* for the construction, operation, maintenance, and use of scaffolds ….. [i]ntended to provide *minimum* guidelines for the safe erection, use, and dismantling of scaffolding…" The ANSI Blog, *ANSI/ASSP A10.8-2019*, https://blog.ansi.org/?p=160634.

The inevitable danger is that allowing evidence of industry standards and government regulations will promote a "least common denominator" approach. As Justice Larsen commented in his concurrence is *Lewis*, "[A] manufacturer cannot avoid liability to its consumers that it injures or maims through its defective designs by showing that 'the other guys do it too.' " *Lewis,* 528 A.2d at 595; *see also Gaudio v. Ford Motor Co.,* 976 A.2d 524 (Pa. Super. 2009)("there is no relevance in the fact that such a design is widespread in the industry").

The conduct of the manufacturer should not be judged by reference to other manufacturers; it is the ***product*** which must be judged as either sufficient or deficient, a focus that the *Tincher* court reaffimed. *Tincher*, 104 A.3d at 382 ("the presumption is that strict liability may be available with respect to any product, provided that the evidence is sufficient to prove a defect.") As noted by the Pennsylvania Superior Court in *Gaudio,,* evidence of applicable government and industry standards should be excluded because "it tends to mislead the jury's attention from their proper inquiry, namely the quality of design of the product in question." *Gaudio, supra,* at 543.

Undoubtedly, the approach to product liability actions under Section 402A has served the interest of promoting product safety. *See* Shapo, *supra*, at 696 ("A generation of precedent indicates that judicial adoption of Section 402A encompassed a commitment to a higher level of consumer protection than did the prior law.") Protecting consumers and enhancing safety has been an obvious objective of Pennsylvania product liability law as it evolved and as detailed in the *Tincher* opinion. *Tincher*, *supra*, at 355-375, 387-388, 389-390, 400-404. In 2021, 11.7 million people were treated in emergency departments for injuries resulting from consumer products. "Safety Topics: Consumer Product Injuries," Consumer Product Injuries - Injury Facts (nsc.org)(2022 National Safety Council). "Most of the injuries involve everyday products often assumed to be safe. Many of these injuries occur to our most vulnerable populations, older adults and young children." *Id*.

The deterrent effect of strict liability suits –encouraging the development of safer alternatives to the product at issue -- will be promoted by refusing to allow industry or government standards to be used as a defense.

> With respect to whether there is a practicable, safer, alternative design, courts can create significant deterrence by distinguishing mere industry custom evidence from evidence of scientific and technological feasibility. The failure to do so can create major disincentives for manufacturers to seek out safer designs.

Gerald F. Tietz, *Strict Products Liability, Design Defects and Corporate Decision-*

*Making: Greater Deterrence Through Stricter Process*, 38 VILL. L. REV. 1361, 1431-32 (1993). "By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research." *Beshada v. Johns-Manville Corp*., 447 A.2d 539, 548 (N.J. 1982).

This Honorable Court in *Tincher* recognized deterrence as a legitimate policy objective of strict liability in tort. *See Tincher*, 104 A.3d at 404 (Pa. 2014)("… that the theory of strict liability—like all other tort causes of action—is not fully capable of providing a sufficient deterrent incentive to achieve perfect safety goals is not a justification for jettisoning or restricting the duty in strict liability"); *see also Browning–Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 n. 20 (1989) ("Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself."). "Deterrence of unsafe practices, whether in a manufacturing or a design context, is even more important now in an era of rapidly changing technology, deregulation and underfunding of regulatory agencies than it was in the 1960s." Larry S. Stewart, "*Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*," 74 BROOKLYN LAW REV. 1039, 1046 (2009).

Reliance on regulatory standards to establish appropriate levels of safety with respect to a consumer product is problematic at best.[3] One drawback is that "[a]dministrative agencies and legislatures…are subject to the phenomenon known as 'regulatory capture,' under which regulations serve not the interest of the public, but the interests of the regulated entity." John Fabian Witt, TORTS: CASES, PRINCIPLES, AND INSTITUTIONS, SECOND EDITION, 220 (CALI eLangdell Press 2016).

