

After 'Tincher,' Tried and True Products Liability Defenses Remain Just That

Stephen J. Finley, Jr.

The Legal Intelligencer, January 26, 2016

Since the Pennsylvania Supreme Court's 2014 decision in *Tincher v. Omega Flex*, courts and practitioners alike have struggled to discern the legal standard for determining whether a product is defective under Pennsylvania product liability law. That question remains very much unsettled. However, case law interpreting *Tincher* shows that tried and true product liability defenses, such as assumption of the risk, product misuse, and the claims limiting effect of Comment K to the Restatement (Second) of Torts, remain valid and in force. Moreover, many cases discussing the scope of these defenses continue to rely upon pre-*Tincher* precedent. This article addresses those cases and explains that, while courts and practitioners answer the Supreme Court's call to grapple with the many issues left unanswered by the *Tincher* decision, practitioners defending a product seller should continue to rely on well-established, tried and true defenses to a product liability claim.

The 'Tincher' Decision

In *Tincher v. Omega Flex*, (Pa. 2014), plaintiff-homeowners brought a product liability action against the manufacturer of stainless steel tubing. The *Tincher* court held that "in Pennsylvania, the cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." Under the approach set forth in *Tincher*, a plaintiff may prove that a product is defective by showing either that the danger is unknowable and unacceptable to the average or ordinary consumer (the consumer expectations test); or a reasonable person would conclude that the probability and seriousness of harm caused by the product outweighs the burden or costs of taking precautions (the risk-utility test). In *Tincher*, the Pennsylvania Supreme Court did away with the unwieldy framework that had developed in Pennsylvania since *Azzarello v. Black Brothers*, (Pa. 1978), but declined to adopt the Restatement (Third) of Torts. The court left it to the General Assembly, the lower courts, and the bar to answer questions regarding the legal principles that now govern Pennsylvania product-liability law. What *Tincher* did not do, however, is upend the defenses to a product liability claim.

Product Misuse

The U.S. District Court for the Middle District of Pennsylvania was the first to examine the product misuse defense in the aftermath of *Tincher*. In *Nathan v. Techtronic Industries North America*, (M.D. Pa. 2015), the plaintiff was injured while using a table saw. It was undisputed that the plaintiff was not using the saw's blade guard assembly when he was injured. In fact, the plaintiff admitted removing the guard assembly because he claimed it interfered with his ability to make narrow cuts. The plaintiff claimed that the manufacturer had long been aware that users of table saws often remove blade guards, which increases the risk of injury. According to the plaintiff's expert, the table saw should have incorporated flesh detection technology, which can prevent such injuries and, according to plaintiff's expert, was a feasible design component when the saw was manufactured.

The court denied the manufacturer's summary judgment motion on plaintiff's design-defect theory and granted summary judgment on plaintiff's failure-to-warn claim. The court also decided the manufacturer's summary judgment motion based upon the product misuse defense. In deciding the misuse issue, the court relied exclusively upon pre-*Tincher* precedent from the U.S. Court of Appeals for the Third Circuit, the Pennsylvania Supreme Court, and the Pennsylvania Superior Court. The Middle District explained that in order to prevail on the product misuse defense, the manufacturer was required to prove "that there is no genuine dispute that the blade guard would have prevented the accident," a standard articulated by the Third Circuit in its 1981 opinion *Hollinger v. Wagner Mining Equipment Company*, (3d Cir. 1981). The court found that the manufacturer could not satisfy this standard, as there was evidence that even with the blade guard in place, the plaintiff could have sustained an injury that flesh detection technology could have prevented.

Not long after *Nathan* was decided, Judge Eduardo C. Robreno of the U.S. District Court for the Eastern District of Pennsylvania ruled that a manufacturer was not entitled to summary judgment based upon the product misuse defense. In *Dalton v. McCourt Electric*, No. 12-3568, (E.D. Pa. Aug. 5, 2015), the plaintiffs brought suit for damage sustained in a fire at their home. They attributed the fire to a defect in a power pack, a device used to reduce current for low-level exterior lighting. The record established that the electrical contractor who installed the device did not read all of the warnings accompanying the product. The issue on summary judgment was whether the fire resulted, not from a defective component of the power pack as alleged by

plaintiffs, but from the improper installation of the power pack. The manufacturer argued "had the power pack been installed outdoors, as per the warnings and instructions, the fire would not have occurred." The court disagreed. Citing to a 40-year-old precedent, the court concluded "the question is not simply whether there was a misuse of the product, but whether the alleged misuse (in installing the power pack indoors, in violation of the product's warning label) was causally connected to the onset of the fire."

While the defendants' summary judgment motions in both *Nathan* and *Dalton* were ultimately denied, both decisions make clear that product misuse remains a recognized defense to a product liability claim in Pennsylvania.

Assumption of the Risk

In *McKenzie v. Dematic Corporation*, No. 3:12-250, (W.D. Pa. Jun. 18, 2015), the plaintiff sustained an on-the-job injury to her right arm when her hand and arm were pulled into the unguarded nip-point on a motorized belt trash conveyor. The defendant argued that the plaintiff's product liability claims were barred by her assumption of the risk. The Western District relied on the Pennsylvania Supreme Court's 2012 decision in *Reott v. Asia Trend*, (Pa. 2012)—a case that predates *Tincher* by two years—for the proposition that assumption of the risk is a recognized defense to a product defect claim. The court also quoted the Pennsylvania Superior Court's decision in *Longwell v. Giordano*, where it was held:

To grant summary judgment on the basis of assumption of the risk it must first be concluded, as a matter of law, that the party consciously appreciated the risk that attended a certain endeavor, assumed the risk of injury by engaging in the endeavor despite the appreciation of the risk involved, and that the injury sustained was, in fact, the same risk of injury that was appreciated and assumed.

The court found that the defendant had not satisfied this standard and denied summary judgment. The court reached this decision relying exclusively upon pre-*Tincher* case law.

Comment K of Restatement (Second) of Torts, Section 402A

Comment K to the Restatement (Second) of Torts, Section 402A, limits liability for "unavoidably unsafe products." Pennsylvania courts have adopted and applied Comment K to both

prescription drugs and prescription medical devices, as held in *Hahn v. Richter*, (Pa. 1996) and *Creazzo v. Medtronic*, (Pa. Super. Ct. 2006). Recent precedent from the U.S. District Court for the Middle District of Pennsylvania confirms the claims-limiting effect of Comment K remains in place after *Tincher*, as in *Krammes v. Zimmer*, No. 3:11-CV-00916,(M.D. Pa. Jul. 24, 2015). In *Krammes*, a case involving a prescription medical device, the court left no doubt as to the applicability of Comment K, holding "we agree with Defendants that *Tincher* did not change existing jurisprudence concerning strict liability with respect to prescription drugs and medical devices." For this reason, the plaintiff's strict liability claims were dismissed.

The *Tincher* decision, while certainly significant, did not do away with well-established defenses to a product liability claim. By overruling *Azzarello*, but declining to adopt the Restatement (Third) of Torts, the Supreme Court rejected calls for a broad, far-reaching reboot of Pennsylvania product liability law. The cases decided since *Tincher* confirm that defenses to a product liability claim, such as assumption of the risk and product misuse, remain valid defenses. Moreover, the parameters of those defenses are largely governed by precedent that predates *Tincher*. When faced with a claim involving an allegedly defective product, practitioners should continue to plead and prove the tried and true product liability defenses that existed prior to the *Tincher* decision.