IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 17-3006

JILL SIKKELEE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID SIKKELEE, DECEASED,

APPELLANT

V.

PRECISION AIRMOTIVE CORPORATION, et al.,

APPELLEES

BRIEF OF *AMICUS CURIAE,* PENNSYLVANIA ASSOCIATION FOR JUSTICE, IN SUPPORT OF THE APPELLANT SUPPORTING REVERSAL

APPEAL FROM A MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AUGUST 3, 2017
(Honorable Matthew W. Brann, District Judge)

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CORPORATE DISCLOSURE STATEMENT

The Pennsylvania Association for Justice is not a party to this case. It is a non-profit, non-stock corporation and, as such, is not publicly held nor does any publicly held corporation own 10% or more of its stock.

/s/Daryl Christopher
Daryl E. Christopher, Esquire

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Pennsylvania Association for Justice (PAJ) is a non-profit organization with a membership of approximately 2,000 attorneys of the trial bar of the Commonwealth of Pennsylvania. Since 1968, PAJ has promoted the rights of individual citizens by advocating for the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. PAJ opposes, in any format, special privileges for any individual, group, or entity. Through its *Amicus Curiae* Committee, PAJ strives to maintain a high profile in the Commonwealth of Pennsylvania and the Federal Courts by promoting, through advocacy, the rights of individuals and the goals of its membership.

PAJ has, through its *Amicus* Committee, authorized the undersigned to file this Brief. No one other than A*micus Curiae*, its members or counsel paid in whole or in part for the preparation of the A*micus* brief or authored in whole or in part the A*micus* brief. No party or party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person contributed money that was intended

to fund preparing or submitting this brief. All costs were borne by Schmidt Kramer PC.

This brief has been filed with the consent of all parties pursuant to F.R.A.P. 29(a)(2).

SUMMARY OF ARGUMENT

Under Pennsylvania law, a product is defective if it fails to contain every element, including warnings, necessary to make it safe for its intended user. A seller may defend against a claim that its product was defective by proving that at the time of injury the product was substantially changed from its condition at the time of sale. However, the seller remains responsible for injuries caused by a dangerous product if it fails to consider and protect against foreseeable post-sale changes to its product.

The questions which are relevant to this inquiry: (1) whether the product was defective when it left the control of the seller, (2) whether a post-sale change to a product was a *substantial* change, and (3) whether a substantial change was *foreseeable* are all questions of fact properly reserved for the fact finder. The District Court failed to properly apply Pennsylvania law when it answered these questions of fact on summary judgment against the nonmoving party.

ARGUMENT

A. UNDER PENNSYLVANIA PRODUCT LIABILITY LAW, QUESTIONS CONCERNING WHETHER A PRODUCT IS UNREASONABLY DANGEROUS, WHETHER A POST-SALE CHANGE IS A SUBSTANTIAL CHANGE, AND WHETHER A POST-SALE CHANGE IS FORESEEABLE ARE JURY QUESTIONS IN ALL BUT THE MOST EXCEPTIONAL CASES.

The general rule in Pennsylvania is that a defendant is strictly liable for injuries caused by a defectively designed product including a product that has undergone post-sale changes, if the product was defective when it left the seller's possession. Only post-sale changes that are both substantial and unforeseeable will allow the manufacture of a defective product to escape liability.

Pennsylvania product liability law has undergone significant changes in recent years since the Pennsylvania Supreme Court opinion in Tincher v. Omega Flex, Inc., 104 A.3d 328, (Pa. 2014). Under Tincher, a plaintiff may proceed under either the Consumer Expectations Standard or the Risk Utility Standard to prove that a product was defective. While Tincher changed some aspects of the law, others remained the same. Pennsylvania has long been a state in which the question of whether a post-sale change to a product was "substantial" or "foreseeable" was reserved to the jury.

> The test in such a situation is whether the manufacturer could have reasonably expected or foreseen such an alteration; such a determination is for the fact-finder unless the inferences are so clear that a court can say as a matter of law that a reasonable manufacturer could not have foreseen the change. *See, e.g. Anderson v. Klix Chemical Co., 256 Or. 199, 472 P.2d 806 (1970); O. S Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963).* Determination of this issue should, therefore, await trial.

D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. 120, 125, 310 A.2d 307, 310 (1973). Tincher did not change this aspect of Pennsylvania law. In fact, the Tincher Court expanded the jury's role in product-defect cases by expressly overruling Azarello v. Black Bros., 480 Pa 547 (1978), which had required that a judge make an initial determination about whether a product was unreasonably dangerous before the jury could determine the merits of the case. See Tincher v. Omega Flex, Inc., 104 A.3d 328, 387 (Pa. 2014). See also Amato v. Bell & Gossett, 2015 PA Super 83 (Apr. 17, 2015), *Allocatur Granted* 130 A.3d 1283 (Pa. 2016) (Allocator was granted on the following issue: "Whether, under the Court's recent decision in *Tincher v. Omega Flex, Inc.*, a defendant in a strict-liability claim based on a failure-to-warn theory has the

right to have a jury determine whether its product was "unreasonably dangerous?").

