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IN THE SUPREME COURT OF PENNSYLVANIA

No. 18 EAP 2022

MICHAEL and MELISSA SULLIVAN, H/W,
Appellees,

v.

WERNER COMPANY and LOWE'S COMPANIES, INC.,
Appellants,

and

MIDDLETOWN TOWNSHIP LOWE'S STORE #1572,
Defendant.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALIATION FOR CIVIL JUSTICE REFORM, PENNSYLVANIA MANUFACTURERS' ASSOCIATION, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF APPELLANTS

Appeal from the Order of the Superior Court of Pennsylvania Entered July 23, 2021, at No. 3086 EDA 2019, Denying Reargument of Decision of April 15, 2021, Affirming the November 19, 2019 Judgment of the Philadelphia County Court of Common Pleas, at No. 161003086

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STATEMENT OF INTEREST OF AMICI CURIAE

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, bipartisan organization representing businesses, health care, and other perspectives. PCCJR is dedicated to improving Pennsylvania's civil justice system by elevating awareness of problems and advocating for legal reform in the legislature and fairness in the courts.

The Pennsylvania Manufacturers' Association ("PMA") is the statewide non-profit organization representing the manufacturing sector in the state public policy process in Harrisburg.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market and 58% of Pennsylvania's market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

Pursuant to Pa.R.A.P. 531(b)(2), PCCJR, PMA, and APCIA (collectively "*Amici*") each file this *amicus* brief in their own right and on behalf of their respective members. *Amici* state that no person, other than their respective members and their respective counsel, paid for or authored this brief, in whole or in part.

QUESTION PRESENTED

This Court granted allocatur on the following issue:

I. Was it an error of law, under the product liability principles this Court established in *Tincher v. Omega Flex, Inc.*, 628 Pa. 296, 104 A.3d 328 (2014), to prevent the jury from considering the product's compliance with pertinent industry and governmental safety standards, where this exclusion of evidence:

> (1) was contrary to *Tincher*'s expressed intent to provide juries with greater, rather than less, ability to decide if an unreasonably dangerous defect exists in a product;
>
> (2) was contrary to *Tincher*'s recognition that strict liability and negligence substantially overlap in product liability cases, particularly as to the "risk/utility" defect theory plaintiffs pursued in this case; and
>
> (3) would once again leave Pennsylvania product liability law in a distinct minority position, concerning admissibility of compliance evidence.

Sullivan v. Werner Co., No. 324 EAL 2021, 2022 WL 2062309 (Pa. June 8, 2022) (*per curiam*).

SUMMARY OF ARGUMENT

Despite this Court's unequivocal rejection of *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), and the clear abrogation of the unworkable legacy of decisions that depend on *Azzarello*'s no-negligence-in-strict liability rubric, the Superior Court in this case nevertheless continued to apply the *Azzarello*-derived categorical prohibition on the admission of government or industry standards evidence in design defect product liability cases. The Superior Court recognized that the *Tincher* Court "expressly overruled" *Azzarello*, but still held that the *per se* exclusion persists because, according to the panel, "*Tincher* neither explicitly nor implicitly overrules the exclusion of industry standards in a products liability case." *Sullivan v. Werner Co.*, 253 A.3d 730, 741, 747-48 (Pa. Super Ct. 2021) (per Pellegrini, J.).

This Court must reverse the plainly erroneous decision of the Superior Court, because it completely undermines this Court's clear direction in *Tincher* that *Azzarello* and its legacy—including *Lewis v. Coffing Hoist Division, Duff-Norton Co.*, 528 A.2d 590 (Pa. 1987)—is not "consistent with reason," and that the *per se* rule excluding negligence concepts "validate[d] the suggestion that the cause of action, so shaped, was not viable." 104 A.3d at 380-81. In adopting the negligence-based risk-utility analysis for design defect product liability cases in *Tincher*, the Court disapproved of the entire body of cases that exclude such

evidence from the jury's consideration. *See, e.g.*, *id.* at 379 (noting that *Lewis* acknowledged that *Azzarello* offered a "distinct standard from … a risk-utility analysis").

