

# Products Liability

## Suggested Standard Jury Instructions

Pursuant to

*Tincher v. Omega Flex, Inc.*,

104 A.3d 328 (Pa. 2014)

2018 Edition – Supercedes 2017 Edition

## 16.10

### GENERAL RULE OF STRICT LIABILITY

[Name of plaintiff] claims that [he/she] was harmed by [insert type of product], which was [distributed] [manufactured] [sold] by [name of defendant].

To recover for this harm, the plaintiff must prove by a fair preponderance of the evidence each of the following elements:

(1) [Name of defendant] is in the business of [distributing] [manufacturing] [selling] such a product;

(2) The product in question had a defect that made it unreasonably dangerous;

(3) The product's unreasonably dangerous condition existed at the time the product left the defendant's control;

(4) The product was expected to and did in fact reach the plaintiff, and was thereafter used at the time of the [accident][exposure], without substantial change in its condition; and

(5) The unreasonably dangerous condition of the product was a substantial factor in causing harm to the plaintiff.

### RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict products liability in Pennsylvania. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014) ("Pennsylvania remains a Second Restatement jurisdiction.").

The elements listed in this instruction are drawn from Section 402A, which 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

(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).

The jury should be given additional instructions, as appropriate, to elaborate on each of the elements of this cause of action.

The contrary SSJI (Civ.) §16.10 retains the *Azzarello*-era instruction that a product is defective if it "lacked any element necessary to make it safe for its intended use." *See Azzarello v. Black Bros. Co.*, 391 A.2d 1010 (Pa. 1978) (endorsing a jury charge instructing that a product must be "provided with every element necessary to make it safe for its intended use").

The SSJI charge is reversible error and should not be given. The Supreme Court overruled *Azzarello* in *Tincher*, specifically rejecting the jury charge that *Azzarello* had endorsed. *See Tincher*, 104 A.3d at 335 (declaring *Azzarello* to be overruled); 378-79 (criticizing *Azzarello* standard as "impractical" and noting that the "every element" language had been taken out of context). Giving an *Azzarello* charge post-*Tincher* is "a paradigm example of fundamental error." *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399 (Pa. Super. 2018) ("*Tincher II*"). Such a charge "employ[s] an incorrect definition of a product 'defect' in light of the Supreme Court's decision" in *Tincher*. *Id.* SSJI (Civ.) §16.10 thus "undervalues the importance of the Supreme Court's decision" in *Tincher*. *Tincher II*. 180 A.3d at 401.

Even before *Tincher*, the "every element" jury instruction had long been the subject of criticism, with the Superior Court remarking three decades ago, "[t]his instruction calls forth fantastic cartoon images of products, both simple and complex, laden with fail-safe mechanism upon fail-safe mechanism." *McKay v. Sandmold*

*Systems, Inc.*, 482 A.2d 260, 263 (Pa. Super. 1984) (quoting Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 637-39 (1980)). Given the longstanding problems with this instruction, as well as its express rejection in *Tincher*, the “every/any element” language has no place in a modern Pennsylvania jury charge.

The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.1 (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

More recent precedent uses the concept of the defendant’s “control” in articulating the defect-at-sale element of §402A. See *Barnish v. KWI Building Co.*, 980 A.2d 535, 547 (Pa. 2009). Older cases express the same concept as the product leaving the defendant’s “hands.” See *Duchess v. Langston Corp.*, 769 A.2d 1131, 1140 (Pa. 2001). These instructions use the term “control” as a more precise description.

“The seller is not liable if a safe product is made unsafe by subsequent changes.” *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997). Whether a post-manufacture change to a product is “substantial” so as to preclude strict liability depends on “whether the manufacturer could have reasonably expected or foreseen such an alteration of its product.” *Id.* (citing *Eck v. Powermatic Houdaille, Div.*, 527 A.2d 1012, 1018-19 (Pa. Super. 1987)). This standard accords with *Tincher*’s recognition of negligence concepts in strict liability. See *Nelson v. Airco Welders Supply*, 107 A.3d 146, 159 n.17 (Pa. Super. 2014) (en banc) (post-*Tincher*); *Roudabush v. Rondo, Inc.*, 2017 WL 3912370, at \*3 (W.D. Pa. Sept. 5, 2017) (same); *Sikkelee v. AVCO Corp.*, 268 F. Supp.3d 660, 711-13 (M.D. Pa. 2017) (same), *reconsideration granted on other grounds*, 2017 WL 3310953 (M.D. Pa. Aug. 3, 2017).

“[R]equirements of proving substantial-factor causation remain the same” for both negligence and strict liability.” *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1165 (Pa. 2010). The Pennsylvania Supreme Court has repeatedly specified “substantial factor” as the causation standard in products liability cases. *E.g. Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016) (post-*Tincher*); *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1091 (Pa. 2012); *Harsh v. Petroll*, 887 A.2d 209, 213-14 & n.9 (Pa. 2005). See instruction §16.80.

## 16.20(1) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

### *Finding of Defect Requires “Unreasonably Dangerous” Condition*

The Plaintiff claims that the [identify the product] was defective and that the defect caused [him/her] harm. The plaintiff must prove that the product contained a defect that made the product unreasonably dangerous.

The plaintiff’s evidence must convince you both that the product was defective and that the defect made the product unreasonably dangerous.

In considering whether a product is unreasonably dangerous, you must consider the overall safety of the product for all [intended] [reasonably foreseeable] uses. You may not conclude that the product is unreasonably dangerous only because a different design might have reduced or prevented the harm suffered by the plaintiff in this particular incident. Rather, you must consider whether any alternative proposed by the plaintiff would have introduced into the product other dangers or disadvantages of equal or greater magnitude.

### RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict products liability in Pennsylvania. Section 402A limits liability to products “in a defective condition *unreasonably dangerous* to the user or consumer.” Restatement (Second) of Torts §402A (emphasis added). “Pennsylvania remains a Second Restatement jurisdiction.” *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014). Thus,

in a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is “defective”; in the context of a strict liability claim, whether a product is defective depends upon whether that product is “unreasonably dangerous.”

*Tincher*, 104 A.3d at 380, 399. “[T]he notion of ‘defective condition unreasonably dangerous’ is the normative principle of the strict liability cause of action.” *Id.* at 400.

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in products liability cases from using the term “unreasonably dangerous.” Instead of juries making this decision, trial courts were required to make “threshold” determinations whether a “plaintiff’s allegations” supported a finding that the product at issue was “unreasonably dangerous,” justifying submission of the case to the jury. *Id.* at 1026; *Dambacher v. Mallis*, 485 A.2d 408, 423 (Pa. Super. 1984) (en banc), *appeal dismissed*, 500 A.2d 428 (Pa. 1985).

*Tincher* expressly overruled *Azzarello*, finding *Azzarello*’s division of labor between judge and jury “undesirable” because it “encourage[d] trial courts to make either uninformed or unfounded decisions of social policy.” *Tincher*, 104 A.3d at 381. “[T]rial courts simply do not have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous.” *Id.* at 380.

*Tincher* found “undesirable” *Azzarello*’s “strict” separation of negligence and strict liability concepts. “[E]levat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative” was not “consistent with reason,” and “validate[d] the suggestion that the cause of action, so shaped, was not viable.” *Id.* at 380-81. Far from separating strict liability and negligence, *Tincher* emphasized their overlap. *Id.* at 371 (describing “negligence-derived risk-utility balancing in design defect litigation”); *id.* (“in design cases the character of the product and the conduct of the manufacturer are largely inseparable”); *id.* at 401 (“the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty”) (internal citations omitted).

In *Tincher*, the court rejected the prevailing standard that a defective product is one that lacks every “element” necessary to make it safe for use. 104 A.3d at 379. In its place, the *Tincher* court instituted a “composite” standard for proving when a design defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01. These tests are discussed in §§16.20(2-3), *infra*.

Before *Azzarello*, proof that “the defective condition was unreasonably dangerous” was an accepted element of strict liability, along with the defect itself, existence of the defect at the time of sale, and causation. *E.g.*, *Bialek v. Pittsburgh Brewing Co.*, 242 A.2d 231, 235-36 (Pa. 1968); *Forry v. Gulf Oil Corp.*, 237 A.2d 593, 597 (Pa. 1967). Given the Supreme Court’s rejection of *Azzarello* and its rationale, post-*Tincher* cases have returned to that pre-*Azzarello* formulation, and hold that juries must be asked whether the product at issue is “unreasonably dangerous.” *See, e.g.*, *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017) (“the *Tincher* Court concluded that the question of whether a product is in a defective condition unreasonably dangerous to the consumer is a question of fact that should generally be reserved for the factfinder, whether it be the trial court or a jury”); *Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015) (“in *Tincher*, the Court returned to the finder of fact the question of whether a product is ‘unreasonably dangerous,’ as that determination is part and parcel of whether the product is, in fact, defective”), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Hatcher v. SCM Group, Inc.*, 167 F. Supp.3d 719, 727 (E.D. Pa. 2016) (“a product is only defective . . . if it is ‘unreasonably dangerous’”); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at \*2 (W.D. Pa. July 14, 2016) (“the *Tincher* Court also made clear that it is now up to the jury not the judge to determine whether a product is in a ‘defective condition unreasonably dangerous’ to the consumer”); *Nathan v. Techtronic Industries North America, Inc.*, 92 F. Supp.3d 264, 270-71 (M.D. Pa. 2015) (court no longer to make threshold “unreasonably dangerous” determination; issues of defect are questions of fact for the jury).

Charging the jury to decide whether defects render products “unreasonably dangerous” is consistent with the vast majority of states that follow §402A (or §402A-based statutes). *See* Arizona – RAJI (Civil) PLI 4; Arkansas – AMJI Civ. 1017; Colorado – CJI Civ. 14:3; Florida – FSJI (Civ.) 403.7(b); Illinois – IPJI-Civ. 400.06; Indiana – IN-JICIV 2117; Kansas – KS-PIKCIV 128.17; Louisiana – La. CJI §11:2; Maryland – MPJI-Cv 26:12; Massachusetts – CIVJI MA 11.3.1; Minnesota – 4A MPJI-Civ. 75.20; Mississippi – MMJI Civ. §16.2.7; Missouri – MAJI (Civ.) 25.04; Nebraska – NJI2d Civ. 11.24; Oklahoma – OUJI-CIV 12.3; Oregon – UCJI No. 48.07; South Carolina – SCRC – Civ. §32-45 (2009); Tennessee – TPI-Civ. 10.01; Virginia – VPJI §39:15 (implied warranty). *Compare:* Georgia – GSPJI 62.640 (“reasonable care”); New Mexico – NMRA, Civ. UJI 13-1407 (“unreasonable risk”); New Jersey – NJ-JICIV 5.40D-2 (“reasonably safe”); New York – NYPJI 2:120 (“not reasonably safe”).

*Tincher* left open the extent to which the “intended use”/“intended user” doctrine that developed under *Azzarello* remains viable, or conversely, whether it has been displaced by negligence concepts of reasonableness and foreseeability. 104 A.3d at 410; *see, e.g.*, *Pennsylvania Dep’t of Gen. Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (strict liability exists “only for harm that occurs in connection with a product’s intended use by an intended user”). This instruction takes no position on that issue, offering alternative “intended” and “reasonably foreseeable” language.

The contrary SSJI (Civ.) §16.20 omits the §402A phrase “unreasonably dangerous,” thereby ignoring *Tincher*’s return of this “normative principle” of strict liability to the jury. *See Tincher*, 104 A.3d at 400. The SSJI charge thus “employ[s] an incorrect definition of a product ‘defect’ in light of the Supreme Court’s decision” in *Tincher*, and “undervalues the importance of the Supreme Court’s decision” in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) (“*Tincher II*”). The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.1 (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

The second paragraph of the charge, regarding the scope of the unreasonably dangerous determination, follows the pre-*Tincher* §402A decision, *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823 (Pa. 2012), which “declin[ed] to limit [unreasonably dangerous analysis – then “relegated” to the trial court by *Azzarello*] to a particular intended use.” *Id.* at 836. “[A] product’s utility obviously may be enhanced by multi-functionality.” *Id.* Therefore, “alternative designs must be safer to the relevant

set of users overall, not just the plaintiff.” *Id.* at 838. *Accord, e.g., Tincher*, 104 A.3d at 390 n.16 (characterizing *Beard* as holding that the defect determination is “not restricted to considering single use of multi-use product in design defect” case); *Phatak v. United Chair Co.*, 756 A.2d 690, 693 (Pa. Super. 2000) (allowing evidence that “incorporating the design [plaintiffs] proffered would have created a substantial hazard to other workers”); *Kordek v. Becton, Dickinson & Co.*, 921 F. Supp.2d 422, 431 (E.D. Pa. 2013) (the “determination of whether a product is a reasonable alternative design must be conducted comprehensively”).