Under the facts of the case *sub judice*, reasonable minds could easily find that the engine was defective when first sold in 1969 and that the 2004 engine overhaul which used lock tab washers to secure the float bowl of the carburetor to the throttle body was either not a substantial change at all, since the parts were indistinguishable from the original parts or was foreseeable, since engines must be overhauled and the parts used were exactly the ones expected to be used.

The Plaintiff/Appellant Ms. Sikkelee has produced evidence in the form of expert reports and testimony that the carburetor bowl assembly was defective as designed and manufactured in 1969 when it left the possession of Defendant/Appellee Lycoming. The method used to secure the body-to-bowl screws was unreasonably dangerous, had an unfavorable risk/utility ratio and did not meet an ordinary consumer's expectation of safety. Ms. Sikkelee has produced evidence in the form of reports and testimony that Lycoming Service Bulletin 366 (SB366) published in 1973 was a defective warning for dealing with the problem of loosening body-to-

bowl screws. Ms. Sikkelee has produced evidence that the 2004 overhaul of the subject engine used the same method for securing the carburetor float bowl to the throttle body as was used in 1969 and was prescribed in SB366. The difference was that the overhaul used new screws, lock tab washers, and gaskets. Following the crash that killed David Sikkelee, the investigation revealed that the throttle body had come loose from the float bowl causing a loss of power. These facts, when read in the light most favorable to Ms. Sikkelee, require that a *jury* determine whether the engine was defective when sold in 1969 and whether the 2004 overhaul was a substantial and unforeseeable change to the Lycoming design.

The requirement that these questions be answered by the jury is well-supported by case law. In Merriweather v. E. W. Bliss Co., 636 F.2d 42, 44–45 (3d Cir. 1980), Your Honorable Court, stated:

> Since the adoption by Pennsylvania's courts of § 402A the doctrine of substantial change has been an integral part of that state's law of products liability. *See e. g. Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 331-37, 319 A.2d 914, 921-23 (1974); Webb v. Zurn, 422 Pa. 424, 427, 220 A.2d 853, 855 (1966); D'Antona v. Hampton Grinding Wheel Co., 225 Pa.Super. 120, 125, 310 A.2d 307 (1973).* Furthermore in this state the question of whether a post-delivery modification constitutes a substantial change in a product has typically been submitted to the jury as a matter for its determination. *See*

> *e. g., Takach v. B. M. Root Co., 279 Pa.Super. 167, 420 A.2d 1084 (1980), (Lipez, J., concurring and dissenting); D'Antona v. Hampton Grinding Wheel Co., supra.* **Moreover, we have, in this court, concluded that, under Pennsylvania law, the question of substantial change is properly one for the jury's consideration**. *See e. g., Heckman v. Federal Press Co., 587 F.2d 612, 616 (3d Cir. 1979); Capasso v. Minister Machine Products Co., Inc., 532 F.2d 952, 955 (3d Cir. 1976).* In fact, in our review of Pennsylvania law on this issue we have failed to find any appellate decisions, either prior to or following *Azzarello*, which have challenged the propriety of this practice. Accordingly we must conclude, in the absence of any clear precedent to the contrary, that the concept of substantial change remains part of the law of Pennsylvania under § 402A.

Merriweather v. E. W. Bliss Co., 636 F.2d 42, 44–45 (3d Cir. 1980). (emphasis added).

In Eck v. Powermatic Houdaile, Div. of Houdaile Inds., Inc., the Pennsylvania Superior Court required a retrial of a case because the trial court **failed to instruct the jury that only substantial changes that were not foreseeable** or were negligently performed would allow a product defendant to escape liability.

> In the case *sub judice*, the court's erroneous instruction with regard to the issue of substantial change may well have affected the jury's determination of defectiveness and causation alike, for the two issues were inextricably interwoven. As the authors of one prominent treatise have observed, "when there has been an unforeseeable or uncontemplated alteration in a product …, it is difficult to determine (1) whether there was ever a

> defect in the product when sold and (2) if so, whether the defect contributed to the damaging event." *Prosser and Keeton on Torts* § 102, at 711 (5th ed. 1984). We hold, therefore, that upon remand the entire issue of liability must be relitigated.

Eck v. Powermatic Houdaille, Div. of Houdaille Indus., Inc., 364 Pa. Super. 178, 195–96, 527 A.2d 1012, 1021 (1987). Pennsylvania law is clear. In all but the rarest of cases, a jury must determine whether a change to a product was a substantial change, and if so, whether that substantial change was so unforeseeable to allow the manufacturer to escape liability for the harm caused.