> The basic problem… is that regulators unavoidably interact with the industries they regulate. Those industries have ample opportunity and motive to advance their interests with regulators. The public, by contrast, is diffuse and disorganized, and may not press its interests nearly as forcefully in the regulatory process. The problem grows worse in systems like the United States, with the so-called "revolving door" between the regulator and the regulated entities.

*Id.*

Indeed, recognizing the weaknesses of a regulatory system comprised of "imperfect federal agencies with limited resources and sometimes limited legal authority" to recall products, United States Supreme Court Justice Sonia Sotomayor recently reiterated the view that "the state design-defect laws play an important role, not only in discovering risks, but also in providing incentives for manufacturers to remove dangerous products from the market promptly." *Mut.*

[3] Appellants' expert has not offered any specifics regarding what OSHA regulations apply, but has merely stated that the scaffold was compliant with OSHA 1926, Subpart L. R. 0262. Differing arguments relate to government regulations as opposed to industry standards and customs, and given the lack of an appropriate record, this Court should reserve consideration of the issue until it is squarely presented in another case.

*Pharm. Co. v. Bartlett*, 133 S.Ct. 2466, 2495 (June 24, 2013)(Sotomayor, dissenting).

One commentator, opining upon the deterrent effect of strict liability actions, has noted the consequences of evidentiary rulings on this policy objective:

> When courts fail to create reasonable safety incentives by not reasonably limiting evidence of common industry practice, manufacturers will probably avoid seeking out, engineering and incorporating important safety devices into their products. Allowing evidence of industry custom in these circumstances encourages juries to find that an industry's actions were reasonable despite clear evidence that the industry as a whole, or any given manufacturer, reasonably could have provided greater safety that would have prevented the plaintiff's injury. This situation comes perilously close to allowing an industry to set its own standards of liability.

Tietz, *supra*, at 1435-1436 (1993).

Allowing evidence of industry and governmental standards would not only be contrary to the social policy considerations recognized in *Tincher*, it would also suggest that the jury evaluate the defendant's conduct against that of other manufacturers, crossing over into a negligence assessment. The admission of industry custom and governmental regulation as relevant to the risk-utility analysis, as urged by Appellants, represents an attempt to insert through the back door the concepts of negligence law that *Tincher* rejected when it refused to adopt the principles of the Restatement Third. Such a result would be antithetical to the Supreme Court's recognition that "[t]he duty spoken of in strict liability is intended

to be distinct from the duty of due care in negligence," *Tincher,* 104 A.3d at 383, and would upset the "proper calibration" of the Restatement Second Section 402A which is at the heart of the *Tincher* decision.

### 3.4 PRECEDENTS IN OTHER JURISDICTIONS ARE NOT PERSUASIVE AND SHOULD NOT SWAY THIS COURT TO DEPART FROM THE PRINCIPLES ENUNCIATED IN *TINCHER*

In an argument equivalent to the "everyone does it that way" defense advanced by manufacturers, Appellants contend that "[a]t least 45 states and the District of Columbia" consider evidence of compliance with industry standards and governmental safety standards admissible evidence of nondefectiveness. Appellant's Br. 42. Appellant refers this Court to the brief of a supporting *amicus curiae* for "a complete review of the nationwide precedent supporting admission of a product's compliance with industry standards and governmental mandates in strict liability litigation." *Id*. at 45 n.21. *See* Brief of *Amicus Curiae* The Product Liability Advisory Council at 3-12.

However, a closer look at this list of authorities reveals nothing close to the consensus Appellants claim. Certainly, there is no compelling groundswell of common law decisions supporting the admissibility of industry and governmental

standards, such as the ANSI and OSHA scaffolding standards excluded in this case.

First, 10 of the 46 jurisdictions referenced have addressed admissibility of government or industry standards or both by statute: Colo. Rev. Stat. §13-21-403(1)(b); Ind. Code Ann. §34-20-5-1; Kan. Stat. Ann. §60-3304(a); Mich. Comp. Laws §600.2946; N.D. Cent. Code §28-01.3-09; Tenn. Code Ann. §29-28-104(a); Tex. Civ. Prac. & Rem. Code Ann. §82.008(a), (c); Utah Code Ann §78B-6-703(2);Wash. Stat. §7.72.050(1) & (2); Wis. Stat. §895.047(3)(b).[4]

These statutes, often enacted as "tort reform," are intended to override the common law in response to perceived political or economic concerns within the state. Pennsylvania's General Assembly has not viewed such legislation as in the best interests of Pennsylvanians. The fact that other state legislatures have done so should have no persuasive effect on this Court.