## 16.20(2) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT

### *Consumer Expectations*

The plaintiff claims that [he/she] was harmed by a product that was defective in that it was unreasonably dangerous under the consumer expectations test.

Under the consumer expectations test, a product is unreasonably dangerous if you find that the product is dangerous to an extent beyond what would be contemplated by the ordinary consumer who purchases the product, taking into account that ordinary consumer’s knowledge of the product and its characteristics.

Under this consumer expectations test, a product is unreasonably dangerous only if the plaintiff proves first, that the risk that the plaintiff claims caused harm was unknowable; and, second, that the risk that the plaintiff claims caused harm was unacceptable to the average or ordinary consumer.

In making this determination, you should consider factors such as the nature of the product and its intended use; the product’s intended user; whether any warnings or instructions that accompanied the product addressed the risk involved; and the level of knowledge in the general community about the product and its risks.

### RATIONALE

This instruction should only be given after the court has made a threshold finding that the consumer expectations test is appropriate, under the facts of a given case, as outlined below.

In *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the court rejected the prevailing standard that a defective product is one that lacks every element necessary to make it safe for use. *Id.* at 379. In its place, the *Tincher* court instituted a “composite” standard for proving when a defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01.

Both tests have their own “theoretical and practical limitations,” and are not both appropriate in every products liability case. *See id.* at 388-89 (limitations of consumer expectations test), 390 (limitations of risk-utility test). Although the plaintiff may choose to pursue one or both theories of defect, that choice does not bind the defense. Rather, the defendant may call on the trial court to act as a “gate-keeper” and to submit to the jury only the test that the evidence warrants. *Id.* at 407 (“A defendant may also seek to have dismissed any overreaching by the plaintiff via appropriate motion and objection”). Judicial “gate-keeping” to ensure that each test is only employed in appropriate cases “maintain[s] the integrity and fairness of the strict products liability cause of action.” *Id.* at 401. As discussed below, post-*Tincher* “gate-keeping” has been repeatedly invoked against the consumer expectations test.

Under the consumer expectations test, a product is unreasonably dangerous by reason of a “defective condition” that makes that product “upon normal use, dangerous beyond the reasonable consumer’s contemplations.” *Tincher*, 104 A.3d at 387 (citations omitted). This test reflects the “surprise element of danger,” and asks whether the danger posed by the product is “unknowable and unacceptable to the average or ordinary consumer.” *See id.*; *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 348 (Pa. Super. 2017).

The consumer expectations test is “reserved for cases in which the everyday experience of the product users permits a conclusion that the product design violated minimum safety

assumptions.” *Tincher*, 104 A.3d at 392 (quoting *Soule v. General Motors Corp.*, 882 P.2d 298, 308-09 (Cal. 1994)). The consumer expectations test does not apply where an “ordinary consumer would reasonably anticipate and appreciate the dangerous condition.” *High*, 154 A.3d at 350 (quoting *Tincher*, 104 A.3d at 387).

As noted above, the Supreme Court recognized several “theoretical and practical limitations” of the consumer expectations test. Because this test only finds a defect where the dangerous condition is unknowable, a product “whose danger is obvious or within the ordinary consumer’s contemplation” would not fall within the consumer expectations test. *Id.* at 388. See *High*, 154 A.3d at 350-51 (obviousness of risk created jury question under *Tincher* factors for consumer expectations test).

On the other end of the spectrum, the consumer expectations test will ordinarily not apply to products of complex design, or that present esoteric risks, because an ordinary consumer simply does not have reasonable safety expectations about those products or those risks. *Tincher*, 104 A.3d at 388. As the *Tincher* court explained:

[A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers’ reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has ‘no idea’ how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.

*Id.* (quoting *Soule* 882 P.2d at 308).

Accordingly, post-*Tincher* cases decline to allow the consumer expectations standard in cases involving complicated machinery. See, e.g., *Yazdani v. BMW of North America, LLC*, 188 F. Supp.3d 468, 493 (E.D. Pa. 2016) (air-cooled motorcycle engine); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439, 452-53 (E.D. Pa. 2016) (“rip fence” on table saw); *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at \*8-9 (E.D. Pa. Sept. 8, 2016) (industrial lift table).

These holdings are consistent with those in other jurisdictions applying a similar consumer expectations test. See, e.g., *Brown v. Raymond Corp.*, 432 F.3d 640 (6<sup>th</sup> Cir. 2005) (ordinary consumer has no expectation regarding safety of forklift design) (applying Tennessee law); *Fremaint v. Ford Motor Co.*, 258 F. Supp.2d 24, 29-30 (D.P.R. 2003) (consumer expectations test “cannot be the basis of liability in a case involving complex technical matters,” such as automotive design); *Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1295-96 (10<sup>th</sup> Cir. 2010) (“complex product liability claims involving primarily technical and scientific information require use of a risk-benefit test rather than a consumer expectations test”) (emphasis original) (applying Colorado law).

The contrary SSJI (Civ.) §16.20 does not use *Tincher*’s formulation of the consumer expectations test, but rather the test enunciated in *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). While *Tincher* at times looked to California law, including *Barker*, in discussing the consumer expectations test, the Pennsylvania Supreme Court chose not to follow *Barker*. Instead, the Court chose the language appearing in the above instruction as the governing test. See *Tincher*, 104 A.3d at 335 (holding that consumer expectations test requires proof that “the danger is unknowable and unacceptable to the average or ordinary consumer”), 387 (a “product is defective [under the consumer expectations test] if the danger is unknowable and unacceptable to the average or ordinary consumer”).

The contrary SSJI’s omission of *Tincher*’s controlling language – “unknowable and unacceptable” – is incorrect. Section 16.20 thus “employ[s] an incorrect definition of a product ‘defect’ in light of the Supreme Court’s decision” in *Tincher*, and “undervalues the importance of the Supreme Court’s decision” in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) (“*Tincher II*”). The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).



**16.20(3) STRICT LIABILITY – DESIGN DEFECT – DETERMINATION OF DEFECT**

***Risk-Utility***

**The plaintiff claims that [he/she] was harmed by a product that was defective in that it was unreasonably dangerous under the risk-utility test.**

**The risk-utility test requires the plaintiff to prove how a reasonable manufacturer should weigh the benefits and risks involved with a particular product, and whether the omission of any feasible alternative design proposed by the plaintiff rendered the product unreasonably dangerous.**

**In determining whether the product was defectively designed under the risk-utility test, and whether its risks outweighed the benefits, or utility, of the product, you may consider the following factors:**

**[Not all factors apply to every case; charge only on those reasonably raised by the evidence.]**

**(1) The usefulness, desirability and benefits of the product to all ordinary consumers – the plaintiff, other users of the product, and the public in general – as compared to that product’s dangers, drawbacks, and risks of harm;**

**(2) The likelihood of foreseeable risks of harm and the seriousness of such harm to foreseeable users of the product;**

**(3) The availability of a substitute product which would meet the same need and involve less risk, considering the effects that the substitute product would have on the plaintiff, other users of the product, and the public in general;**

**(4) The relative advantages and disadvantages of the design at issue and the plaintiff’s proposed feasible alternative, including the effects of the alternative design on product costs and usefulness, such as, longevity, maintenance, repair, and desirability;**

**(5) The adverse consequences of, including safety hazards created by, a different design to the plaintiff, other users of the product, and the public in general;**

**(6) The ability of product users to avoid the danger by the exercise of care in their use of the product; and**

**(7) The awareness that ordinary consumers would have of dangers associated with their use of the product, and their likely knowledge of such dangers because of general public knowledge, obviousness, warnings, or availability of training concerning those dangers.**

**RATIONALE**

This instruction should only be given after the court has made a threshold finding that the risk-utility test is appropriate, under the facts of a given case, as outlined below.

In *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the court rejected the prevailing standard that a defective product is one that lacks every element necessary to make it safe for use. *Id.* at 379. In its place, the *Tincher* court instituted a “composite” standard for proving when defect makes a product unreasonably dangerous: this composite standard includes both a consumer expectations test, and a risk-utility test. *See id.* at 400-01.

Both tests have their own “theoretical and practical limitations,” and are not both appropriate in every products liability case. *See id.* at 388-89 (limitations of consumer expectations test), 390 (limitations of risk-utility test). Although the plaintiff may choose to pursue one or both theories of defect, that choice does not bind the defense. Rather, the defendant may call on the trial court to act as a “gate-keeper” and to submit to the jury only the test that the evidence warrants. *See id.* at 407 (“A defendant may also seek to have dismissed any overreaching by the plaintiff via appropriate motion and objection”). Judicial “gate-keeping” to ensure that each test is only employed in appropriate cases “maintain[s] the integrity and fairness of the strict products liability cause of action.” *Id.* at 401.

Under the risk-utility test, a product is in a defective condition “if a ‘reasonable person’ would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions.” *Id.* at 389 (citations omitted). A product is not defective if the seller’s precautions anticipate and reflect the type and magnitude of the risk posed by the use of the product. *See id.* The risk-utility test asks courts to “analyze *post hoc* whether a manufacturer’s conduct in manufacturing or designing a product was reasonable.” *Id.* This standard is a “negligence-derived risk-utility alternative formulation” that “reflects the negligence roots of strict liability.” *Id.* at 389, 403.

In defining this “cost-benefit analysis,” many jurisdictions rely on the seven risk-utility factors identified by John Wade, a leading authority on tort law. *See id.* at 389-90 (quoting John W. Wade, ON THE NATURE OF STRICT TORT LIABILITY FOR PRODUCTS, 44 Miss. L.J. 825, 837-38 (1973)). The Pennsylvania Supreme Court did not fully endorse these so-called “Wade factors,” as not all would necessarily apply, depending on the “allegations relating to a particular design feature.” *See id.* at 390. Given their longevity and widespread approval, six of the seven concepts addressed by the Wade factors are incorporated into the above instruction, to be selected and charged in particular cases as the evidence warrants. *See generally Phatak v. United Chair Co.*, 756 A.2d 690, 695 (Pa. Super. 2000) (applying several Wade factors; “the safeness of [plaintiffs’] proposed design feature was a factor that was relevant to the determination of whether the chair was ‘defectively designed’”). The above instruction omits the final Wade factor, which concerns the availability of insurance to the defendant. This consideration is inappropriate for a jury charge in Pennsylvania. *See, e.g., Deeds v. University of Pennsylvania Medical Center*, 110 A.3d 1009, 1013-14 (Pa. Super. 2015) (discussion of insurance violated collateral source rule). It has been replaced with a factor examining various avenues of available public knowledge about relevant product risks. Other factors, not listed here, may be appropriate for jury consideration in particular cases. *See Tincher*, 104 A.3d at 408 (“the test we articulate today is not intended as a rigid formula to be offered to the jury in all situations”).

Like the consumer expectations test, the risk-utility test has “theoretical and practical limitations.” *See Tincher*, 104 A.3d at 390. The goal of the risk-utility test is to “achieve efficiency” by weighing costs and benefits, but such an economic calculation can, in some respects, “conflict[] with bedrock moral intuitions regarding justice in determining proper compensation for injury” in particular cases. *Id.* Additionally, the holistic perspective to product design suggested by the risk-utility test “may not be immediately responsive” in a case focused on a particular design feature. *Id.* Thus, although no decision has yet occurred, there may be cases where the risk-utility test is inappropriate.

The contrary SSJI (Civ.) §16.20 truncates the factors to be considered in the risk-utility analysis. It paraphrases only two of the Wade factors, drawing not from *Tincher*, but from the California decision, *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). While *Tincher* at times looked to California law, including *Barker*, in describing the risk-utility test, the Pennsylvania Supreme Court chose not to follow *Barker*, and instead cited the Wade factors in preference to the test enunciated in *Barker*. Section 16.20 thus “employ[s] an incorrect definition of a product ‘defect’ in light of the Supreme Court’s decision” in *Tincher*, and “undervalues the importance of the Supreme Court’s decision” in *Tincher*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399, 401 (Pa. Super. 2018) (“*Tincher II*”).