The District Court does cite to a number of cases in support of its Opinion that summary judgment is appropriate. These cases are distinguishable from the present case. First, many of these cases were resolved after trials, not by summary judgment. A close reading of Southwire Co. v. Beloit E. Corp., 370 F. Supp. 842, 858 (E.D. Pa. 1974), shows that the case fails to discuss or address the question of whether a change to a product is foreseeable, most likely because the parties did not raise the issue. Southwire was also decided after a bench trial.

> Our detailed findings of fact and conclusions of law now follow. **We note that it is the factual and not the legal issues which are crucial in this case. We have**

> **made extensive findings of fact in the wake of which the legal issues become relatively simple and straightforward**. Suffice it to say at this juncture that, after careful consideration of all the evidence, we have concluded that plaintiffs must be denied relief since they failed to carry their burden of proving their claim by a fair preponderance of the evidence.

Southwire Co. v. Beloit E. Corp., 370 F. Supp. 842, 845 (E.D. Pa. 1974). (emphasis added).

In Fisher v. Walsh Parts & Serv. Co., 277 F. Supp. 2d 496, 501–02 (E.D. Pa. 2003), the court stated that the factfinder had to determine whether a manufacturer should have anticipated and warned against removing safety wires and washers required to make a product safe or should have used an alternate design that could not be altered. After a bench trial, the court found in favor of the Defendant. See Fisher v. Walsh Parts & Serv. Co., 296 F. Supp. 2d 551, 565 (E.D. Pa. 2003). The fact that the Plaintiff in Fisher was ultimately unsuccessful does not change the fact that these are questions properly reserved to the factfinder. See also Myers v. Triad Controls, Inc., 720 A.2d 134, 136 (Pa. Super. Ct. 1998), in which the court reversed a grant of summary judgment to the defendant on the question of substantial change and held that the jury should have been allowed to determine whether the plaintiff's

injury had been caused by an initial defect or by a change to the product. Id. at 136.

Reese v. Ford Motor Co., No. CIV.A. 09-2948, 2011 WL 4572027, (E.D. Pa. Oct. 4, 2011), aff'd in part, rev'd in part and remanded, 499 F. App'x 163 (3d Cir. 2012), was a decision on a motion for summary judgment, but the court determined that Plaintiff had produced no evidence to show that Ford could have foreseen the use of aftermarket wire in its vehicle.

> I write further to address issues particularly affecting the Reeses' strict liability claim against Ford. **The Reeses' own expert, Victor Donatelli, testified that the Monterey would not have left Ford's possession with aftermarket wiring.** Doc. 39–6 at p. 4, 359 A.2d 822. The Reeses attempt to overcome this testimony by arguing that the installation of aftermarket wiring was foreseeable. Plaintiffs correctly note that "[w]here the product has reached the user or consumer with substantial change, the question becomes whether the manufacturer could have reasonably expected or foreseen such an alteration of its product." *Davis,* 690 A.2d at 190. **But the record contains no evidence suggesting that Ford should have foreseen the installation of aftermarket wiring by one of its authorized dealers.** Donatelli testified that when he was a mechanic at another manufacturer's dealership, he made undocumented repairs to vehicles, but he also testified that he never used aftermarket parts. Doc. 45–14 at p. 4, 690 A.2d 186. Based on the record evidence, Ford could not have foreseen the alterations that were made to the Reese's vehicle.

Reese v. Ford Motor Co., No. CIV.A. 09-2948, 2011 WL 4572027, at *5 (E.D. Pa. Oct. 4, 2011), aff'd in part, rev'd in part and remanded, 499 F. App'x 163 (3d Cir. 2012) (emphasis added). The present case is easily distinguished because the Plaintiff's experts have clearly linked the design flaws which caused this crash to Lycoming.

Schwartz v. Abex Corp., 106 F. Supp. 3d 626, 653 (E.D. Pa. 2015), and Speyer, Inc. v. Humble Oil & Ref. Co., 403 F.2d 766 (3d Cir. 1968), are also distinguishable from the present case. In each of these cases, the subsequent change, and only the change to the product after it left the possession of the manufacturer, was the cause of the harm. In Schwartz, the Defendant's product, which did not contain asbestos, was used in a larger machine that did contain asbestos. The court held that under those circumstances, the Defendant could not be responsible for the asbestos-related injuries. By contrast, the design of the engine in the present case, including the use of the lock tab wash was the same in 2004 as it was in 1969. The replacement parts which failed were indistinguishable from the original parts. The fact that these parts were used was clearly foreseeable because the Defendant's

maintenance instructions required the engine to be overhauled and required substantially identical replacement parts to be used during the overhaul.