This Court should take the opportunity in this case to expressly overrule *Lewis* and reject the invitation to resurrect the *per se* exclusion of government and industry standards evidence in design defect cases, especially since it violates "*Tincher*'s functional purpose of reducing jury confusion." *Lehmann v. Louisville Ladder Inc.*, ____ F. Supp. 3d ____, 2022 WL 2541432, at *9 (E.D. Pa. 2022).[1] Accordingly, this Court should reverse the Superior Court panel, vacate its Order, and remand for further proceedings consistent with the terms of this Court's forthcoming opinion.

[1] In recognition of the proper role of *amicus curiae*, which is to bring to this Court's attention relevant matter which—although of considerable help—might not be raised by the parties, *Amici* do not endeavor to address herein each issue subsumed within the question presented. Nor do *Amici* undertake to confront each one of the flaws contained within the panel's decision. Rather, *Amici* largely confine this brief to addressing the merits (or lack thereof) of continuing the categorical prohibition on the admission of government or industry standards evidence in design defect product liability cases. *Amici* concur, in full, with the well-reasoned and well-supported arguments advanced by Defendants/Appellants Werner Co. and Lowe's Companies, Inc. (collectively "Werner") in their principal brief.

ARGUMENT

II. The Superior Court Committed Reversible Error By Continuing the Categorical Prohibition On The Admission Of Government or Industry Standards Evidence In Design Defect Cases Post-*Tincher*

A. In Overruling *Azzarello* and Adopting the Negligence-Based Risk-Utility Analysis for Design Defect Product Liability Cases, *Tincher* Necessarily Overturned *Lewis* and its Bright-Line Rule

For nearly 40 years, Pennsylvania courts followed a "unique and, at times, almost unfathomable approach to products litigation," based on *Azzarello*'s "idiosyncratic, 'super' strict liability approach." James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 897 (1998); *Sullivan*, 253 A.3d at 741. The *Azzarello* Court created a distinct divide between strict liability and negligence claims, by suggesting that negligence concepts have no place in Pennsylvania strict liability doctrine. *See, e.g.*, *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. Ct. 2017).

This is despite the fact that strict liability theory "at its core, as has been developed in Pennsylvania, incorporates the principle of risk-utility (or cost-benefit) balancing derived from negligence theory." *Schmidt v. Boardman Co.*, 11 A.3d 924, 939 (Pa. 2011) (Opinion in Support of Reversal); *see Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228, 1233 (Pa. 2009) (Saylor, J., dissenting statement) ("[T]he core problem in the application of prevailing Pennsylvania law lies in the

insistence on maintaining a doctrinal assertion that there is no negligence in strict liability, when, functionally, the law of 'strict' products liability is infused with negligence concepts.").

Specifically, the *Azzarello* Court held that, for purposes of Section 402A of the Second Restatement of Torts, the phrase "unreasonably dangerous" would "mislead" jurors into thinking that negligence governs strict liability cases. 391 A.2d at 1027. While the *Azzarello* Court reasoned that a jury was permitted to determine whether the product was defective or to resolve any "dispute as to the condition of a product," the Court held that the threshold question of whether a product was unreasonably dangerous was to be determined by the trial court. *Id.* at 1025.

As amply developed elsewhere, *Azzarello*'s no-negligence-in-strict-liability rubric "resulted in material ambiguities and inconsistencies in Pennsylvania's procedure." *Schmidt*, 11 A.3d at 940 (Opinion in Support of Reversal); *accord Phillips v. Cricket Lighters*, 841 A.2d 1000, 1016-19 (Pa. 2003) (Saylor, J., concurring). Nevertheless, the Court in *Lewis* extended the *Azzarello*'s exclusion of negligence principles from strict liability cases to bar evidence of compliance with industry standards in design defect cases. 528 A.2d at 594. In doing so, the *Lewis* Court concluded that such evidence "go[es] to the reasonableness of the [manufacturer's] conduct in making its design choice," and per *Azzarello*,

"improperly [brings] into the case concepts of negligence law." *Id.* (alterations added); *see Sullivan*, 253 A.3d at 740 (acknowledging that the *Lewis* Court "cit[ed] *Azzarello* as support for its holding").