*Tincher*’s broader sweep indicates that it would be error to foreclose potentially relevant factors *a priori*. *See Tincher*, 104 A.3d at 408 (“In charging the jury, the trial court’s objective is ‘to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict.’ Where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted.”) (internal citation omitted). The

Wade-factor-based approach here, rather than SSJI §16.20(1), best reflects Pennsylvania law, and offers a wide-ranging list of factors in the proposed jury instruction, with the intent that the court and the parties in each particular case will identify those factors reasonably raised by the evidence for inclusion in the ultimate jury charge. The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.1 (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

\* \* \*

The contrary SSJI (Civ.) §16.20 also includes an “alternative” jury instruction that would shift the burden of proof in the risk-utility test to the defendant. Such an instruction is premature and speculative. It should not be included in any standard charge. As noted, the *Tincher* court drew on certain principles of California law, while rejecting others. See *Tincher*, 104 A.3d at 408 (adopting *Barker* “composite” defect analysis); *id.* at 377-78 (rejecting *Cronin* “rings of negligence” approach). *Tincher’s* discussion of *Barker* and the burden of production and persuasion was pure *dictum*, and recognized as such. The parties had not briefed the issue, and the Court expressly declined to decide it. See *id.* at 409 (“[W]e need not decide it [*i.e.*, the question of burden-shifting] to resolve this appeal”). Rather, the Supreme Court also discussed “countervailing considerations [that] may also be relevant,” including, *inter alia*, the principle that Pennsylvania tort law assigns the burden of proof to the plaintiff. *Id.*

In Pennsylvania, the burden of proving product defect has always belonged to the plaintiff. See *Tincher*, 104 A.3d at 378 (discussing “plaintiff’s burden of proof” under *Azzarello*). Accord, *e.g.*, *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1003 (Pa. 2003); *Schroeder v. Pa. Dep’t of Transportation*, 710 A.2d 23, 27 (Pa. 1998); *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997); *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995); *Walton v. Avco Corp.*, 610 A.2d 454, 458 (Pa. 1992); *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 754 (Pa. 1989). Shifting the burden of proof would be a drastic step and a change to a foundational principle of tort law. To take that step would run counter to the *Tincher* Court’s repeated respect for “judicial modesty.” See *Tincher*, 104 A.3d at 354 n.6, 377-78, 397-98, 406. Indeed, the *Tincher* Court explained that resolution of the burden-shifting question, like other subsidiary issues, would require targeted briefing and advocacy in a factually apposite case. See *id.* at 409-10. Accordingly, the expressly undecided question of burden-shifting is inappropriate for inclusion in a standard jury charge.

## 16.30

### STRICT LIABILITY – DUTY TO WARN/WARNING DEFECT

Even a perfectly made and designed product may be defective if not accompanied by adequate warnings or instructions. Thus, the defendant may be liable if you find that inadequate, or absent, warnings or instructions made its product unreasonably dangerous for [intended] [reasonably foreseeable] uses. A product is defective due to inadequate warnings when distributed without sufficient warnings to notify [intended] [reasonably foreseeable] users of non-obvious dangers inherent in the product.

Factors that you may consider in deciding if a warning is adequate are the nature of the product, the identity of the user, whether the product was being used in an [intended] [reasonably foreseeable] manner, the expected experience of its intended users, and any implied representations by the manufacturer or other seller.

#### RATIONALE

The RESTATEMENT (SECOND) OF TORTS §402A, is the basis for strict products liability in Pennsylvania. Section 402A limits liability to products “in a defective condition *unreasonably dangerous* to the user or consumer.” Restatement (Second) of Torts §402A (emphasis added). “Pennsylvania remains a Second Restatement jurisdiction.” *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014). Thus,

in a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is “defective”; in the context of a strict liability claim, whether a product is defective depends upon whether that product is “unreasonably dangerous.”

*Tincher*, 104 A.3d at 380, 399. “[T]he notion of ‘defective condition unreasonably dangerous’ is the normative principle of the strict liability cause of action.” *Id.* at 400.

For many years, the now-overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), decision prohibited jury instructions in products liability cases from using the term “unreasonably dangerous.” Instead of juries making this decision, trial courts were required to make “threshold” determinations” whether a “plaintiff’s allegations” supported a finding that the product at issue was “unreasonably dangerous,” justifying submission of the case to the jury. *Id.* at 1026; *Dambacher v. Mallis*, 485 A.2d 408, 423 (Pa. Super. 1984) (en banc), *appeal dismissed*, 500 A.2d 428 (Pa. 1985).

*Tincher* expressly overruled *Azzarello*, finding *Azzarello*’s division of labor between judge and jury “undesirable” because it “encourage[d] trial courts to make either uninformed or unfounded decisions of social policy.” *Tincher*, 104 A.3d at 381. “[T]rial courts simply do not have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous.” *Id.* at 380.

While neither *Azzarello* nor *Tincher* involved alleged inadequate product warnings or instructions, comment j to §402A recognizes that “to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning.” *Tincher* acknowledged that overruling *Azzarello* “may have an impact upon . . . warning claims.” 104 A.3d at 409. Before *Tincher*, the Supreme Court held that “[t]o establish that the product was defective, the plaintiff must show that a warning of a particular danger was either inadequate or altogether lacking, and that this deficiency in warning made the product ‘unreasonably dangerous.’” *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995). *Tincher* restored the “unreasonably dangerous” element of strict liability to the jury as the finder of fact. 104 A.3d at 380-81.

After *Tincher*, “[a] plaintiff can show a product was defective” where a “deficiency in warning made the product unreasonably dangerous.” *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 351 (Pa. Super. 2017) (quoting *Phillips, supra*). With design and warning defect claims routinely tried together, juries would be confused, and error invited, by using the overruled *Azzarello* instruction in warning cases. Thus, the *Tincher*/§402A “unreasonably dangerous” element should be charged in warning

cases. *See Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015) (*Tincher* “provided something of a road map for navigating the broader world of post-*Azzarello* strict liability law” in warning cases), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Horst v. Union Carbide Corp.*, 2016 WL 1670272, at \*15 (Pa. C.P. Lackawanna Co. April 27, 2016) (*Tincher* and “defective product unreasonably dangerous” apply to warning claims); *Igwe v. Skaggs*, 258 F. Supp.3d 596, 609-10 (W.D. Pa. 2017) (plaintiff “may recover only if the lack of warning rendered the product unreasonably dangerous”); *Wright v. Ryobi Technologies, Inc.*, 175 F. Supp.3d 439 (E.D. Pa. 2016) (“[a] plaintiff raising a failure-to-warn claim must establish . . . the product was sold in a defective condition unreasonably dangerous to the user”); *Inman v. General Electric Co.*, 2016 WL 5106939, at \*7 (W.D. Pa. Sept. 20, 2016) (“a plaintiff raising a failure to warn claim must establish . . . that the product was sold in a defective condition ‘unreasonably dangerous’ to the user”); *Bailey v. B.S. Quarries, Inc.*, 2016 WL 1271381, at \*14-15 (M.D. Pa. March 31, 2016) (*Azzarello* . . . and its progeny are no longer good law” with respect to plaintiff’s warning claim).

*Tincher* relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook further supports applying *Tincher*’s negligence-influenced defect analysis to warning claims. Owen Handbook §9.2 at 589 (“claims for warning defects in negligence and strict liability in tort are nearly, or entirely, identical”).

Another issue *Tincher* left open is the extent to which the “intended use”/“intended user” doctrine that developed under *Azzarello* remains viable, or conversely, whether it has been displaced by negligence concepts of reasonableness and foreseeability. 104 A.3d at 410; *see, e.g., Pennsylvania Dep’t of Gen. Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) (strict liability exists “only for harm that occurs in connection with a product’s intended use by an intended user”). This instruction takes no position on that issue, offering alternative “intended” and “reasonably foreseeable” language.

The Pa. Bar institute’s SSJI (Civ.) §16.122 fails to follow *Tincher* by omitting §402A’s “unreasonably dangerous” defect standard, returned to the jury by *Tincher*. The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*’s “significant[] alter[ation of] the common law framework for strict products liability.” *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017).

Also unlike the SSJI, this instruction follows *Tincher* by including factors that a jury may consider in evaluating whether a defective warning made the product unreasonably dangerous. *See* 104 A.3d at 351 (“when a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict”). The factors are derived from *Tincher*’s list of those relevant to the “consumer expectations” design defect test. *Id.* at 387. Using these factors is appropriate since “express” representations such as warnings and instructions are a major source of consumer expectations about products. *Id.*; *High*, 154 A.3d at 348.

The duty to provide an adequate product warning can arise even after the product is sold, under certain circumstances. First, as you were instructed earlier, the product's unreasonably dangerous condition must have existed at the time the product left the defendant's control. Second, the potential harm must be both substantial and preventable. Third, the defendant must have learned about the risk created by the product's unreasonably dangerous condition sufficiently before the plaintiff suffered harm so that the defendant could take reasonable steps to warn reasonably foreseeable users about the risk. Fourth, a reasonable and practical means must have existed so that the defendant's post-sale warning would have been received and acted upon, either by the plaintiff, or by someone else in a position to act, in a way that would have prevented the plaintiff's harm.

Factors that you may consider in deciding if a post-sale warning should have been given include the nature of the product, the nature and likelihood of harm, the feasibility and expense of issuing a warning, whether the claimed defect was repairable, whether the product was mass-produced, or alternatively sold in a small and distinct market, whether the product's users could be easily identified and reached, and the likelihood that the product's purchasers would be unaware of the risk of harm,.

#### RATIONALE

Pennsylvania recognized a post-sale duty to warn in *Walton v. Avco Corp.*, 610 A.2d 454, 459 (Pa. 1992). The duty recognized in *Walton* was limited by negligence considerations of reasonableness and practicality. *Id.* at 459 (“sellers must make reasonable attempts to warn the user or consumer”). “[T]he peculiarities of the industry “support[ed] the imposition” of a post-sale duty to warn. The product was not an “ordinary good . . . that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate.” *Id.* Rather, the product was “not mass-produced or mass-marketed.” *Id.* Products “sold in a small and distinct market” with product servicers that “are convenient and logical points of contact,” are candidates for post-sale warning duties, particularly where the manufacturer “remained in contact” with such servicers “for the very purpose of keeping [them] current on all pertinent information.” *Id.*

*Walton's* reliance on considerations of reasonableness and practicality was vindicated when *Tincher* abolished the dichotomy between negligence and strict liability. *See Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 380-81 (Pa. 2014) (*Azzarello's* “strict” separation of negligence and strict liability concepts is “undesirable”; “elevat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative” not “consistent with reason,” and “validate[d] the suggestion that the cause of action, so shaped, was not viable”).

No post-sale duty to warn has been imposed on “common business appliances.” *Habecker v. Clark Equipment Co.*, 797 F. Supp. 381, 388 (M.D. Pa. 1992), *aff'd*, 36 F.3d 278 (3d. Cir. 1994); *Boyer v. Case Corp.*, 1998 WL 205695, at \*1-2 (E.D. Pa. 1998) (same). *See Ierardi v. Lorillard, Inc.*, 777 F. Supp. 420, 423 (E.D. Pa. 1991) (impossible to give post-sale warnings to cigarette smokers). There must be “logical and convenient locations through which [product] manufacturers can contact customers” before a post-sale duty to warn can exist. *Trask v. Olin Corp.*, 2016 WL 1255302, at \*10 (W.D. Pa. March 31, 2016) (post-*Tincher*).

*Tincher* also confirmed that the RESTATEMENT (SECOND) OF TORTS §402A, remains the basis for strict products liability in Pennsylvania. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014). As discussed in the rationale for Instruction §16.10, section 402A requires that any defect exist when the product leaves the defendant's control. In *DeSantis v. Frick Co.*, 745 A.2d 624 (Pa. Super. 1999), the court applied the defect-at-sale requirement in the context of a post-sale duty to warn, holding that “whether the claim is grounded in negligence or strict liability, no post-sale duty

to warn about changes in technology existed where the product was not defective at the time of sale.” *Id.* at 630-31. *DeSantis* therefore rejected Restatement (Third) of Torts, Products Liability §10 (1998), which extended post-sale warning duties to products not defective when leaving the defendant’s control. *Accord Inman v. General Electric Co.*, 2016 WL 5106939, at \*6 (W.D. Pa. Sept. 20, 2016) (following *DiSantis* post-*Tincher*); *Trask*, 2016 WL 1255302, at \*9 n.20 (same).

The factors in the second paragraph are drawn not only from *Walton*, but also from the extensive discussion in *Patton v. Hutchinson Wil-Rich Manufacturing Co.*, 861 P.2d 1299, 1315 (Kan. 1993).