Second, Appellant includes in its count 10 jurisdictions where the highest court has not squarely addressed the issue. These include eight state intermediate court decisions. *See Hohlenkamp v. Rheem Mfg. Co.,* 655 P.2d 32 (Ariz. Ct.App. 1982)(Government and industry standards); *Kaur v. Boston Scientific Corp.*, C.A. No.: N19C-07-117, 2022 WL 1486178 (Del. Super.Ct. May 11, 2022)(FDA

[4] Colorado, Kansas, Tennessee, Texas and Wisconsin statutes cover governmental standards only.

regulations)*; Chambers v. Canal Athletic Ass'n Inc.*, 2022 WL 103067 (Del. Super.Ct. Jan. 11, 2022) (non-products negligence case); *Kidron, Inc. v. Carmona,* 665 So.2d 289 (Fla Dist.Ct. App. 1995), *overruled on other grounds*, *D'Amario v. Ford Motor Co*., 806 So.2d 424 (Fla. 2001)(government standard); *Jackson v. H.L. Bouton Co., Inc*., 630 So.2d 1173 (Fla. Dist.Ct.App. 1994)(industry standard); *Worldwide Equip., Inc. v. Mullins*, 11 S.W.3d 50 (Ky.Ct.App. 1999)(industry standard*); Sawyer v. Niagara Mach. and Tool Works, Inc.*, 535 So.2d 1057 (La.Ct.App. 1988)(government standard); *Cannon v. Cavalier Corp*., 572 So.2d 299 (La. Ct. App. 1990)(industry standard); *Troja v. Black & Decker Mfg. Co*., 488 A.2d 516 (Md.Ct. Spec.App. 1985)(government standard); *Kent Vill. Assocs. Joint Venture v. Smith,* 657 A.2d 330 (Md.Ct.Spec.App. 1995)(industry standard); *Jackson v. New Jersey Mfrs. Ins. Co.*, 400 A.2d 81 (N.J. Super.Ct. App.Div. 1979)(government standard); *Mathews v. Univ. Loft Co*., 903 A.2d 1120, (N.J. Super.Ct. App.Div. 2006)(industry standard); *Gable v. Gates Mills*, 784 N.E.2d 739 (Ohio Ct.App. 2003), *rev'd on other grounds*, 816 N.E.2d 1049 (Ohio 2004)(government standard); *Kelley v. Cairns & Bros, Inc*., 626 N.E.2d 986 (Ohio Ct. App. 1993)(industry standard).

Two additional decisions were issued by federal courts endeavoring to make "*Erie* guesses" as to the state court's position on admissibility. *See Meisner v. Patton Elec. Co., Inc.*, 781 F.Supp.1432 (D. Neb. 1990)(industry standard);

*Raymond v. Riegel Textile Corp*., 484 F.2d 1025 (1st Cir. 1973)(government standard); *Est. of Spinosa*, 621 F.2d 1154 (1st Cir. 1980)(industry standard).

Finally, defense *amicus* includes a number of the state supreme court decisions that address only admissibility of compliance evidence on the issue of design negligence, without squarely addressing strict liability, or, in a few instances, do not involve compliance evidence at all:

**AL**
*Dunn v. Wixom Bros*., 493 So.2d 1356, 1359-60 (Ala. 1986) (Customary practices or industry standards admissible on negligent failure to warn, but "do not furnish a conclusive test of negligence").

**AK**
*Forrest City Mach. Works. Inc. v. Aderhold*, 616 S.W.2d 720 (Ark. 1981)(Compliance with industry customs not a defense as a matter of law to a negligence action).

**CO**
*Yampa Valley Elec. Ass'n, Inc. v. Telecky*, 862 P.2d 252 (Colo. 1993) (non-product case; compliance with industry standards admissible on issue of negligence).

**HI**
*Nobriga v. Raybestos Manhattan, Inc*., 683 P.2d 389 (Haw. 1984)(defense based on government contract specifications, not safety standards); *Brown v. Clark Equip. Co.*, 618 P.2d 267 (Haw. 1980)(National Safety Council voluntary standards admissible on the issue of negligence).