The Court also declared that "there is no relevance" in the fact that a design is widespread in the industry. *Lewis*, 528 A.2d at 594. The *Lewis* Court further concluded that the admission of industry standards evidence would create a "strong likelihood" of diverting the jury's attention in a design defect case from the manufacturer's control of the product to the reasonableness of its conduct in choosing its design. *Lewis*, 528 A.2d at 594. The bright-line rule announced in *Lewis* was subsequently extended to exclude evidence of compliance with government standards. *See, e.g., Gaudio v. Ford Motor Co.*, 976 A.2d 524, 544 (Pa. Super. Ct. 2009) (collecting cases).

In 2014, however, the Court overruled *Azzarello* and disavowed the no-negligence rubric used to narrow defenses available in strict liability actions. *Tincher*, 104 A.3d at 308, 376. In the process, the *Tincher* Court "telegraphed" its disapproval of *Lewis*. *Lehmann*, 2022 WL 2541432, at *9. As recently explained by the United States District Court for the Eastern District of Pennsylvania:

> The court acknowledged its opinion in *Tincher* might affect "subsidiary issues constructed from *Azzarello*." At the end of the section of *Tincher* overruling *Azzarello*, the Supreme Court noted: "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 in light of the considerations pertaining to the case." *Lewis* is a "subsequent application" of *Azzarello* regarding negligence concepts. . . . ***Tincher's language suggests Lewis's bright-line rule of excluding industry standards evidence is extinct***.

Lehmann, 2022 WL 2541432, at *9 (emphasis added; footnotes omitted). The federal district court added: "We cannot square a per se exclusion of industry standards with *Tincher*'s criticisms of the *Azzarello* doctrine." *Id.* Indeed, the federal district court's conclusion is understated. *Tincher* expressly noted that *Lewis* itself described *Azzarello* as offering a "distinct standard from either a risk-utility or consumer expectation test," 104 A.3d at 379—clearly implying that the precise foundation of the holdings in *Lewis* were incompatible with the *Tincher* Court's express adoption of those tests.

Therefore, and because the categorical prohibition traces its origin to the now-defunct *Azzarello* regime, "[t]he extinction of *Azzarello* vitiates the *Lewis* reasoning." *Lehmann*, 2022 WL 2541432, at *8; *see, e.g., Cloud v. Electrolux Home Prods., Inc.*, No. 15-00571, 2017 WL 3835602, at *2 (E.D. Pa. Jan. 26, 2017) ("*Lewis*'s bright-line delineation between negligence and strict liability concepts is . . . in tension with *Tincher*'s holding that a manufacturer's conduct and reasonableness are relevant to the determination of product defect. After *Tincher*, courts should not draw a bright line between negligence theories and strict liability

theories regarding evidence of industry standards." (citations omitted)).[2] Accordingly, contrary to the panel's holding, *Tincher* necessarily overturned *Lewis* and its bright-line rule.

B. This Court Should Decline Any Invitation to Resurrect the *Per Se* Exclusion Of Government or Industry Standards Evidence in Design Defect Cases

It is anticipated that Plaintiffs will ask this Court to resurrect the *per se* exclusion of government or industry standards evidence in design defect cases. This Court should decline that invitation for several reasons, and chief among them is that the bright-line rule violates "*Tincher*'s functional purpose of reducing jury confusion." *Lehmann,* 2022 WL 2541432, at *10.

Section 402A encompasses two types of defect cases: (1) manufacturing defects; and (2) design defects. *See, e.g., Keen v. C.R. Bard, Inc.*, 480 F.Supp.3d 624, 634 (E.D. Pa. 2020) (applying Pennsylvania law). A manufacturing defect is often "readily identifiable" to the jury. *Barker v. Lull Eng'g Co.*, 573 P.2d 443,