Beyond warnings, no duty to recall or retrofit a product exists under Pennsylvania law. *Lynch v. McStome & Lincoln Plaza Assocs.*, 548 A.2d 1276, 1281 (Pa. Super. 1988); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at \*11 (Pa. C.P. Clarion Co. Oct. 19, 2015) (post-*Tincher*); *Habecker v. Copperloy Corp.*, 893 F.2d 49, 54 (3d Cir. 1990) (applying Pennsylvania law); *Talarico v. Skyjack, Inc.*, 191 F. Supp.3d 394, 398-401 (M.D. Pa. 2016) (post-*Tincher*); *McLaud v. Industrial Resources, Inc.*, 2016 WL 7048987, at \*8 (M.D. Pa. 2016) (post-*Tincher*); *Inman*, 2016 WL 5106939, at \*7 (post-*Tincher*); *Padilla v. Black & Decker Corp.*, 2005 WL 697479, \*7 (E.D. Pa. 2005); *Girard v. Allis Chalmers Corp.*, 787 F. Supp. 482, 486 n.3 (W.D. Pa. 1992); *Boyer*, 1998 WL 205695, at \*2. Nor has a general post-sale duty to warn been imposed on a successor corporation, corporate affiliates, or third-party suppliers, *See LaFountain v. Webb Industies Corp.*, 951 F.2d 544, 549 (3d Cir. 1991) (applying Pennsylvania law); *Zhao v. Skinner Engine Co.*, 2013 WL 6506125, at \*4 & n.13 (E.D. Pa. Dec. 10, 2013); *Olejar v. Powermatic Division*, 1992 WL 236960, at \*5 (E.D. Pa. Sept. 17, 1992); *Gillyard v. Eastern Lift Truck Co.*, 1992 WL 25826, at \*3 (E.D. Pa. Feb. 7, 1992).

## 16.40 “HEEDING PRESUMPTION” FOR SELLER/DEFENDANT WHERE WARNINGS OR INSTRUCTIONS ARE GIVEN

Where the defendant provides adequate product warnings or instructions, it may reasonably assume that those warnings will be read and heeded. You may not find the defendant liable for harm caused by the plaintiff not reading or heeding adequate warnings or instructions provided by the defendant.

### RATIONALE

“Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.” Restatement (Second) of Torts §402A, comment j (1965). Comment j is the law of Pennsylvania. *E.g.*, *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Hahn v. Richter*, 673 A.2d 888, 890 (Pa. 1996) (both applying comment j). Thus, “comment j gives an evidentiary advantage to the defense” where warnings are adequate. *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff’d mem.*, 881 A.2d 1262 (Pa. 2005). The comment j presumption was rejected by the Restatement (Third) of Torts, Products Liability §2, comment l & Reporter’s Notes (1998). In *Tincher*, however, Pennsylvania declined to “move” to the Third Restatement. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 399 (Pa. 2014). Thus, the comment j presumption remains the law of Pennsylvania.

In *Davis* the defendant could not be liable for its product lacking an unremovable guard where it adequately warned users to use the guard and avoid the area in question while the product was operating. Because “the law presumes that warnings will be obeyed,” *id.* at 190 (following comment j), it was “untenable” that defendants “must anticipate that a specific warning” would not be obeyed. *Id.* at 190-91. Disobedience of adequate warnings is unforeseeable as a matter of law. *Id. Accord Gigus v. Giles & Ransome, Inc.*, 868 A.2d 459, 462-63 (Pa. Super. 2005); *Fletcher v. Raymond Corp.*, 623 A.2d 845, 848 (Pa. Super. 1993); *Roudabush v. Rondo, Inc.*, 2017 WL 3912370, at \*7 (W.D. Pa. Sept. 5, 2017) (post-*Tincher*). Thus, where plaintiffs advance design defect allegations, as in *Davis*, *Gigus*, *Fletcher*, and *Roudabush*, juries should be instructed on the legal import of relevant warnings, should they find them adequate.

The Pa. Bar Institute’s SSJI 16.40 is classified as a warning instruction. That is incorrect. In warning defect cases, where the warning is “proper and adequate,” *id.*, the defendant necessarily prevails on the warning’s adequacy alone. *E.g.*, *Mackowick v. Westinghouse Electric Corp.*, 575 A.2d 100, 103-04 (Pa. 1990). Thus a warning causation instruction predicated on an “adequate” warning is superfluous because where a warning is found adequate, the jury will never reach causation. The effect of adequate warnings can only be a subject of jury consideration where the defect that is claimed to render the product unreasonably dangerous is not the warning itself. *See Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at \*2-3 (E.D. Pa. Jan. 26, 2017) (jury to consider whether plaintiff conduct in not “heeding instructions” that “a reasonable consumer” would have followed is part of design defect analysis).



## 16.50 STRICT LIABILITY – DUTY TO WARN – “HEEDING PRESUMPTION” IN WORKPLACE INJURY CASES

[This instruction is only to be given in cases involving workplace injuries.]

If you find that warnings or instructions were required to make the product nondefective, and that the product was unreasonably dangerous without such warnings or instructions, then the law presumes, and you would have to presume, that, if there had been adequate warnings or instructions, the plaintiff would have followed them.

This presumption is rebuttable, and to overcome it, the defendant’s evidence must establish that the plaintiff would not have heeded adequate warnings or instructions. If you find that the defendant has not rebutted this presumption, then you may not find for the defendant based on a conclusion that, even with adequate warnings or instructions, the plaintiff would not have read or heeded them.

### RATIONALE

During the *Azzarello* era, some courts recognized a “logical corollary” to the comment j presumption that adequate warnings are read and heeded (*see* Rationale for SSJI 16.40, *supra*) that where a warning is inadequate, a plaintiff will be presumed to have read and heeded an adequate warning, had one been given. *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa. Super. 1999), *appeal granted*, 743 A.2d 920 (Pa. 1999); *Pavlik v. Lane Limited/Tobacco Exporters International*, 135 F.3d 876, 883 (3d Cir. 1998) (applying Pennsylvania law). However, the bankruptcy of the asbestos defendant in *Coward* foreclosed the Pennsylvania Supreme Court from ruling on the issue in *Coward* and the high court has yet to revisit it.

In *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the court declined to adopt the Third Restatement of Torts, which would have abolished the comment j presumption, and thus its “corollary.” *Id.* at 399; *compare* Restatement (Third) of Torts, Products Liability §2, comment l & Reporter’s Notes (1998).

In Pennsylvania, the heeding presumption has been limited to products liability cases involving workplace injuries such as *Coward*. “[W]here the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful.” *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff’d*, 881 A.2d 1262 (Pa. 2005) (per curiam); *accord Moroney v. General Motors Corp.*, 850 A.2d 629, 634 & n.3 (Pa. Super. 2004) (heeding presumption “authorized only in cases of workplace exposure,” not automobiles); *Goldstein v. Phillip Morris*, 854 A.2d 585, 587 (Pa. Super. 2004) (same as *Viguers*); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at \*1 (Pa. C.P. Clarion Co. Oct. 19, 2015). *See Demmler v. SmithKline Beecham Corp.*, 671 A.2d 1151, 1155 (Pa. Super. 1996) (“proximate cause is not presumed” in prescription medical product cases).

The heeding presumption is “rebuttable upon evidence that the plaintiff would have disregarded a warning even had one been given, *Coward*, 729 A.3d at 620, with the burden of production of such evidence initially on the defendant. *Coward*, 720 A.2d at 622. Once the defendant has produced rebuttal evidence, the burden “shifts back to the plaintiff to produce evidence that he would have acted to avoid the underlying hazard had the defendant provided an adequate warning.” *Id.* Examples of proper rebuttal evidence are: (1) that the plaintiff already knew of the risk, or (2) in fact failed to read the warnings (if any) that were given. *Id.* at 620-21 (discussing *Sherk v. Daisy-Heddon*, 450 A.2d 615, 621 (Pa. 1982), and *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1171 (Pa. 1995)); *see, e.g., Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp.2d 530, 543-44 (E.D. Pa. 2005). Rebutting the heeding presumption requires only evidence “sufficient to support a finding contrary to the presumed fact.” *Coward*, 729 A.2d at 621.

**16.60 STRICT LIABILITY – DUTY TO WARN – CAUSATION, WHEN "HEEDING PRESUMPTION"  
FOR PLAINTIFF IS REBUTTED**

**[No instruction should be given.]**

**RATIONALE**

Once the heeding presumption has been rebutted, it “is of no further effect and drops from the case.” *Coward*, 729 A.2d at 621; *accord, e.g., Overpeck v. Chicago Pneumatic Tool Co.*, 823 F.2d 751, 756 (3d Cir. 1987) (applying Pennsylvania law). Thus, there is no need for a separate standard instruction, concerning how the jury should proceed once the presumption has been rebutted. *Cf.* PBI SSJI (Civ) 16.60 (“Duty to Warn – Causation, When ‘Heeding Presumption’ for Plaintiff Is Rebutted”). Where the jury is to decide whether the heeding presumption is rebutted, the only additional instruction appropriate in the event that the jury finds in favor of rebuttal is the generally applicable causation instruction. Thus, there is no need for a separate SSJI 16.60.

## 16.70 STRICT LIABILITY – FACTUAL CAUSE

**If you find that the product was defective, the defendant is liable for all harm caused to the plaintiff by such defective condition. A defective condition is the factual cause of harm if the harm would not have occurred absent the defect. In order for the plaintiff to recover in this case, the defendant's conduct must have been a factual cause of the accident.**

### RATIONALE

This instruction incorporates the first paragraph of PBI SSJI (Civ) 16.70, which is a correct statement of the “but for” causation requirement of Pennsylvania law. “But for” causation is a well-established element in ordinary Pennsylvania product liability cases. *E.g.*, *Summers v. Giant Food Stores, Inc.*, 743 A.2d 498, 509 (Pa. Super. 1999); *First v. Zem Zem Temple*, 686 A.2d 18, 21 & n.2 (Pa. Super. 1996); *Klages v. General Ordnance Equipment Corp.*, 367 A.2d 304, 313 (Pa. Super. 1976); *E.J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F. Supp. 883, 889 (E.D. Pa. 1985) (followed in *Summers* and *First*). Where more than one possible cause of the plaintiff’s harm is at issue, *see* instruction 16.80, below.

The PBI commentary, however, is no longer viable after *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). Its suggestion that “foreseeability,” and thus abnormal use, were “stricken from strict liability” as “a test of negligence” is no longer the law. *Tincher* found “undesirable” *Azzarello’s* “strict” separation of negligence and strict liability concepts. “[E]levat[ing] the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative” was not “consistent with reason,” and “validate[d] the suggestion that the cause of action, so shaped, was not viable.” *Id.* at 380-81. Far from separating strict liability and negligence, *Tincher* emphasized their overlap. *Id.* at 371 (describing “negligence-derived risk-utility balancing in design defect litigation”); *id.* (“in design cases the character of the product and the conduct of the manufacturer are largely inseparable”); *id.* at 401 (“the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty”) (internal citations omitted).

The PBI commentary as to abnormal use, relying on the plurality decision in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975), is also obsolete in that *Berkebile* was overruled, specifically as to abnormal use, by *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1100 (Pa. 2012) (rejecting “non-precedential sentiments raised by the lead opinion in *Berkebile* that ‘abnormal use’ is to be used as rebuttal evidence only”). As confirmed in *Reott*, abnormal use remains a well-established strict liability defense in Pennsylvania. *See also* *Barnish v. KWI Building Co.*, 980 A.2d 535, 544-45 (Pa. 2009); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 617-18 (Pa. 1982); *Brill v. Systems Resources, Inc.*, 592 A.2d 1377, 1379 (Pa. Super. 1991); *Metzgar v. Playskool Inc.*, 30 F.3d 459, 464-65 & n.9 (3d Cir. 1994) (applying Pennsylvania law).

Other topics mentioned in PBI SSJI (Civ) 16.70 are separately addressed in these suggested instructions. The proper use of evidence of a plaintiff’s conduct is addressed in suggested instruction 16.122(4). Crashworthiness is addressed in suggested instructions 16.175, 16.176, and 16.177.

## 16.80 PRODUCTS LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING CAUSES)

**In this case you must evaluate evidence of several possible causes, including a defective condition in the defendant’s product, to decide which, if any, are factual causes of the plaintiff’s harm. A possible cause becomes a legal cause of the plaintiff’s harm when it was a substantial factor in bringing that harm about. In order for the plaintiff to recover in this case, the defective condition in the defendant’s product thus must have been a substantial factor in bringing about the plaintiff’s harm. More than one substantial factors may combine to bring about the plaintiff’s harm.**

**You should use your common sense in determining whether each possible cause was a substantial factor in bringing about the plaintiff’s harm. A substantial factor must be an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the plaintiff’s harm.**

### RATIONALE

This instruction restores the “substantial factor” concurrent causation test of Restatement (Second) of Torts §431 (1965), in concurrent cause cases. “We have adopted a ‘substantial factor’ standard for legal causation.” *Commonwealth v. Terry*, 521 A.2d 398, 407 (Pa. 1987). The Pennsylvania Supreme Court has repeatedly confirmed “substantial factor” as the proper concurrent causation standard specifically in product liability cases. “In a products liability action, Pennsylvania law requires that a plaintiff prove . . . that the [product] defect was the substantial factor in causing the injury.” *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1037 n.2 (Pa. 2016) (quoting *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997)). See *Betz v. Pneumo Abex LLC*, 44 A.3d 27, 58 (Pa. 2012); *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1165 (Pa. 2010); *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007); *Harsh v. Petroll*, 887 A.2d 209, 213 n.9 (Pa. 2005). See also Restatement (Second) of Torts §431 (1965).

