

TERRENCE D. TINCHER and
JUDITH R. TINCHER
Plaintiffs

VS.

OMEGAFLEX, INC., et al.
Defendants/Appellants

: IN THE COURT OF COMMON PLEAS
: CHESTER COUNTY, PENNSYLVANIA
:

: NO. 2008-00974-CA
: 1472 EDA 2011
:

: CIVIL ACTION

Mark E. Utke, Esquire, Attorney for Plaintiffs

Kristen E. Dennison, Esquire and William J. Conroy, Esquire, Attorneys for Defendants

OPINION AND ORDER

On remand from the Supreme Court of Pennsylvania, we consider Omega Flex Inc.'s Renewed Motion for Post-Trial Relief. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). Omega Flex seeks a new trial following Terrence and Judith Tincher's recovery of damages at the hands of a jury on a claim of strict liability. We heard oral argument and have considered the legal memoranda of able counsel. For the reasons discussed below, we deny the Motion and reaffirm the jury's verdict.

On June 20, 2007, a fire ignited at the Tinchers' home located at 570 Gramercy Lane, Downingtown, Chester County, PA. The source of the fire was determined by the jury to be an indirect lightning strike that energized corrugated stainless steel tubing, marketed by Omega Flex as "TracPipe", and installed in the house, connecting the main natural gas

supply to a natural gas-fed fireplace located on the first floor of Tinchers' home. The fire caused substantial damage to home and contents. The Tinchers sued OmegaFlex under several theories, including upon a claim strict liability.

The predominant factual issue in the case was whether the corrugated stainless steel tubing was defective because of its inferior wall thickness (equal to the thickness of 4 sheets of paper), rendering it incapable of withstanding perforation by an electrical arc produced by lightning. At trial, the Tinchers' expert posited that a lightning strike energized the TracPipe, and in doing so created an electrical arc with other metal, perforating the TracPipe by burning a hole in the pipe through which natural gas was then ignited. The damaged pipe was recovered from the area of the fire's origin near the fireplace, and was tested, confirming the cause of the fire. A severed grounding wire, called a "bonding wire"¹, and its clamp, connected to the TracPipe's manifold, were found hanging in the area of the fire's origin, and displayed signs of

¹ Bonding refers to the fact that in a building with electric service it is normal for safety reasons to connect all metal objects, such as pipes, together to the alternating current (AC) electric power supply to form an equipotential zone. Equipotential bonding involves joining together metalwork to the Earth's conductive surface so that it is at the same potential (i.e., voltage) everywhere. Inadequate bonding renders metal objects susceptible to a hazardous conductive path. Examples of articles that require bonding include metallic water piping systems and gas piping.

melting and “forced damage”. Without recounting the testimony, the evidence proved that the area of the house exposed to the greatest intensity of combustible fire damage occurred in the area of the fireplace where the perforated TracPipe was found.

At trial, we denied Omega Flex’s Motion in Limine, which sought to apply the law stated in the Restatement (Third) of Torts to the Tinchers’ strict liability claim. At the time of trial, Pennsylvania trial courts were required to apply the Restatement (Second) of Torts to Section 402A strict liability claims. In our instruction to the jury we charged as required by *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), the then leading precedent governing strict liability product defect cases in this Commonwealth. *Azzarello* instructed that when strict liability is appropriate, “[i]t is a judicial function to decide whether, under plaintiff’s averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint. They do not fall within the orbit of a factual dispute which is properly assigned to the jury for resolution.” *Id.*

Under Pennsylvania law prior to *Tincher*, the finding of a defect required a balancing of the utility of the product against the seriousness

and likelihood of injury and the availability of precautions that, though not foolproof, might prevent the injury. *Burch v. Sears, Roebuck and Co.*, 320 Pa.Super. 444, 467 A.2d 615 (Pa.Super. 1983). The case is given to the jury only after the court has initially considered the risk associated with the product weighed against its utility, an analysis previously characterized by the courts as implicating social policy considerations. *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 3rd Cir. (Pa. 1997); *Marshall v. Philadelphia Tramrail Co.*, 426 Pa.Super. 156, 626 A.2d 620, (1993); *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000, 1013 (2003)(Justice Thomas G. Saylor's Concurring Opinion). Once the case is given to the jury at trial, the jury determines, as it did in this instance, whether the product is defective and lacks any element necessary to make it safe for its intended use.

In *Tincher*, the Supreme Court overruled *Azzarello*, but declined to adopt the Restatement (Third) of Torts. Rather, it held that "a plaintiff pursuing a cause upon a theory of strict liability in tort must prove that the product is in a "defective condition" by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and

seriousness of harm caused by the product outweigh the burden or costs of taking precautions...”.

With respect to determining “defective condition” the Court held that “Whether a product is in a defective condition is a question of fact ordinarily submitted for determination to the finder of fact. The question is removed from the jury’s consideration only where it is clear that reasonable minds could not differ on the issue. Thus, the trial court is relegated to its traditional role of determining issues of law...”