[2] *See also Rapchak v. Haldex Brake Prods. Corp.*, No. 2:13-CV-1307, 2016 WL 3752908, at *3 (W.D. Pa. July 14, 2016) ("[A]lthough evidence of compliance with industry standards is not a complete defense to a plaintiff's strict liability claim, or even necessarily [ ] highly probative, . . . without affirmative authority from *Tincher* or any other post-*Tincher* precedential decision [of the Pennsylvania Supreme Court] barring such evidence . . . the principles of *Tincher* counsel in favor of its admissibility." (alterations in original; citation and quotation marks omitted)); *cf. Covell v. Bell Sports, Inc.*, 651 F.3d 357, 365-66 (3d Cir. 2011) ("To rely upon *Lewis* (handed down in 1987, during the zenith of Pennsylvania's no-negligence-in-strict-liability regime) would be to assume the question out of existence, because *Lewis* based its reasoning entirely upon the premise that there shall be no negligence in products liability. No longer can a court assume that premise is true—which means, by extension, that no longer can a court assume *Lewis* accurately reflects the law of Pennsylvania." (citations omitted)).

454 (Cal. 1978), *superseded by statute on other grounds as stated in Merrill v. Navegar, Inc.*, 89 Cal.Rptr.2d 146 (Cal. App. Ct. 2000). This is because the jury is "frequently able to judge the defective item by comparing it to others similarly produced by the manufacturer," providing a "built-in standard" against which to measure the adequacy of the product. *Union Supply Co. v. Pust*, 583 P.2d 276, 286 (Colo. 1978); James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 774 (1978-79).

A design defect, by contrast, cannot be identified simply by comparing the product with the manufacturer's plans or with other units of the same product line. *Barker*, 573 P.2d at 454. In such cases, the plaintiff is attacking the design itself, necessitating an inquiry on "the value choices implicit in the manufacturer's design choices." Henderson, Jr., *supra*, 63 MINN. L. REV. at 774. Thus, by reason of the nature of a design defect case, "the trier of fact is greatly dependent on expert evidence ***and industry standards*** in deciding whether a defect is present." *Union Supply*, 583 P.2d at 286 (emphasis added); *see also Lewis*, 528 A.2d at 596 (Hutchinson, J., dissenting) ("Courts are at best novices in the designer's field and often illiterate in his language. The technical or design expertise we gain in one case is generally not transferable to the next. Nevertheless, we must provide an impartial forum when poorly designed products cause injuries. ***To provide that***

kind of forum, we need all the help we can get." (emphasis added)).[3] Indeed, as astutely noted by *Amicus Curiae* Philadelphia Association of Defense Counsel (PDAC), prevailing government or industry standards are, more often than not, an integral part of the design of a product. (Br. of *Amicus Curiae* PDAC at 3, 17-19).

Were this Court to nonetheless reinstate the categorical prohibition on government or industry standards evidence, it would force juries to make design defect determinations "in a vacuum." David A. Urban, *Custom's Proper Role in Strict Product Liability Actions Based on Design Defect*, 38 UCLA L. REV. 439, 440 (1990); *see* Henderson, Jr., *supra*, 63 MINN. L. REV. at 780-81 n.40 (reasoning that, without meaningful design standards, there will be a "heavy reliance upon the unsupported opinions of experts relating to the ultimate issue of the reasonableness of defendant's conscious design choices"); *see also* Joel I. Fishbein, *Industry Custom Evidence: Its Relevance in Design Defect Products Liability Cases-Lewis v. Coffing Hoist Division, Duff-Norton Co.*, 61 TEMP. L. REV. 627, 640 (1987) ("Evidence revealing a substantial majority of engineers in a field reached the same conclusion regarding how to safely design a product certainly has probative value in a design defect case. The alternative, mandated by *Azzarello*, is a battle

[3] *See generally* Kim D. Larsen, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045, 2059-60 (1984) ("Evidence of industry standards or custom, government regulation, and the financial success of other manufacturers' products can guide courts and juries in determining the incremental costs and benefits associated with a particular design alternative." (footnotes omitted)).

between the two parties' experts, each proffering their own hindsight opinion regarding the efficacy of defendant's chosen design." (footnotes omitted)).