The second paragraph is based on the concurrent causation jury charge affirmed in *Roverano v. John Crane, Inc.*, 177 A.3d 892, 899 (Pa. Super. 2017). “[T]he jury should consider [whether] the plaintiff’s exposure to each defendant’s product “was on the one hand, a substantial factor or a substantial cause or, on the other hand, whether the defendant’s conduct was an insignificant cause or a negligible cause.” *Id.* at 897 (quoting *Rost*, 151 A.3d at 1049). “[W]e have consistently held that multiple substantial causes may combine and cooperate to produce the resulting harm to the plaintiff.” *Id.* at 898

While the PBI’s SSJI (Civ.) initially enunciated the correct “substantial factor” concurrent causation standard (*e.g.* SSJI (Civ.) §8.04 (1980 revision)), the current suggested instructions, use only “factual cause,” a vague term that has not been recognized as an adequate causation standard by the Pennsylvania Supreme Court. SSJI (Civ.) §§16.70. 16.80. Given the well-established Pennsylvania legal pedigree of “substantial factor” causation, and that terminology’s superior ability to convey the concept of causation to the jury in language laypersons can understand, these suggested instructions adopt “substantial factor” as the standard for charging the jury.

## 16.85 PRODUCTS LIABILITY – (MULTIPLE POSSIBLE CONTRIBUTING EXPOSURES)

In this case you must evaluate evidence of the [plaintiff's/decendent's] exposure to asbestos from several possible sources. In order to recover from any of the defendants, plaintiff must establish that [s/he/the decedent] inhaled asbestos fibers from that defendant's product(s), and that the the [plaintiff's/decendent's] exposure from that defendant's product(s) was a substantial factor in causing the [plaintiff's/decendent's] harm. You may find asbestos exposure to be such a substantial factor if you believe that evidence establishes that the [plaintiff/decedent] was exposed to that defendant's asbestos containing product(s): (1) sufficiently frequently; (2) with sufficient regularity; (3) and the exposure was sufficiently proximate – that is, [s/he] was close enough to the product – that it contributed to [his/her] harm. You must make this determination as to each defendant separately. However, more than one substantial factors may combine to bring about the [plaintiff's/decendent's] harm.

You should use your common sense in determining whether each possible cause was a substantial factor in bringing about the [plaintiff's/decendent's] harm. A substantial factor must be an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the plaintiff's harm.

### RATIONALE

In asbestos litigation, the “substantial factor” concurrent causation test (see Instruction §16.80) has been refined to require the plaintiff to produce “evidence concerning the frequency, regularity, and proximity of [the plaintiff's or the decedent's] exposure to asbestos-containing products sold by” each defendant. *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007). See also *Betz v. Pneumo Abex LLC*, 44 A.3d 27, 56-57 (Pa. 2012) (discussing application of frequency, regularity, and proximity test); *Nelson v. Airco Welders Supply*, 107 A.3d 146, 157-58 (Pa. Super. 2014) (en banc) (same). “Our decisions in *Gregg* and *Betz* aligned Pennsylvania with the majority of other courts adopting the ‘frequency, regularity, and proximity’ test.” *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016).

Under this test, “to create a jury question, a plaintiff must adduce evidence that exposure to defendant's asbestos-containing product was sufficiently ‘frequent, regular, and proximate’ to support a jury's finding that defendant's product was substantially causative of the disease.” *Rost*, 151 A.3d at 1044. Such evidence varies from case to case, but must “tak[e] into consideration exposure history, individual susceptibility, biological plausibility, and relevant scientific evidence (including epidemiological studies).” *Id.* at 1046 (footnote omitted). A single, or *de minimis* exposure to a defendant's product is insufficient. *Id.* at 1048 (“causation experts may not testify that a single exposure (i.e., ‘one or a *de minimis* number of asbestos fibers’) is substantially causative”); *Vanaman v. DAP, Inc.*, 966 A.2d 603, 610 (Pa. Super. 2009) (en banc) (“very minimal exposure is insufficient to implicate a fact issue concerning the substantial-factor causation”).

The rest of this instruction incorporates the general instruction on substantial factor causation discussed in Instruction §16.80.

Because the frequency, regularity, and proximity test has often been applied in asbestos mesothelioma cases, this instruction includes as optional phrasing consistent with a wrongful death action.

While the frequency, regularity, and proximity test has to date been limited to asbestos litigation, it is possible that this test might apply in other multiple exposure cases involving other hazardous substances. See *Melnick v. Exxon Mobil Corp.*, 2014 WL 10916974, at \*7 (Pa. Super. June 9, 2014) (mem.) (test applies in “exposure cases,” which could include benzene).

## 16.90 STRICT LIABILITY – MANUFACTURING DEFECT – MALFUNCTION THEORY

The plaintiff may prove a manufacturing defect indirectly by showing the occurrence of a malfunction of a product during normal use, without having to prove the existence of a specific defect in the product that caused the malfunction. The plaintiff must prove three facts: that the product malfunctioned, that it was given only normal or reasonably foreseeable use prior to the accident, and that no reasonable secondary causes were responsible for the product malfunction.

### RATIONALE

The so-called “malfunction theory” is a method of circumstantial proof of defect available “[i]n certain cases of alleged manufacturing defects.” *Long v. Yingling*, 700 A.2d 508, 514 (Pa. Super. 1997). To establish a basis for liability under the malfunction theory, a plaintiff must prove three things: a product malfunction, only normal product use, and absence of “reasonable secondary causes” for the malfunction:

First, the “occurrence of a malfunction” is merely circumstantial evidence that the product had a defect, even though the defect cannot be identified. The second element in the proof of a malfunction theory case, which is evidence eliminating abnormal use or reasonable, secondary causes, also helps to establish the first element of a standard strict liability case, the existence of a defect. By demonstrating the absence of other potential causes for the malfunction, the plaintiff allows the jury to infer the existence of defect from the fact of a malfunction.

*Barnish v. KWI Building Co.*, 980 A.2d 535, 541 (Pa. 2009). Without this proof, “[t]he mere fact that an accident happens . . . does not take the injured plaintiff to the jury.” *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d 489, 496 (Pa. Super. 1997).

This instruction follows the post-*Barnish* charge approved in *Wiggins v. Synthes*, 29 A.3d 9, 18-19 (Pa. Super. 2011), as modified by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), to include “reasonably foreseeable” as the standard for abnormal use. Prior to *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), the standard for abnormal use in a malfunction theory case “depend[ed] on whether the use was reasonably foreseeable by the seller.” *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 921 n.13 (Pa. 1974) (plurality opinion). *Tincher* overruled *Azzarello*’s bar to strict liability jury instructions mentioning reasonableness and foreseeability, 104 A.3d at 389, and cited *Kuisis* favorably. *Id.* at 363-64. Since plaintiffs must prove lack of abnormal use as an element of their *prima facie* circumstantial defect case, a second, separate jury instruction on abnormal use is unnecessary. *Wiggins*, 29 A.3d at 18-19.

The malfunction theory is proper only in manufacturing defect cases. *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 755 (Pa. 1989) (accepting malfunction theory “as appropriate in ascertaining the existence of a defect in the manufacturing process”); *Dansak*, 703 A.2d at 495 (“in cases of a manufacturing defect, a plaintiff could prove a defect through a malfunction theory”); *accord Ducko v. Chrysler Motors Corp.*, 639 A.2d 1204, 1205 (Pa. Super. 1994); *Smith v. Howmedica Osteonics Corp.*, 251 F. Supp.3d 844, 851-52 (E.D. Pa. 2017); *Varner v. MHS, Ltd.*, 2 F. Supp.3d 584, 592 (M.D. Pa. 2014).

In design defect cases, *Tincher* adopted a “composite” approach to liability that “requires proof, in the alternative, either of the ordinary consumer’s expectations or of the risk-utility of a product.” 104 A.3d at 401. Although *Tincher* considered the malfunction theory, *id.* at 362-63, it did not identify product malfunction as a relevant factor for either method of proving design defect. *Id.* at 387 (consumer expectations), 389-90 (risk-utility). Thus, under *Tincher*, the malfunction theory cannot be a method of proving design defect. *See also Dansak*, 703 A.2d at 495 n.8 (“to prove that an entire line of products was designed improperly, the plaintiff need not resort to the malfunction theory”).

A warned-of malfunction would not be unexplained. Thus, no precedent supports use of the malfunction theory in warning cases. *See Dolby v. Ziegler Tire & Supply Co.*, 2017 WL

781650, at \*6, 161 A.3d 393 (Table) (Pa. Super. 2017) (plaintiffs "only pursued a strict liability failure to warn case, the malfunction theory is not applicable") (unpublished); *cf. Barnish*, 980 A.2d at 542 ("facts indicating that the plaintiff was using the product in violation of the product directions and/or warnings" defeats malfunction theory as a matter of law).

The malfunction theory is limited to new, or nearly new products, as the longer a product is used, the more likely reasonable secondary causes, such as improper maintenance or ordinary wear and tear, become. "[P]rior successful use" of a product "undermines the inference that the product was defective when it left the manufacturer's control." *Barnish*, 980 A.2d at 547; *accord Kuisis*, 319 A.2d at 922-23 ("normal wear-and-tear" over 20 years precluded malfunction theory); *Nobles v. Staples, Inc.*, 2016 WL 6496590, at \*6 (Pa. C.P. Phila. Co. Feb. 9, 2016) (three years of successful use precludes malfunction theory), *aff'd*, 150 A.3d 110 (Pa. Super. 2016); *Wilson v. Saint-Gobain Universal Abrasives, Inc.*, 2015 WL 1499477, at \*15 (W.D. Pa. Apr. 1, 2015) (malfunction theory allowed where new product "failed as soon as [plaintiff] touched it"); *Banks v. Coloplast Corp.*, 2012 WL 651867, at \*3 (E.D. Pa. Feb. 28, 2012) (malfunction on "first use" allows malfunction theory); *Hamilton v. Emerson Electric Co.*, 133 F. Supp.2d 360, 378 (M.D. Pa. 2001) ("one to two years" of successful use precludes malfunction theory).

The malfunction theory only applies "where the allegedly defective product has been destroyed or is otherwise unavailable." *Barnish*, 980 A.2d at 535; *accord Wiggins*, 29 A.3d at 14; *Wilson*, 2015 WL 1499477, at \*12-13; *Houtz v. Encore Medical Corp.*, 2014 WL 6982767, at \*7 (M.D. Pa. Dec. 10, 2014); *Ellis v. Beemiller, Inc.*, 910 F. Supp.2d 768, 775 (W.D. Pa. 2012).

A plaintiff has the burden of producing "evidence eliminating abnormal use or reasonable, secondary causes." *Barnish*, 980 A.2d at 541 (quoting *Rogers*, 656 A.2d at 754); *accord Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 830 n.10 (Pa. 2012) (noting "plaintiff's burden, under malfunction theory, of addressing alternative causes"). Thus, "a plaintiff does not sustain its burden of proof in a malfunction theory case when the defendant furnishes an alternative explanation for the accident." *Raskin v. Ford Motor Co.*, 837 A.2d 518, 522 (Pa. Super. 2003); *accord Thompson v. Anthony Crane Rental, Inc.*, 473 A.2d 120, 125 (Pa. Super. 1984) (jury finding product operator negligent established "secondary cause" precluding malfunction theory). A plaintiff must also "present[] a case-in-chief free of secondary causes." *Rogers*, 656 A.2d at 755; *accord Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 72 (Pa. Super. 2005) (malfunction theory precluded where "record also establishes" use of product in excess of what "it was either designed or manufactured to withstand"). "Defendant's only burden is to identify other possible non-defect oriented explanations." *Long*, 700 A.2d at 515.

This instruction differs from the Pa. Bar Institute's SSJI (Civ.) §16.90 in: (1) explicitly limiting the instruction to manufacturing defect, and (2) using "reasonable foreseeability" language. The SSJI fails to follow *Tincher*. The "suggested" instructions "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They "have not been adopted by our supreme court," are "not binding," and courts may "ignore them entirely." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). The SSJI notes are also obsolete, citing no precedent less than 20 years old, and in particular omitting *Barnish*.