In short, the trial judge is no longer the “gatekeeper”, whose function it previously was to initially consider the risk associated with the product weighed against its utility before sending the case to the jury on the plaintiff’s strict liability claim. The question whether a product is in a defective condition is removed “from the jury’s consideration only where it is clear that reasonable minds cannot differ on the issue”. *Tincher*, Slip Opinion, p. 132. Instantly, the case was submitted to the jury to decide whether TracPipe is defective. The *Tincher* Court plainly held that Omega Flex “is entitled to the benefit of our decision” overruling *Arrazello*. *Tincher*, Slip Opinion, p. 136.

Omega Flex consequently argues that it is entitled to a new trial because the jury, as the finder of fact, now must be permitted to balance

the evidence and determine whether the risk of using TracPipe is outweighed by its utility, and whether the product is unreasonably dangerous. It also argues that, had the parties known they would be trying the case on the basis of the risk of TracPipe versus its utility, Omega Flex would have presented a different evidentiary case. That simply is not supported by the trial record. In fact, the case was tried by the parties on competing evidence implicating the relative merits of the use of TracPipe versus black iron pipe in home construction, all with an eye toward convincing the jury whether the risks associated with the use of TracPipe greatly outweighed, or not, the use of black iron pipe. Both parties, through their witnesses, and through cross-examination, hammered those points home to the jury throughout the trial. In opposition to Defendant's renewed motion for post-trial relief, Plaintiffs' brief details the evidence in this regard proffered to the jury by both parties, and that evidence need not be repeated here by this court.

With that evidence before the trial court, we denied Defendant's motion for a directed verdict, and submitted the case to the jury with the instruction to decide whether TracPipe was defective, that is, contained any condition that made it unsafe for its intended purpose. Speaking plainly, a product used to convey natural gas in a residential dwelling that

is determined by the jury to be defective for the obvious reason that its component parts are inadequate to preclude the unanticipated escape of gas must also be considered unreasonably dangerous . This is the conclusion the jury reached in this case, and in this court's view, reasonable minds could not differ on the point. With the jury fully cognizant of the evidence educed by the parties over 7 days of trial premised upon the risk versus the utility of the two means of conveying natural gas in a home, to conclude now that the jury would have reached a different result had it been directed, as the finder of fact, to conclude that TracPipe's utility outweighed its risks, in the context of the facts of this case, would require one to ignore the voluminous evidence the jury heard on those very issues.

If the jury instruction we gave in this case required a new trial as argued by Omega Flex, it is evident that our Supreme Court would have simply remanded this case for a new trial. However, in remanding the case to the trial court, the Court stated: "Whether Omega Flex is entitled to additional relief, including a new trial or judgment notwithstanding the verdict is not apparent upon the record before us." It noted that a new trial is appropriate if an erroneous jury instruction amounts to fundamental error or the record is insufficient to determine whether such error affected

the verdict. *Price v. Guy*, 735 A.2d 668, 672 (Pa. 1998) (in determining a claim regarding error with respect to specific jury charge, appellate court must view charge in its entirety, taking into consideration all the evidence of record to determine whether error was committed, and if error was committed, appellate court must then determine whether that error was prejudicial to complaining party). It is this court's opinion that based on the evidence the jury heard, the instruction we gave was not prejudicial to Omega Flex for the reasons noted above, and did not affect the jury's verdict. Indeed, in the instant case, it was proven by a preponderance of the evidence that TracPipe's danger was unknowable and certainly unacceptable to the Tinchers, the very standard required by the *Tincher* Court.

Judgment notwithstanding the verdict may be entered only if movant is entitled to judgment as a matter of law and if evidence presented at trial was such that no two reasonable minds could disagree that the verdict would be in favor of movant. In determining whether judgment notwithstanding the verdict is required, only evidence which supports the verdict may be considered, giving verdict winner the benefit of any doubt. *Degenhardt v. The Dillon Company*, 669 A.2d 946, 950 (Pa. 1996). Giving the Plaintiffs the benefit of any doubt, we conclude that reasonable minds

would agree that Defendant is not entitled to judgment on the facts
educed in this case.

For purposes of our determination, we find the Plaintiffs' brief in
opposition to Defendant's motion compelling and adopt its rationale as our
own. Accordingly, we enter the accompanying Order.

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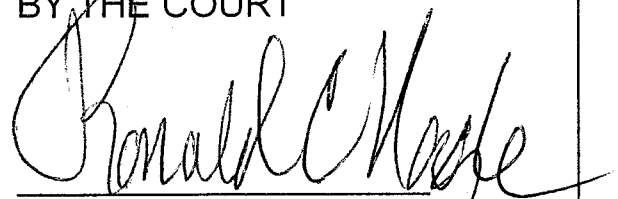
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ORDER

AND NOW, this 20th day of March 2016, upon consideration of Defendant, Omega Flex's Renewed Motion for Post Trial Relief, the opposition of Plaintiffs Terence D. Tincher and Judith R. Tincher thereto, and following able counsels' oral arguments and consideration of their respective briefs it is ORDERED and DIRECTED that Defendant's said Motion is **DENIED**.

BY THE COURT


Ronald C. Nagle S.J.