The following hypothetical illustrates this point:

> A manufacturer produces high-lift loaders with no doors. These lifts can topple when carrying too much weight on rough terrain. The manufacturer can incorporate two safety features into the lifts. First, it can supply doors. However, purchasers of lifts prefer them without because workers find doors ungainly. Second, the manufacturer could, at a low cost, make the lifts less likely to topple by adding counterweights to the rear of the vehicle. This feature, however, would greatly reduce speed and fuel efficiency. As a result of these considerations, all manufacturers of lifts produce them with no doors and no counterweights.
>
> A worker suffers injury when he drives a lift on rough terrain and causes the lift to topple. The worker sues, alleging that the lift is defective in design. . . .
>
> * * *
>
> [T]o make the risk-benefit determination, the jury must consider, first, whether the manufacturer should have supplied doors. Without custom, the manufacturer faces considerable difficulty convincing the jury that purchasers actually prefer lifts with no doors and that adding doors is thus infeasible. The fact that no manufacturers have supplied doors indicates that no one, neither purchasers nor manufacturers, has found it imperative to do so. But the jury may not learn of this fact. Next, to decide whether the risk-benefit test mandates counterweights, the jury must consider technologically complex and probably conflicting evidence regarding the feasibility of an alternative design—how much a decrease in fuel efficiency will affect, for example, the sale price of the lift, the usability of the lift, the potential for harm, and other factors—without knowing that the industry has rejected the alternative. In short, ***the jury is asked to solve a multifaceted and technologically complex problem with no point of reference***.

Urban, *supra*, 38 UCLA L. REV. at 440-41 (footnotes omitted). Thus, continuing to exclude negligence-based evidence regarding industry standards in design defect cases leads to jury confusion and "furthers the same goal *Tincher* rejected." *Lehmann*, 2022 WL 2541432, at *10.

As shown in this case, such confusion does not come from introducing government or industry standards evidence. Rather, it comes from not allowing the jury to hear evidence that it knows exists. Henderson, Jr., *supra*, 63 MINN. L. REV. at 780-81 n.40 ("The absence of any viable product safety standards with which to decide [design defect] cases . . . would be obvious to even the casual observer."); *cf. Robinson v. G.C.C., Inc.*, 808 P.2d 522, 527 (Nev. 1991) ("The best way to determine if a defendant should have built a safer product is to let the jury hear all the evidence relating to the course of conduct of both the industry, and the particular manufacturer.").[4]

Here, the Trial Court granted Plaintiffs' motion *in limine* and precluded Werner from, *inter alia*, introducing evidence of the product design's compliance with industry and government safety standards. (R.R. 30a, 105a-113a). Then, to keep the jury from learning that the product involved in the accident complied with

[4] Although aware of their existence, *Amici* are not suggesting that the jury is sufficiently familiar with government or industry standards to the point where it obviates the need for testimony about them. To the contrary, and consistent with the wealth of authority on the topic, *Amici* believe that expert testimony on the pertinent government or industry standards is essential to the jury performing its role in a design defect case.

government regulations and industry standards, the Trial Court took the extraordinary—and likely, unprecedented—step of ordering that the product be physically altered to conceal evidence of such compliance. (R.R. 1204a-1205a, 1216a-1217a).

Despite concealing this information, the jury still desired to know whether the product at issue complied with the pertinent regulations and standards, raising the issue on its own and submitting a note during deliberations about it. (R.R. 1201a-1202a). Therefore, like *Azzarello*'s no-negligence-in-strict-liability rubric, the categorical prohibition "perpetuated jury confusion in [] strict liability cases, rather than dissipating it." *Tincher*, 104 A.3d at 377 (alteration added).

Moreover, preserving the *per se* exclusion entails approving *Lewis*'s erroneous belief that, when faced with evidence of government or industry standards, a jury cannot be trusted to distinguish between the design and the manufacturer's conduct. *Lewis*, 528 A.2d at 594. Such a patronizing view of jurors is as misguided as it is offensive. John H. Chun, *The New Citadel: A Reasonably Designed Products Liability Restatement*, 79 CORNELL L. REV. 1654, 1678 (1994) (reasoning that "*Lewis* keeps jurors from considering evidence of industry standards relevant to the product's design emphasizes Pennsylvania's minimization of the jury's role").