16.122(1)

STRICT LIABILITY – STATE OF THE ART EVIDENCE

*Unknowability of Claimed Defective Condition*

**You have been instructed about applicable test[s] for unreasonably dangerous product defect. Under the risk/utility test, you must consider known or knowable product risks and benefits. Under the consumer expectations test, the plaintiff must prove that the risk[s] [was/were] unknowable when the product was sold.**

**[Omit consumer expectations or risk/utility language if that test is not at issue]**

**Thus, [under either test,] you may only find the defendant liable where the plaintiff proves that the [plans or designs] for the product [or the methods and techniques for the manufacture, inspection, testing and labeling of the product] were state of the art at the time the product left the defendant’s control.**

**“State of the art” means that the technical, mechanical, scientific, [and/or] safety knowledge were known or knowable at the time the product left the defendant’s control. Thus, you may not consider technical, mechanical, scientific [and/or] safety knowledge that became available only by the time of trial or at any time after the product left the defendant’s control**

**RATIONALE**

This instruction is to be given where the jury must resolve a dispute over whether the product risk that the plaintiff claims has caused injury was knowable, given the technological state of the art when the product was manufactured or supplied.

In *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978). *Tincher* replaced *Azzarello*-era defect standards with a “composite” test utilizing both “risk/utility” and “consumer expectations” defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). See 104 A.3d at 387-89.

The risk/utility prong of *Tincher*’s “composite” defect test provides “an opportunity to analyze *post hoc* whether a manufacturer’s conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability.” 104 A.3d at 389. The consumer expectations prong is explicitly limited to risks that are “unknowable and unacceptable” to “average or ordinary consumer[s].” *Id.* at 335, 387. *Tincher* did “not purport to either approve or disapprove prior decisional law,” on issues such as state of the art. *Id.*

Likewise, Restatement §402A, reaffirmed in *Tincher*, limits the duty to warn to information that the manufacturer or seller “has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge,” thus rejecting liability for unknowable product risks. Restatement (Second) of Torts §402A, comment j (1965).

*Tincher* relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook supports admission of state of the art evidence, dismissing liability for unknowable defects as a “dwindling idea.” Owen Handbook §9.2 at 587. The state of the art is relevant to consumer



expectations “to determine the expectation of the ordinary consumer,” and to risk/utility, since the risk-utility test rests on the *foreseeability* of the risk and the availability of a *feasible* alternative design.” *Id.* §10.4, at 715 (emphasis original). “[T]he great majority of judicial opinions” hold that “the practical availability of safety technology is relevant and admissible.” *Id.* at 717. Likewise, *Barker* recognized that “the evidentiary matters” relevant to its test “are similar to those issues typically presented in a negligent design case.” 573 P.2d at 326. Thus, the *Azzarello*-era rationale for exclusion no longer exists after elimination of the strict separation of negligence and strict liability.

*Tincher* held that, “strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty.” 104 A.3d at 401. Accordingly, *Tincher* rejected the view that “negligence concepts” in strict liability could only “confuse” juries.

[A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

*Id.* “Even a cursory reading of *Tincher* belies th[e] argument” that *Tincher* “overruled *Azzarello* but did little else.” *Renninger v. A&R Machine Shop*, 163 A.3d 988, 1000 (Pa. Super. 2017). Rather, in *Tincher*, “the Supreme Court rejected the ‘per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law.’” *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at \*6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381).

During the now-repudiated *Azzarello* period, the Superior Court held that strict liability allowed liability for scientifically unknowable product risks, because “inviting the jury to consider the ‘state of the art’ . . . injects negligence principles into a products liability case.” *Carreter v. Colson Equipment Co.*, 499 A.2d 326, 329 (Pa. Super. 1985). Both pre-*Azzarello* strict liability and negligence liability rejected liability for unknowable product risks. See *Leibowitz v. Ortho Pharmaceutical Corp.*, 307 A.2d 449, 458 (Pa. Super. 1973) (“[a] warning should not be held improper because of subsequent revelations”) (opinion in support of affirmance); *Mazur v. Merck & Co.*, 964 F.2d 1348, 1366-67 (3d Cir. 1992) (defect depends on “the state of medical knowledge” at manufacture) (applying Pennsylvania law); *Frankel v. Lull Engineering Co.*, 334 F. Supp. 913, 924 (E.D. Pa. 1971) (§402A “requires only proof that the manufacturer reasonably should have known”), *aff’d*, 470 F.2d 995 (3d Cir. 1973) (*per curiam*).

Post-*Tincher*, technological infeasibility has been recognized as relevant. *Igwe v. Skaggs*, 258 F. Supp.3d 596, 611 (W.D. Pa. 2017) (risk “cannot be reasonably designed out based on the technology used at the time of production”). Pennsylvania cases also support admissibility of state of the art evidence generally. See *Renninger*, 163 A.3d at 1000 (“a large body of post-*Azzarello* and pre-*Tincher* law” is no longer binding precedent); *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 482 (Pa. Super. 2016) (the *Azzarello* “strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania”); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on “state-of-the-art” grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016). “A product is not defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains.” *Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790, at \*2 (Pa. C.P. Mifflin Co. Sept. 23, 2016), *aff’d mem.*, 2017 WL 1163056 (Pa. Super. March 28, 2017).

The contrary SSJI (Civ.) §16.122 does not rely on Pennsylvania law, but rather on the “Wade-Keeton test” that would impute all knowledge available at the time to the manufacturer/supplier. *Id.* at Subcommittee Note. However, that test has never been adopted in Pennsylvania, and was criticized by *Tincher*. 104 A.3d at 405 (“Imputing knowledge . . . was theoretically counter-intuitive and offered practical difficulties, as illustrated by the Wade-Keeton debate.”). See Owen Handbook §10.4 at 733 (“modern products liability law is quite surely better off without a duty to warn or otherwise protect

against unknowable risks”). The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.1 (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher’s* “significant[] alter[ation of] the common law framework for strict products liability.” *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017).

*Compliance with Product Safety Statutes or Regulations*

**You have heard evidence that the [product] complied with the [identify applicable statute or regulation]. While compliance with that [statute or regulation] is not conclusive, it is a factor you should consider in determining whether the design of the product was defective so as to render the product unreasonably dangerous.**

## RATIONALE

This instruction is to be given where the jury has heard evidence that the product at issue complied with the requirements of an applicable product safety statute or governmental regulation.

In *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978). *Tincher* replaced *Azzarello*-era defect standards with a “composite” test utilizing both “risk/utility” and “consumer expectations” defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). See 104 A.3d at 387-89. *Barker* also recognized that “the evidentiary matters” relevant to its test “are similar to those issues typically presented in a negligent design case.” 573 P.2d at 326.

The risk/utility prong of *Tincher*’s “composite” defect test provides “an opportunity to analyze *post hoc* whether a manufacturer’s conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability.” 104 A.3d at 389. The consumer expectations prong is explicitly limited to risks that are “unknowable and unacceptable” to “average or ordinary consumer[s].” *Id.* at 335, 387.

*Tincher* did “not purport to either approve or disapprove prior decisional law,” on issues such as state of the art. *Id.* at 409-10. However, the *Azzarello*-era rationale for exclusion of regulatory compliance evidence no longer exists after elimination of the strict separation of negligence and strict liability. “[S]ubsequent application” of what “bright-line” or “per se” rules against “negligence rhetoric and concepts” is neither “consistent with reason” nor “viable.” *Tincher*, 104 A.3d at 380-81. Courts excluding such evidence “relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim.” *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016). Thus, “a large body of post-*Azzarello* and pre-*Tincher* law” can no longer be considered binding precedent. *Renninger v. A&R Machine Shop*, 163 A.3d 988, 1000 (Pa. Super. 2017).

*Tincher* relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook supports admission of regulatory compliance:

The rule as to a manufacturer’s compliance with a governmental safety standard set forth in a statute or regulation largely mimics the rule on violation: compliance with a regulated safety standard . . . is widely considered proper evidence of a product’s nondefectiveness but is not conclusive on that issue.

*Id.* §6.4, at 401 (footnote omitted).

*Tincher* held that, “strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty.” 104 A.3d at 401. Accordingly, *Tincher* rejected the view that “negligence concepts” in strict liability could only “confuse” juries.

[A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

*Id.* “Even a cursory reading of *Tincher* belies th[e] argument” that *Tincher* “overruled *Azzarello* but did little else.” *Renninger*, 163 A.3d at 1000. Rather, in *Tincher*, “the Supreme Court rejected the ‘*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law.’” *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at \*6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381).

During the now-repudiated *Azzarello* period, the Superior Court held that strict liability precluded evidence that the defendant’s product complied with governing safety statutes or regulations because “the use of such evidence interjects negligence concepts and tends to divert the jury from their proper focus, which must remain upon whether or not the product . . . was ‘lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.’” *Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 962 (Pa. Super. 2009) (en banc). *Hicks* used the now-repudiated *Azzarello* defect standard to overrule prior precedent that held regulatory compliance admissible in strict liability actions. See *Cave v. Wampler Foods, Inc.*, 961 A.2d 864, 869 (Pa. Super. 2008) (regulatory compliance “evidence is directly relevant to and probative of [plaintiff’s] allegation that the product at issue was defective”) (overruled in *Hicks*); *Jackson v. Spagnola*, 503 A.2d 944, 948 (Pa. Super. 1986) (regulatory compliance is “of probative value in determining whether there is a defect”) (overruled in *Hicks*); *Brogley v. Chambersburg Engineering Co.*, 452 A.2d 743, 745-46 (Pa. Super. 1982) (negligence case; courts have “uniformly held admissible . . . safety codes and regulations intended to enhance safety”).

Even *Hicks*, however, recognized that regulatory compliance would be relevant to a consumer expectations test for defect, because “evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect.” 984 A.2d at 966. Likewise, the risk/utility test “reflects the negligence roots of strict liability” and “analyzes *post hoc* whether a manufacturer’s conduct . . . was reasonable.” *Tincher*, 104 A.3d at 389. Since the risk/utility inquiry involves “conduct,” regulatory compliance is admissible evidence. “Pennsylvania courts permit[] defendants to adduce evidence of compliance with governmental regulation in their efforts to demonstrate due care (when conduct is in issue).” *Lance v. Wyeth*, 85 A.3d 434, 456 (Pa. 2014).

Post-*Tincher* Pennsylvania cases support admissibility of state of the art evidence generally. See *Webb*, 148 A.3d at 482 (the *Azzarello* “strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania”); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on “state-of-the-art” grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016). See *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at \*3 (W.D. Pa. July 14, 2016) (the “the principles of *Tincher* counsel in favor of [the] admissibility” of compliance with “industry or government standards”); *Morello v. Kenco Toyota Lift*, 142 F. Supp.3d 378, 386 (E.D. Pa. 2015) (expert regulatory compliance testimony held relevant in strict liability).

The contrary SSJI (Civ.) §16.122 would perpetuate the *Lewis per se* exclusion of regulatory compliance evidence. *Id.* at Subcommittee Note (relying solely upon the *Lewis* line of cases). The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.1 (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*’s “significant[] alter[ation of] the common law framework for strict products liability.” *High*, 154 A.3d at 347.

*Compliance with Industry Standards*

**You have heard evidence that the [product] complied with the design and safety customs or practices in the [type of product] industry. While compliance with these industry standards is not conclusive, it is a factor you should consider in determining whether the design of the product was defective so as to render the product unreasonably dangerous.**

## RATIONALE

This instruction is to be given where the jury has heard evidence that the product at issue complied with industry-wide standards.

In *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the court rejected the strict separation of negligence and strict liability theories that had been characteristic of Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978). *Tincher* replaced *Azzarello*-era defect standards with a “composite” test utilizing both “risk/utility” and “consumer expectations” defect approaches derived from *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). See 104 A.3d at 387-89. *Barker* recognized that “the evidentiary matters” relevant to its test “are similar to those issues typically presented in a negligent design case.” 573 P.2d at 326.

The risk/utility prong of *Tincher*’s “composite” defect test provides “an opportunity to analyze *post hoc* whether a manufacturer’s conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability.” 104 A.3d at 389; accord *Renninger v. A&R Machine Shop*, 163 A.3d 988, 997 (Pa. Super. 2017) (*Tincher* risk/utility test “is derived from negligence principles”). Likewise, compliance with industry standards would be relevant to consumer expectations test for defect, because “evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect.” *Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 966 (Pa. Super. 2009) (en banc).