**IL**
*Jablonksi v. Ford Motor Co.*, 955 N.E.2d 1138, 1154 (Ill. 2011) ("conformance to industry standards is relevant, but not dispositive on the issue of negligence."); Werner additionally quotes *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 260 (Ill. 2007), for the inapt holding that evidence may be introduced to show "that the design used did *not* conform with the

design standards of the industry, design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation." Appellant's Brief at 43.

**ME**
*Bernier v. Raymark Indus., Inc*., 516 A.2d 534 (Me. 1986)(state-of-art evidence of what was known at time of exposure was admissible in negligent failure to warn case).

**MN**
*Gryc v. Dayton-Hudson Corp.,* 297 N.W.2d 727 (Minn. 1980)(compliance with Congressionally-enacted flammability test relevant *to the issue of punitive damages*); *Kallio v. Ford Motor Co.,* 407 N.W.2d 92 (Minn. 1987) (does not address admissibility of industry or government safety standards); *Schmidt v. Beninga,* 173 N.W.2d 401 (Minn. 1970) (nonproduct negligence action).

**NE**
*McDaniel v. McNeil Labs., Inc*., 241 N.W.2d 822 (Neb. 1976)(discusses FDA approval of drug labeling, not governmental safety standard).

**NV**
*Gov't:Robinson v. G.G.C., Inc.,* 808 P.2d 522 (Nev. 1991)(addresses admissibility of evidence of *noncompliance* with government or industry standards).

**NY**
*Palmatier v. Mr. Heater Corp.,* 159 A.D.3d 1084, 1086 (N.Y. App.Div. 2018)(compliance with the Federal Flammability Act standards "is merely some evidence of due care and does not preclude a finding of negligence" ); *Alicea v. Gorilla Ladder Co*., 181 A.D.3d 512 (N.Y. App.Div. 2020)(negligent design claim).

**NC**
*Williams v. City of Durham,* 473 S.E.2d 665, 666-67 (N.C. Ct.App. 1996)(nonproduct negligence case; "public safety statutes customarily set forth a standard of care such that noncompliance constitutes negligence *per se"*); *Sloan v. Carolina Power & Light Co*., 102 S.E.2d 822 (N.C. 1958) (nonproducts negligence case; evidence of *noncompliance* with industry standard); *Beck v. Carolina Power and Light Co*., 291 S.E.2d 897

(nonproduct negligence case; evidence of *noncompliance* with industry standard)(N.C. App.Ct. 1982).

**SD**
*Zacher v. Budd Co.*, 396 N.W.2d 122 (S.D. 1986)(Approves jury instruction: "compliance with such legislative enactments, rules or regulations and/or … standards and customs of their own industry … are not controlling and does not prevent you from finding them *negligent*").

**TN**
*Flax v. DaimlerChrysler Corp*., 272 S.W.3d 521 (Tenn. 2008)("While evidence of compliance with government regulations is certainly evidence that a manufacturer was not *reckless*, it is not dispositive.. . . Similarly, if a manufacturer knows that a common practice in an industry presents a substantial and unjustifiable risk to consumers, then compliance with the common practice is not an absolute bar to the recovery of *punitive damages*).

**TX**
*Turner v. Gen. Motors Corp*., 514 S.W.2d 497 (Tex. App. 1974)("while conformance to industry custom is admissible on the question of negligence, the custom itself may be shown to be negligent").

**VT**
*McCullock v. H.B. Fuller Co*., 981 F.2d 656, 657 (2d Cir. 1992)(compliance with OSHA requirements regarding warning content was not at issue where plaintiff alleged manufacturer gave no warning at all).

Scrutiny thus reveals that the highest courts in only 14 states have authoritatively declared that compliance with either industry standards or governmental safety standards may be admitted as relevant to the issue of defective design in strict liability cases. In most of those decisions, the courts devoted little or no analysis to the question. This is far short of the wildly exaggerated flood of

authority claimed by Appellants and supporting *amicus*. This Court should not be swayed from developing the common law of Pennsylvania to best serve Pennsylvanians.