Juries are often tasked with deciding complex issues. *See*, *e.g.*, *Walsh v. BASF Corp.*, 234 A.3d 446, 466 (Pa. 2020) (holding that, in the context of a toxic tort/products liability action involving novel scientific evidence, "[h]ow effectively and convincingly an expert employs a given methodology is a matter for the jury to assess"). In fact, studies show that jurors comprehend rather complicated subject matter. *See, e.g.*, Philip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 909, 920-21 (2002) (listing various studies on jury ability to comprehend complex matters); *see also* Facts About Civil Juries in the United States (Citizens for Corporate Accountability & Individual Rights 2000) (citing Hans & Vidmar, Judging the Jury (1986), and stating: "In studying data from hundreds of jury trials and jury simulations, Professors Valerie P. Hans and Neil Vidmar found that juror incompetence is a rare phenomenon. This is because the deliberative process allows jurors to pool their collective memories, allowing them to recall and analyze the evidence and the law. One study examining jurors' memories for facts and law found that a jury's collective memory was large, recalling 90 percent of the evidence and 80 percent of the instructions.").

Fundamentally, it is for the jury to determine in design defect cases if the product was unreasonably dangerous. *See*, *e.g.*, *Soproni v. Polygon Apartment Partners*, 971 P.2d 500, 505-06 (Wash. 1999). Courts have recognized that juries must consider a multitude of factors in determining whether a product is defective,

of which regulatory compliance is one essential piece. *See, e.g.*, *Jackson v. Spagnola*, 503 A.2d 944, 948 (Pa. 1986) (arguing that regulatory compliance is "'only a piece of the evidentiary puzzle'" (quoting *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985)); *Tobin v. Astra Pharm. Prods.*, 993 F.2d 528, 538 (6th Cir. 1993) (opining that "the jury may weigh FDA approval as it sees fit, especially in a case where the plaintiff has presented evidence to support an articulable basis for disregarding an FDA finding"); *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 70-71 (Mass. 1985) (treating compliance with an FDA-approved warning on oral contraceptive as a factor to be considered).

Therefore, the proper procedure in design defect cases is to provide adequate guidance to jurors on the evidentiary value of government or safety standards via a jury instruction, not to exclude such relevant evidence because of its supposed complexity. Fishbein, *supra*, 61 TEMP. L. REV. at 641 ("Evidence of industry customs and standards . . . should be admitted because the evidence is relevant, and with proper jury instructions, not unduly prejudicial to the plaintiff's case."); *see, e.g.*, *Moehle v. Chrysler Motor Corp.*, 443 N.E.2d 575, 578 (Ill. 1982) ("With careful instructions to the jury by the trial judge and with effective argument by plaintiff's counsel we believe that the jury can properly evaluate the importance of

the safety-standard evidence and then weigh it with all the other evidence in the record.").[5]

Further, maintaining the categorical prohibition necessitates endorsing the increasingly outmoded theory espoused in *Lewis* that strict products liability is "so entirely different from negligence that it should not share any features with negligence doctrines." *Kim v. Toyota Motor Corp.*, 197 Cal. Rptr. 3d 647, 659-61 (Cal. App. Ct. 2016), *aff'd* 424 P.3d 290 (Cal. 2018). As observed by the California Supreme Court:

> [T]he risk-benefit balancing does in some ways resemble a traditional negligence inquiry, and most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the risk-benefit standard—e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case…. The pertinent difference between the two inquiries . . . is that strict liability marshals this evidence to illuminate the condition of the product, rather than the reasonableness of the manufacturer's conduct. And as noted, evidence of industry custom and practice can shed some light on the condition of the challenged product, as opposed to the reasonableness of the manufacturer's conduct. ***To admit industry custom and practice evidence for this limited purpose pays proper respect to the distinct doctrine of strict products liability***.

[5] As recognized by several courts, the adversary process itself will further diminish any concerns over admitting evidence of government or industry standards. *See, e.g., Union Supply*, 583 P.2d at 286-87 (finding that, "since we require that the safety standards be introduced through an expert witness, the adverse party will have a fair opportunity to cross-examine the expert on any inconsistencies, misrepresentations or other limitations of the standards"); *Moehle v. Chrysler Motor Corp.*, 443 N.E.2d at 578 ("As the plaintiffs did in this case, plaintiffs are free to dispute the importance of safety-standard evidence in deciding whether a product is defective or unreasonably dangerous. We believe that the jury is capable of giving the proper weight to this type of evidence.").