*Tincher* did “not purport to either approve or disapprove prior decisional law,” on issues such as state of the art. 104 A.3d at 409-10. However, the *Azzarello*-era rationale for exclusion of industry standards evidence no longer exists after elimination of the strict separation of negligence and strict liability. “[S]ubsequent application” of what “bright-line” or “per se” rules against “negligence rhetoric and concepts” is neither “consistent with reason” nor “viable.” *Id.* at 380-81. Courts excluding such evidence “relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim.” *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016). *Lewis*, which *Tincher* recognized as “in harmony with *Azzarello*,” is part of “a large body of post-*Azzarello* and pre-*Tincher* law” that can no longer be considered binding precedent. *Renninger*, 163 A.3d at 1000-01.

*Tincher* relied heavily on David G. Owen, *Products Liability Law* (Hornbook Series 2d ed. 2008). 104 A.3d at 387-402 (twelve separate citations). The Owen Handbook views the *Lewis* blanket inadmissibility rule is “an outmoded holdover from early, misguided efforts to distinguish strict liability from negligence,” and recognizes that a “great majority of courts allow applicable evidence of industry custom.” *Id.* §6.4, at 392-93 (footnote omitted). Industry standards are “some evidence” concerning defect and “does not alone conclusively establish whether a product is defective.” *Id.* at 394-95 (footnote omitted).

*Tincher* held that, “strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty.” 104 A.3d at 401. Accordingly, *Tincher* rejected the view that “negligence concepts” in strict liability could only “confuse” juries.

[A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated

from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

*Id.* “Even a cursory reading of *Tincher* belies th[e] argument” that *Tincher* “overruled *Azzarello* but did little else.” *Renninger*, 163 A.3d at 1000. Rather, in *Tincher*, “the Supreme Court rejected the ‘*per se* rule that negligence rhetoric and concepts were to be eliminated from strict liability law.’” *DeJesus v. Knight Industries & Associates, Inc.*, 2016 WL 4702113, at \*6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 104 A.3d at 381).

During the now-repudiated *Azzarello* period, the Pennsylvania Supreme Court held that strict liability precluded evidence that the defendant’s product complied with industry standards in *Lewis v. Coffing Hoist Div.*, 528 A.2d 590 (Pa. 1987). “[I]ndustry standards” go to the negligence concept of reasonable care, and . . . under our decision in *Azzarello* such a concept has no place in an action based on strict liability in tort.” *Id.* at 594. *Lewis* thus used the now-repudiated *Azzarello* defect standard to depart from prior precedent that had held industry standards admissible in strict liability. See *Forry v. Gulf Oil Corp.*, 237 A.2d 593, 598 & n.10 (Pa. 1968) (industry standards – “the custom and practice in the [relevant] industry” held relevant to establishing product defect under §402A).

Post-*Tincher* Pennsylvania cases support admissibility of state of the art evidence generally. See *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 350 n.5 (Pa. Super. 2017) (expert industry standards compliance testimony relevant to product’s “nature” in consumer expectations approach); *Webb*, 148 A.3d at 482 (the *Azzarello* “strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania”); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on “state-of-the-art” grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Mercurio v. Louisville Ladder, Inc.*, 2018 WL 2465181, at \*7 (M.D. Pa. May 31, 2018) (following *Cloud* and *Rapchak*); *Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at \*2 (E.D. Pa. Jan. 26, 2017) (“After *Tincher*, courts should not draw a bright line between negligence theories and strict liability theories regarding evidence of industry standards”); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at \*3 (W.D. Pa. July 14, 2016) (the “the principles of *Tincher* counsel in favor of [the] admissibility” of compliance with “industry or government standards”); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at \*7 (Pa. C.P. Clarion Co. Oct. 19, 2015) (industry standards evidence admissible as “particularly relevant to factor (2)” of *Tincher*’s risk/utility approach).

The contrary SSJI (Civ.) §16.122 would perpetuate the *Lewis per se* exclusion of industry standards evidence. *Id.* at Subcommittee Note (relying solely upon the *Lewis* line of cases). The “suggested” instructions “exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.l (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI ignore *Tincher*’s “significant[] alter[ation of] the common law framework for strict products liability.” *High*, 154 A.3d at 347.

**16.122(4)****STRICT LIABILITY – PLAINTIFF CONDUCT EVIDENCE**

**You have heard evidence about the manner that the plaintiff[s] used the product. You may consider this evidence as you evaluate whether the product was in a defective condition and unreasonably dangerous to the user. However, a plaintiff's failure to exercise care while using a product does not require your verdict to be for the defendant.**

**[If the evidence is that the plaintiff's conduct was "highly reckless" and creates a jury question whether this conduct could be "a sole or superseding cause" of the plaintiff's harm, then the jury should also be instructed on that conduct as a superseding cause.]**

**RATIONALE**

The pre-*Tincher* decision *Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012), held that a plaintiff conduct, such as product misuse, was admissible in strict liability when "highly reckless" and tending to establish that such conduct "was the sole or superseding cause of the injuries sustained." *Id.* at 1101. Evidence that showed nothing more than "a plaintiff's comparative or contributory negligence" was not admissible. *Id.* at 1098. Under the Pennsylvania Fair Share Act, plaintiff conduct cannot be apportioned to reduce recovery in strict liability – liability is reduced only by the conduct of "joint defendants." 42 Pa. C.S. §7102(a.1).

However, *Tincher* also viewed plaintiff conduct as relevant to whether a claimed product defect creates an "unreasonably dangerous" product, particularly under the risk/utility prong of its "composite" test. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 401-02 (Pa. 2014). The fifth risk/utility factor is, "The user's ability to avoid danger by the exercise of care in the use of the product." *Id.* at 389-90 (quoting factors). Post-*Tincher* courts applying the risk/utility prong utilize these factors to determine unreasonably dangerous defect. *Punch v. Dollar Tree Stores*, 2017 WL 752396, at \*8 (Mag. W.D. Pa. Feb. 17, 2017), *adopted*, 2017 WL 1159735 (W.D. Pa. March 29, 2017); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at \*2-3 (W.D. Pa. March 15, 2016); *Lewis v. Lycoming*, 2015 WL 3444220, at \*3 (E.D. Pa. May 29, 2015); *Capece v. Hess Maschinenfabrik GmbH & Co. KG*, 2015 WL 1291798, at \*3 (M.D. Pa. July 14, 2015); *Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790, at \*3 (Pa. C.P. Mifflin Co. Sept. 23, 2016), *aff'd mem.*, 2017 WL 1163056 (Pa. Super. March 28, 2017); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at \*4 (Pa. C.P. Clarion Co. Oct. 19, 2015).

Plaintiff conduct evidence thus has been held relevant, regardless of causation, where such evidence would make the risk/utility factor of avoidance of danger through exercise of care in using the product more or less probable. *Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at \*2-3 (E.D. Pa. Jan. 26, 2017) (plaintiff conduct in not "heeding instructions" that "a reasonable consumer" would have followed is admissible); *Punch*, 2017 WL 752396, at \*11 ("a jury could conclude that the Plaintiffs might have avoided the injury had they exercised reasonable care with the product"); *Sliker*, 2015 WL 6735548, at \*4 (plaintiff conduct "may be relevant to the risk-utility standard articulated in *Tincher* and is therefore admissible for that purpose"). Exercise of care as risk avoidance, however, is just one factor in the risk/utility determination.

Contributory fault, in and of itself, is not a defense to strict liability. 42 Pa. C.S. §7102(a.1); see *Kimco Development Corp. v. Michael D's Carpet Outlets*, 637 A.2d 603, 606 (Pa. 1993). In cases where plaintiff conduct evidence is admitted as relevant to defect, the plaintiff would be entitled to request a cautionary instruction to prevent the jury from considering such evidence for any other purpose. *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997); *Bialek v. Pittsburgh Brewing Co.*, 242 A.2d 231, 235 (Pa. 1968).

The contrary SSJI (Civ.) §16.122 does not mention the *Tincher* risk/utility factor of avoidance of danger through exercise of care. *Id.* at Subcommittee Note (discussing plaintiff conduct solely in the causation context). The "suggested" instructions "exist only as a

reference material available to assist the trial judge and trial counsel in preparing a proper charge.” *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.1 (Pa. 1997). They “have not been adopted by our supreme court,” are “not binding,” and courts may “ignore them entirely.” *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992). Here, the SSJI, ignore *Tincher’s* “significant[] alter[ation of] the common law framework for strict products liability,” specifically *Tincher’s* recognition of a new test for product defect. *High*, 154 A.3d at 347.



**16.150****STRICT LIABILITY – COMPONENT PART**

**A component part, used to make a completed product assembled by the completed product's manufacturer, is not in a defective condition or unreasonably dangerous if the [manufacturer/seller/distributor] of the component produced a component that met the requirements of the manufacturer of the completed product, unless you find: (1) the completed product manufacturer's requirements were obviously deficient, or (2) the component supplier substantially participated in the [design/preparation] of the completed product.**

**A [manufacturer/seller/distributor] of a component part who produced a component that met the specifications and requirements set forth by the assembler of the completed product, is not liable for harm resulting from unreasonably dangerous defects in other part(s) of the completed product that the component part [manufacturer/seller/distributor] did not produce, unless you find that the component part [manufacturer/seller/distributor] substantially participated in the [design/preparation] of those other part(s) of the completed product.**

**RATIONALE**

Restatement (Second) of Torts §402A (1965), as adopted by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), does not address liability considerations involving component parts. *Id.* §402A comment q. Pennsylvania law has recognized special considerations concerning component parts on numerous occasions. See *Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 479 (Pa. 1991) (“untenable” to impose duties of a completed product assembler on a “manufacturer [that] supplies a mere component of a final product that is assembled by another party”); *Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 564 A.2d 1244, 1247 (Pa. 1989) (component not defective where “the placement of the [relevant components] were all decisions made by [the completed product assembler] in manufacturing the [completed product]”).

[T]he appellant's argument on this appeal amount[s] to no more than an assertion that knowledge of a potential danger created by the acts of others gives rise to a duty to abate the danger. We are not prepared to accept such a radical restructuring of social obligations.

*Id.* at 1248.

Component part suppliers are strictly liable for defects that render the components they supply unreasonably dangerous, *E.g.*, *Walton v. Avco Corp.*, 610 A.2d 454, 456-57 (Pa. 1992); *Burbage v. Boiler Engineering & Supply Co.*, 249 A.2d 563, 566 (Pa. 1989); *Kephart v. ABB, Inc.*, 2015 WL 1245825, at \*11 (W.D. Pa. Mar. 18, 2015) (post-*Tincher*).

A component part supplier's compliance with the specifications or requirements of the assembler of the completed product ordinarily shields the component supplier from liability. *E.g.* *Wenrick*, 564 A.2d at 1246-47 (compliance with assembler's decisions precluded liability); *Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 70 (Pa. Super. 2005) (same with respect to assembler's contractual specifications); *Summers v. Giant Food Stores, Inc.*, 743 A.2d 498, 508-09 (Pa. Super. 1999) (component purchaser's refusal to buy non-defective component held sole cause of injury); *Taylor v. Paul O. Abbe, Inc.*, 516 F.2d 145, 148 (3d Cir. 1975) (compliance with assembler's specifications precluded liability) (applying Pennsylvania law); *Willis v. National Equipment Design Co.*, 868 F. Supp. 725, 728-29 (E.D. Pa. 1994) (same), *aff'd without op.*, 66 F.3d 314 (3d Cir. 1995); *Lesnefsky v. Fisher & Porter Co.*, 527 F. Supp. 951, 955 (E.D. Pa. 1981) (“no public policy is served by requiring the component manufacturer to hire experts, at great cost, to review specifications provided by an experienced purchaser in order to determine whether the product design will be safe”). Liability is allowed where the component part supplier, rather than the completed product assembler, prepared the component's specifications. *Stecyk v. Bell Helicopters Textron, Inc.*, 1996 WL 153555, at \*12 (E.D. Pa. Apr. 2, 1996).

The maker of a non-defective component part could not be liable where the plaintiff's "injury [was] caused by another component part, manufactured by another company" and the component part supplier "did not participate in the decisions regarding the design [of the completed product] or the location of" any other component. *Petrucci v. Bohringer & Ratzinger*, 46 F.3d 1298, 1302, 1310 (3d Cir. 1995) (applying Pennsylvania law); accord *Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626, 654 & n.75 (E.D. Pa. 2015) ("a component part is a separate 'product' for purposes of application of Section 402A") (post-*Tincher*).

