

## Superior Court of Pennsylvania Reverses *Tincher* and Rules that *Azzarello* Jury Instructions Fail to Conform to Applicable Law

By: Jerry Anders and Alison Russell

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In 2014, The Supreme Court of Pennsylvania decided *Tincher v. Omega Flex* and overruled *Azzarello*. The *Tincher* court remanded the case for further proceedings to determine whether the defendants should be granted a new trial. In *Tincher II*, the trial court found that the *Azzarello* charge that included language about the defendant being a “guarantor” of the product was a harmless error. Recently, the Superior Court of Pennsylvania reversed the trial court’s decision and held that the *Azzarello* jury instruction contained a fundamental misstatement of the governing law. *Tincher v. Omega Flex, Inc.*, A.3d, No. 1285 EDA 2016 (Pa. Super. Feb. 16, 2018).

To recap, the *Azzarello* jury charge contained language stating that, “the seller of a product is a guarantor of its safety” and therefore, “the product must be provided with every element necessary to make it safe for its intended use and without any condition that makes it unsafe for its intended use.” In addressing whether the *Tincher II* trial court made a fundamental mistake at trial, the Superior Court decided that there was no question that the jury charge was incorrect because it contained all of the product liability law under *Azzarello* that had been expressly overruled by the Pennsylvania Supreme Court. The controlling issue became whether the trial court abused its discretion in declining to order a new trial, despite the error.

The Superior Court concluded that because the *Azzarello* charge contained an incorrect description of the law, which was critical to a disputed factual issue, it was fundamentally erroneous and entitled the defendants to a new trial. Giving a jury charge under law that the Supreme Court explicitly overruled is “a paradigm example of fundamental error.” In further support of its determination that the error was fundamental to the case, the Superior Court explained that the incorrect jury charge dealt with the principal issue disputed by the parties. Simply stated, an *Azzarello* charge “fail[s] to conform to the applicable law, as stated in *Tincher*.” Under this opinion, instructing the jury in a strict liability products case with an *Azzarello* charge will require a new trial.

After the Pennsylvania Supreme Court’s decision in *Tincher I*, but prior to the Superior Court’s decision in *Tincher II*, the Pennsylvania Bar Institute published updated Suggested Standard Civil Jury Instructions that retained most of the *Azzarello* charge language and omitted the “unreasonably dangerous” defect principle fundamental to *Tincher I*. The Pennsylvania Defense Institute countered with alternative suggested jury instructions that followed their different interpretation of *Tincher I*. In light of the Superior Court’s decision, it remains to be seen what will happen with the most recent Suggested Standard Jury Instructions and how courts will react in similar products cases.

Our attorneys are involved with the Philadelphia Association of Defense Counsel, which has supported the Pennsylvania Defense Institute’s alternative suggested jury instructions. If you have any questions or would like additional information, please contact Jerry Anders (215.864.7003; andersj@whiteandwilliams.com) or Alison Russell (215.864.6835; russella@whiteandwilliams.com).

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