Kim v. Toyota Motor Corp., 424 P.3d 290, 300 (Cal. 2018) (citations and quotation marks omitted; emphasis added). Put simply, the bright-line rule cannot be reconciled with the more modern view that the law of strict products liability is infused with negligence concepts.

Likewise, maintaining the *per se* exclusion invariably require perpetuating the fiction, first expressed in *Lewis*, that government or industry standards evidence is not relevant in design defect cases or, alternatively, only relevant if the plaintiff "opens the door." *Lewis*, 528 A.2d at 594; *Gaudio*, 976 A.2d at 544. In reality, evidence of a manufacturer's compliance or non-compliance with the pertinent standards is "plainly relevant" in design defect cases. AM. L. PROD. LIAB. 3D §17:19 (2022). As stated by a federal district court:

> Compliance with an industry standard may prove whether the manufacturer's assessment of the risks and utilities of designing the product as it did were reasonable. And non-compliance with an industry standard may prove the manufacturer created an unreasonable risk in designing the product as it did. Industry standards evidence thus reflects an item of proof relevant to the risk-utility test.

Lehmann, 2022 WL 2541432, at *10.

The California Supreme Court similarly reasoned:

> In what may be a more common scenario, plaintiffs might legitimately seek to inform the jury that the defendant has not implemented a safety feature that is standard in the industry. . . . Again, such evidence could not be dispositive; perhaps other manufacturers have chosen, for whatever reason, to incur unnecessary costs for miniscule safety gains, or perhaps the unique design of the defendant's product

> makes the industry-standard feature redundant. But plaintiffs would surely be within their rights in asking the jury to make the comparison and to draw reasonable inferences from the widespread adoption of a safety feature missing from the defendant's product.
>
> By the same token, a defendant might point to the fact that a particular safety feature is not standard in the industry as some evidence of whether the challenged design embodies excess preventable danger under *Barker*. The probative value of such evidence may well vary from case to case, and in some cases the relationship between industry design practices and consideration of the *Barker* factors may be sufficiently attenuated to warrant exclusion of the evidence. But in cases such as this one, competing manufacturers' independent design decisions may reflect their own research or experience in balancing safety, cost, and functionality, and thus shed some light on the appropriate balance of safety risks and benefits in much the same manner as evidence of industry-wide technical standards. Again, such evidence cannot be dispositive; perhaps the entire industry has unduly lagged in adopting feasible safety technologies. But although counsel may argue that industry standards can and should be more stringent, [e]vidence that all product designers in the industry balance the competing factors in a particular way clearly is relevant to the issue before the jury.

Kim, 424 P.3d at 299-300 (Cal. 2018) (alteration in original; footnote, citations, and quotation marks omitted).

Thus, regardless of whether it is offered by the plaintiff or the defendant, government or industry standards evidence "may be relevant in a strict products liability action in determining whether a product embodies excessive preventable danger, which is the ultimate question under the risk-benefit test." *Kim*, 197 Cal. Rptr. 3d at 659.

Additionally, preserving the bar on government or industry standards entails keeping from the jury evidence that is "provable as a fact, and thus is considerably stronger than an expert's' assessment of a product's dangerousness." *Urban*, *supra*, 38 UCLA L. REV. at 466-67 (footnote and quotation marks omitted). The absurdity of that outcome is self-evident. Finally, as they represent the consensus of an entire industry, government or industry standards "are likely to be more probative than a single learned treatise or an expert opinion." *Id*. at 466. To exclude those standards is tantamount to turning the concept of relevancy on its head.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Manufacturers' Association, and American Property Casualty Insurance Association urge this Court to reverse the Superior Court panel, vacate its Order, and remand for further proceedings consistent with the terms of this Court's forthcoming opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of *Amici Curiae* Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Manufacturers' Association, and American Property Casualty Insurance Association in Support of Appellants complies with the word-count limit set forth in Pa.R.A.P. 531. Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required under Rule 2135(b), (d)), contains 4,914 words.

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

Dated: July 18, 2022

/s/ Casey Alan Coyle
Casey Alan Coyle, Esquire

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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