The exceptions stated in this instruction, for transparently inadequate specifications and substantial participation in design or preparation of other, defective parts of a completed product, are recognized by Restatement (Third) of Torts, Products Liability §5 & comment e (1998). While *Tincher* declined to adopt the Third Restatement wholesale, it did not address, let alone criticize, the Third Restatement's approach to component part liability, which has won widespread acceptance. *E.g. Ramos v. Brenntag Specialties, Inc.*, 372 P.3d 200, 204 (Cal. 2016) (Restatement §5 "accurately reflect[s]" the law); *In re New York City Asbestos Litigation*, 59 N.E.3d 458, 478 (N.Y. 2016) (applying Restatement §5 substantial participation standard); *Gudmundson v. Del Ozone*, 232 P.3d 1059, 1073-74 (Utah 2010) (collecting cases). Similar rules exist in negligence. *See* Restatement (Second) of Torts § 404, comment a ("chattels are often made by independent contractors. . . . In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer.")

**The plaintiff has alleged a crashworthiness defect. By “crashworthiness” I mean the accident that happened was not caused by any defect in the [product]/[vehicle]. Instead the plaintiff alleges that a defect enhanced injuries that [he]/[she] sustained in that accident, making those injuries worse than if the alleged defect did not exist.**

**In a crashworthiness case, the first question is whether the [product]/[vehicle] was defective. Only if you find that the design of the [product’s]/[vehicle’s] [specific defect alleged] was unreasonably dangerous and defective, under the definitions I have just given you, should you proceed to examine the remaining elements of crashworthiness.**

#### RATIONALE

“Crashworthiness,” in Pennsylvania, has been considered a design defect-related “subset of a products liability action pursuant to Section 402A.” *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994); *accord Parr v. Ford Motor Co.*, 109 A.3d 682, 689 (Pa. Super. 2014) (post-*Tincher*). *Cf. Harsh v. Petroll*, 887 A.2d 209, 211 n.1 (Pa. 2005) (noting “continuing controversy” about “whether crashworthiness claims . . . are appropriately administered as a subset of strict liability and/or negligence theory”). “The effect of the crashworthiness doctrine is that a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy.” *Kupetz*, 644 A.2d at 1218.

“[T]he crashworthiness doctrine is uniquely tailored to address those situations where the defective product did not cause the accident but served to increase the injury.” *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 925-26 (Pa. Super. 2002). Crashworthiness thus is not merely “an additional theory of recovery that a plaintiff may elect to pursue.” *Id.* at 926 (“disagree[ing]” with that proposition). Rather crashworthiness requires “particularized instructions to jurors concerning increased harm.” *Pennsylvania Dep’t of Gen. Servs. v. U.S. Mineral Prod. Co.*, 898 A.2d 590, 602 (Pa. 2006). These crashworthiness instructions are to be given in any case involving enhanced injuries from a design defect not alleged to cause the accident itself.

While the crashworthiness doctrine in Pennsylvania applies most commonly in the context of motor vehicles, it is not limited to that scenario. *Colville*, 809 A.2d at 923 (standup rider). The principle underlying the doctrine is compensation for injuries that result not from an initial impact, but from an unnecessary aggravation or enhancement caused by the design of the product. *Id.* For example, a claim that the structure of an automobile failed to prevent an otherwise preventable injury in a foreseeable accident would fall under the crashworthiness doctrine. *Harsh*, 887 A.2d at 211 n.1. The crashworthiness doctrine likewise applies to safety devices such as helmets that are designed to reduce or mitigate injury in foreseeable impacts. *Svetz v. Land Tool Co.*, 513 A.2d 403 (Pa. Super. 1986) (motorcycle helmet); *Craigie v. General Motors*, 740 F. Supp. 353, 360 (E.D. Pa. 1990) (characterizing *Svetz*).

Although the crashworthiness doctrine is sometimes described in terms of “second collision,” this terminology is disfavored. Crashworthiness is frequently invoked where no literal “second collision” or “enhanced injury” is present. *Colville*, 809 A.2d at 924; *Kupetz*, 644 A.2d at 1218. The doctrine applies, for instance, not only when a vehicle occupant sustains injuries within the vehicle itself, but also when an occupant is ejected or suffers injury without an actual second collision or “impact.” *Colville*, 809 A.2d at 924.

Likewise, while the doctrine refers to the “enhancement” of an occupant’s injuries, its application is not limited to instances of literal “enhancement” of an otherwise existing injury. Rather, the crashworthiness doctrine extends to situations of indivisible injury, such as death. *Harsh*, 887 A.2d at 219. The doctrine also “include[s] those circumstances where an individual would not have received any injuries in the absence of a defect.” *Colville*, 809

A.2d at 924-25; see *Kolesar v. Navistar Int'l Transp. Corp.*, 815 F. Supp. 818, 819 (M.D. Pa. 1992) (permitting plaintiff to proceed on a crashworthiness theory where the plaintiff would have walked away uninjured absent the defect), *aff'd*, 995 F.2d 217 (3d Cir. 1993).

This instruction's "unreasonably dangerous" language recognizes that *Tincher v. Omega Flex, Inc.*, changed the defect test in all §402A strict liability actions by returning to the jury the inquiry of whether a product is "unreasonably dangerous." 104 A.3d 328, 380 389-91 (Pa. 2014). See Rationale for Suggested Instruction 16.20(1). The consumer expectations test for "unreasonably dangerous" will ordinarily not apply to products of complex design or that present esoteric risks, because an ordinary consumer does not have reasonable safety expectations about those products or those risks. *Tincher*, 104 A.3d at 388. As the *Tincher* court explained:

[A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.

*Id.* (quoting *Soule* 882 P.2d at 308). The crashworthiness doctrine exists to address exactly such products and scenarios. *Cf. Harsh*, 887 A.2d at 219. Accordingly, the consumer expectations method of proof should not be permitted, and the jury should not be instructed on the consumer expectations test in crashworthiness cases.

I will now instruct you on the plaintiff's burden in a crashworthiness case. In order to prove the defendant liable in a "crashworthiness" case, the plaintiff has the burden of proving:

1. That the design of the [product]/[vehicle] in question was defective, rendering the product unreasonably dangerous, and that at the time the [product]/[vehicle] left the defendant's control, an alternative, safer design, practicable under the circumstances existed;

2. What injuries, if any, the plaintiff would have sustained had the alternative, safer design been used; and

3. The extent to which the plaintiff would not have suffered these injuries if the alternative design had been used, so that those additional injuries, if any, were caused by the defendant's defective design.

If after considering all of the evidence you feel persuaded that these three propositions are more probably true than not, your verdict must be for plaintiff. Otherwise your verdict must be for the defendant.

#### RATIONALE

The burden of proving the elements of crashworthiness rests on the plaintiff. *Schroeder v. Com., DOT*, 710 A.2d 23, 27 n.8 (Pa. 1998); *Parr v. Ford Motor Co.*, 109 A.3d 682, 689 (Pa. Super. 2014) (post-*Tincher*); *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532, 548, 550-551 (Pa. Super. 2009); *Raskin v. Ford Motor Co.*, 837 A.2d 518, 524 (Pa. Super. 2003); *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 922-23 (Pa. Super. 2002); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994). In *Stecher v. Ford Motor Co.*, 812 A.2d 553, 558 (Pa. 2002), the Supreme Court reversed as deciding a moot issue a Superior Court ruling that purported to shift the burden of proof in crashworthiness cases to defendants. All post-*Stecher* appellate decisions impose the burden of proof on plaintiffs.

Although some federal cases predicting Pennsylvania law listed four elements of crashworthiness (breaking element one, above, into two elements at the "and"), see *Oddi v. Ford Motor Co.*, 234 F.3d 136, 143 (3d Cir. 2000); *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 284 (3d Cir. 1994), the great majority of Pennsylvania precedent, including all recent state appellate authority, defines crashworthiness as having three elements. See *Schroeder*, 710 A.2d at 27 n.8; *Parr*, 109 A.3d at 689; *Gaudio*, 976 A.2d at 532, 550-551; *Colville*, 809 A.2d at 922-23; *Kupetz*, 644 A.2d at 1218. This instruction follows the controlling Pennsylvania cases. It is based on the crashworthiness charge approved as "correct" in *Gaudio*, 976 A.3d at 550-51, to which is added the "unreasonably dangerous" language required of all §402A instructions by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 380 399-400 (Pa. 2014). See Rationale for Suggested Instruction 16.20(1), *supra*.

Crashworthiness "requir[es] the fact finder to distinguish non-compensable injury (namely, that which would have occurred in a vehicular accident in the absence of any product defect) from the enhanced and compensable harm resulting from the product defect." *Pennsylvania Dep't of Gen. Servs. v. U.S. Mineral Prod. Co.*, 898 A.2d 590, 601 (Pa. 2006). Crashworthiness allows recovery of "increased or enhanced injuries over and above those which would have been sustained as a result of an initial impact, where a vehicle defect can be shown to have increased the severity of the injury." *Harsh v. Petroll*, 887 A.2d 209, 210 n.1 (Pa. 2005). These instructions direct the jury to apportion the plaintiff's injury, in order to limit recovery to compensable harm. *Kupetz*, 644 A.2d at 1218. Thus, "[t]he second

of these elements required the plaintiff to demonstrate “what injuries, *if any*, the plaintiff would have received had the alternative safer design been used.” *Colville*, 809 A.2d at 924 (emphasis original).

The “precept of strict liability theory that a product’s safety be adjudged as of the time that it left the manufacturer’s hands,” *Duchess v. Langston Corp.*, 769 A.2d 1131, 1140 (Pa. 2001), is recognized throughout Pennsylvania strict liability jurisprudence, including the “subset” of crashworthiness doctrine.

**16.177 CRASHWORTHINESS – SAFER ALTERNATIVE DESIGN PRACTICABLE  
UNDER THE CIRCUMSTANCES**

**In determining whether the plaintiff’s proposed alternative design was safer and practicable under the circumstances at the time the [product][vehicle] left the defendant’s control, the plaintiff must prove that the combined risks and benefits of the product as designed by the defendant made it unreasonably dangerous compared to the combined risks and benefits of the product incorporating the plaintiff’s proposed feasible alternative design.**

**In determining whether the product was crashworthy under this test, you may consider the following factors:**

**[Instruct on the risk-utility factors from Suggested Instruction 16.20(3)]**

**RATIONALE**

Crashworthiness involves a risk-utility test that compares the defendant’s design with the plaintiff’s proposed alternative. *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 548-50 (Pa. Super. 2009). While *Tincher v. Omega Flex, Inc.*, permits a plaintiff in an ordinary §402A claim to prove that a product is unreasonably dangerous and defective under either a consumer expectations test or a risk-utility test, 104 A.3d 328, 335, 388, 406-07 (Pa. 2014); see Suggested Instructions 16.120(2) & 16.120(3), *supra*, the comparison between the manufacturer’s design, present in the challenged product, and the plaintiff’s proposed alternative design, is an essential element of crashworthiness. *E.g.*, *Schroeder v. Commonwealth, DOT*, 710 A.2d 23, 28 n.8 (Pa. 1998); *Parr v. Ford Motor Co.*, 109 A.3d 682 (Pa. Super. 2014) (post-*Tincher*); *Gaudio*, 976 A.2d at 532; *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 922 (Pa. Super. 2002); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994). This instruction therefore utilizes the same risk-utility factors as the risk-utility prong of the “composite” defect test from *Tincher*, 104 A.3d at 389-91.

Prior to its *Tincher* decision, the Supreme Court recognized that risk-utility analysis encompasses all intended uses of a product, not limited to the narrowly defined set of circumstances that led to the injury at issue. *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823, 836-37 (Pa. 2012) (scope of the risk-utility analysis in a strict-liability design defect case is not limited to a particular intended use of the product). Because the real likelihood exists that an increase in safety in one aspect of a product may result in a decrease in safety in a different aspect of the same product, Pennsylvania courts have recognized that a manufacturer’s product development and design considerations are relevant, in the context of a risk-utility analysis, to assess a plaintiff’s crashworthiness claim. *Gaudio*, 976 A.2d at 548 (“If, in fact, making the [product] in question ‘safer’ for its occupants also created an ‘unbelievable hazard’ to others, the risk-utility is essentially negative. The safety utility to the occupant would seemingly be outweighed by the extra risk created to others.”) (quoting *Phatak v. United Chair Co.*, 756 A.2d 690, 694 (Pa. Super. 2000)). For these reasons, juries consider the same set of factors in evaluating a proposed alternative design that are used to evaluate whether the subject design is unreasonably dangerous. Just as when the jury assesses overall product design, some, or all of the factors may be particularly relevant, or somewhat less relevant, to the jury’s risk-utility assessment. See Rationale of Suggested Instruction 16.120(3), *supra*.