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Davis v. Volkswagen Group of America

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As the Pennsylvania judicial system continues to try to wrap its head around *Tincher v. Omega -Flex, Inc.*[1] and its implications on product liability claims, almost eight (8) years later, a recurring issue continues to pop up across the Commonwealth – the effect Tincher has had on jury instructions and, more specifically, which of the two (2) newly formed "tests" to proceed under: consumer expectations or risk-utility. Enter *Davis v. Volkswagen Group of America*[2], a crashworthiness case out of Lehigh County, in which a Volkswagen Passat caught on fire, killing the driver, as a result of a head-on collision.

The accident happened in 2012, but *Tincher* had been decided by the time the case approached trial in 2017, and the plaintiff filed a Motion *in Limine* to preclude retroactive application of *Tincher*, or, in the alternative, to have the Court apply the consumer expectations test only.[3] Volkswagen argued that *Tincher* should apply "fully" to the case, and the only appropriate test for strict product liability claims "involving complex products such as automobiles" was the risk-utility test.[4]

At the charging conference, the plaintiff presented a consumer expectations test instruction, as well as a risk-utility test instruction, as an alternative to the former should the Court decline to utilize it.[5] Volkswagen only provided a proposed risk-utility test instruction.[6] The trial court stated it would instruct the jury on both tests, as "it could be either, and/or."[7] The parties also discussed whether the Court should instruct the jury that the other driver involved in the collision was negligent and said negligence caused the collision (plaintiff objected), the concurrent cause instruction, and, whether the defect was a "factual cause" (plaintiff's request) or a "substantial factor" (Volkswagen's request).[8] The trial court ruled it would instruct the jury the other driver was negligent, the negligence caused the collision, and the negligence caused harm to the decedent, and, that it would use the term "factual cause."[9]

The jury found that while the Passat had a defective fuel tank and was not "crashworthy," the defective fuel tank did not bring about harm to the decedent.[10] The plaintiff filed post-trial Motions, which were denied, and then a notice of appeal.[11] The appeal contained seven (7) issues, three (3) of which involved the instructions, and the last of which stated: Did the Trial Court abuse its discretion or commit legal error by refusing to allow Appellants to pursue their chosen theory of liability, as commanded by the Pennsylvania Supreme Court in *Tincher v. Omega-Flex, Inc.*?[12]

The Superior Court initially noted that trial courts have "wide discretion in fashioning jury instructions" and are "not required to give every charge that is requested by the parties."[13] As such, "[a] jury charge is adequate unless the issues are not made clear, the jury was misled by the instructions, or there was an omission from the charge amounting to a fundamental error."[14]

Plaintiff argued the trial court erred in instructing the jury on both the consumer expectations test and the risk-utility test, when she litigated her case under the consumer expectations test and only asked the Court to instruct on that particular theory.[15] By instructing the jury on both tests, plaintiff claimed the trial court prevented her from "trying this case under her chosen theory of liability."[16] Recognizing that in accordance with *Tincher*, a plaintiff can "predicate a strict liability claim on either the consumer expectations test or the risk-utility test," the Superior

Court pointed out that "where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted."[17] Volkswagen had admitted into evidence expert testimony that the fuel tank was not punctured, and that the fire started in the engine, not near the fuel tank, which put the risk-utility test into issue, despite the plaintiff's theory being consumer expectations.[18] As such, there was no error, and the instruction on both tests was proper.[19]

While the Superior Court's opinion is non-precedential, it certainly provides guidance on how to shape and tailor our product liability theories going forward, and what we might expect to see from the Appellate Courts in the future, should challenges arise. More specifically, we must be prepared to present our product claims under either theory and test, should the trial court provide an instruction on both consumer expectations and risk-utility. It is seemingly also the first case that demonstrated the other side may use one of the tests as a defense, thus necessitating plaintiffs' lawyers thinking ahead as to what evidence may be needed to rebut any such arguments. ◆

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1 104 A.3d 328 (Pa. 2014).
2 2019 Pa. Super. Unpub. LEXIS 2763 (Pa. Super. Ct. 2019), *app. denied* 224 A.3d 364 (Pa. 2020).
3 *Id.* at *2.
4 *Id.*
5 *Id.* at *4.
6 *Id.*
7 *Id.*
8 *Id.* at *5.
9 *Id.*
10 *Id.* at *14.
11 *Id.*
12 *Id.* at *16.
13 *Id.* at *17, quoting *Amato v. Bell & Gassett,* 116 A.3d 607, 621 (Pa. Super. Ct. 2015).
14 *Davis supra,* 2019 Pa. Super. Unpub. LEXIS 2763 at *17, quoting *Tincher* supra, 104 A.3d at 351.
15 *Id.* at *32.
16 *Id.*
17 *Id.* at *33.
18 *Id.*
19 *Id.* at *33-34.