Critical analysis should also apply to *Kim v. Toyota Motor Corp*., 424 P.3d 290 (Cal. 2018), one of the cases highlighted by Appellants because of this Honorable Court's favorable citation of *Barker v Lull Engineering Co*., 573 P.2d 443 (Cal. 1978), in *Tincher.* A close reading of *Kim,* however, leads to the conclusion the appropriate application of the risk-benefit test in *Barker* does not lead to the result argued for by Appellants, the overturning of *Lewis* and other precedents which restrict the use of compliance with industry custom and government standards.

*Kim* is factually distinguishable. In *Kim*, the plaintiffs themselves introduced evidence of industry custom and practice to demonstrate that the defendant knew that the safety system in question –vehicle stability control ("VSC"), which was included as standard equipment on SUVs with similar stability issues as the subject vehicle (the Tundra pick up)- was not included as a standard feature on any of the competitors' trucks, and made the decision to disregard the risk of loss of control because they saw no competitive advantage in making the VSC standard equipment on the Tundra pick-up. *See Kim, supra*, at 299. Under these circumstances the plaintiffs cannot be heard to complain that the

jury heard evidence of "industry custom," that no other manufacturer utilized the VSC as standard equipment. *Id*. at 301.[5] Secondly, in *Kim,* decided under California law, the burden was placed upon the *defendant* of demonstrating that the benefits of the challenged design outweigh its risks. *Id.* at 300. Neither situation is the case here. It should also be noted that in *Kim* evidence of compliance with federal motor vehicle standards was not an issue before the Court on appeal. *Id.* at 294 n. 3.

More significantly, the majority opinion acknowledges that "…whether a manufacturer's product is as safe as or safer than any product on the market is not the question in a strict products liability case." *Id*. at 302. The majority in *Kim* reasoned that the evidence of industry practices ***may*** be relevant, ***in some circumstances***, to the balancing of risks and benefits in choosing a particular design, under the risk-utility analysis articulated in *Barker*, *see Kim*, *supra,* at 298-99 & 330, and approved in *Tincher*. Thus, *Kim* hardly represents a wholesale endorsement of the admissibility of industry practice and standards.

[5] Nevertheless, Justice Dato in his concurrence points out the danger of placing evidence of noncompliance on the same level as evidence of compliance: "Evidence of *noncompliance* with custom and practice is admissible to show the technological and practical feasibility of an alternative design, whereas evidence of *compliance* cannot prove a negative—that the design was *not* defective." *Kim, supra,* at 304 n. 1(emphasis in original).

The flaw in promoting the uncritical and unlimited admission of such evidence is elucidated most cogently in Justice Dato's concurring opinion. "The majority opinion appears to endorse admission of a defendant's industry custom and practice evidence as a proxy for the foundational risks and benefits that a manufacturer *should* be evaluating in making product design decisions." *Kim*, *supra*, at 303 (concurring opinion)(emphasis in original). Without evidence establishing that prevailing industry design choices and standards in fact "reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality, *id.*, at 301, their admission is simply an invitation to the jury to make a speculative leap from the assertion that "this is what everyone does" [or is expected to do] to the ***conclusion***, whether warranted or not, that the design is not defective because it has been determined that the benefits in terms of cost, functionality and feasibility outweigh the inherent risks of this design choice. *See Kim, supra*, at 304 (concurring opinion)("To admit the conclusion [the industry custom-and-practice evidence] before the foundational evidence establishing that the appropriate risks and benefits were balanced would be pure speculation.**"**). *See also, id.* at 303(Jurors should not be left to guess.) The evidence devolves, therefore, into nothing more than an "everybody does it this way" defense, discredited in Pennsylvania jurisprudence --- and California's as

well, *id.* at 303—as impermissibly judging the reasonableness of the defendant's *conduct* by comparison to others.

## 4. CONCLUSION

Based upon the foregoing arguments and authorities, the decision of the Superior Court should be affirmed.

Respectfully submitted,

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I hereby certify that the foregoing brief does not comply with the word limit of Pennsylvania Rule of Appellate Procedure 2135. Specifically, it contains 778 words in the statements portion of the brief and 7674 words in the substantive portion of the brief for a total of 8,452 words based on the word count of Microsoft Word 2019, the word processing system used to prepare the brief. Leave is sought simultaneously herewith to exceed the word limitations of Rule 531.

This brief complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) and 2135(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14–point Times New Roman font.

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## CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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