Speyer is even more easily distinguished from the present case. In Speyer, a taxi driver forgot to remove a gasoline hose from his taxi as he drove away. The tension of the hose on the pump caused a leak and a fire. Speyer, Inc. v. Humble Oil & Ref. Co., 403 F.2d 766 (3d Cir. 1968), 768. After a bench trial, the court *found* that the injury was caused by the negligent driver, not the pump manufacturer. The Plaintiff then raised a new theory of liability stating that the injury was caused by a subsequent addition of a metal hose to the pump which was so strong that it damaged the gas pump when pulled. The court *found* that it was not possible for the defendant to have foreseen these kinds of changes to a gas hose that were not technically feasible at the time of the original sale. Id. at 771.

Jacobini v. V. & O. Press Co., 527 Pa. 32, 39–40, 588 A.2d 476, 479–80 (1991), presents a similar situation. In Jacobini, the Plaintiff attempted to hold a die set manufacturer responsible for injuries caused by a power press in which the die set was used.

Plaintiff's own expert conceded that the die set itself did not need a guard. The court stated that the manufacturer of the die set could not foresee and warn against dangers caused by other machines in which its product was used. Jacobini, which was decided by directed verdict after Plaintiff put on his evidence at trial, would be more akin to a lawsuit against a third-party manufacturer who only made lock tab washers rather than a suit against Lycoming.

The District Court also relies on Davis v. Berwind Corp., 547 Pa. 260, 267–68, 690 A.2d 186, 190 (1997). Davis really involves the warning, not whether there was a substantial change to the product. The product in Davis was a blender that came equipped with both safety guards and warnings not to put one's hand into the openings. The Plaintiff claimed that the Defendant should have anticipated removal of the safety guards and should have warned that the blades would continue to spin after power to the machine was terminated. The Court held that the warning not to put one's hand in to the opening of the machine was sufficient as a matter of law. Even if the guards were removed, the Plaintiff would have to ignore this clear warning to ever come into contact with the blades. In other words, the warning was so specific that it protected against

liability regardless of whether the guards were on or off. The question of whether the removal of the guards was a substantial change was irrelevant to the decision, which was based entirely on the warning.

Finally, the District Court relies on Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 334–37, 319 A.2d 914, 922–23 (1974), for the proposition that the mere passage of time is enough to allow for summary judgment on causation. Obviously a long time passed between 1969 and 2005. However, Kuisis, merely states that the passage of time may prevent a plaintiff from *inferring* that a defect caused his injury when there is no direct evidence of a defect.

> We recognize that, as a general rule, 'prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of the factual issue whether (a defect in design or) manufacture proximately caused the harm'. Pryor v. Lee C. Moore Corp., 262 F.2d 673, 675 (10th Cir. 1958). The age of an allegedly defective product must be considered in light of its expected useful life and the stress to which it has been subjected. In most cases, the weighing of these factors should be left to the finder of fact. But in certain situations the prolonged use factor may loom so large as to obscure all others in a case. Professor Prosser has summarized the position generally taken by the courts on this question: '(Lapse of time and long continued use) in itself is not enough, even when it has extended over a good many years, to defeat the recovery

> where there is satisfactory proof of an original defect; but when there is no definite evidence, and it is only a matter of inference from the fact that something broke or gave way, the continued use usually prevents the inference that the thing was more probably than not defective when it was sold. **Were there any direct evidence of a specific defect in the brake locking mechanism at the time of delivery, the age of the crane would not, as a matter of law, defeat liability, but in the absence of such evidence in the record before us, we do not think appellant has made out a case for the jury**.

Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 334–37, 319 A.2d 914, 922–23 (1974) (emphasis added). In the present case, Ms. Sikkelee has provided evidence from the post-crash investigation which links the defect to the cause of the crash. Ms. Sikkelee has also produced evidence which shows a history of similar washer failures in Lycoming engines going back decades.

The reliance on the passage of time is somewhat of a red herring here because the engine was in storage for the vast majority of that time and had very recently been overhauled. The facts make questions of wear and tear or a long operating history without incident irrelevant, and likewise the passage of time irrelevant to causation in the present case. It bears noting that the ultimate holding in Kuisis was that a new trial was necessary when the lower court had granted judgement to the defendant as a matter of law.

Id. at 917. The case again underscores that the questions at issue before Your Honorable Court are questions of fact for a jury.

Pennsylvania law is clear. Questions regarding initial defects and post-sale changes to products are jury questions. The District Court committed an error of law when it improperly invaded the province of the jury, failed to read all facts in the light most favorable to the non-moving party, and granted summary judgment. The present case involves numerous genuine issues of material fact which must be determined by the fact finder.

Amicus counsel has chosen to focus on the limited issues raised in this brief because of the importance of protecting the sacred right to have questions of fact decided by juries. *Amicus Curiae* fully supports and joins in the arguments made on behalf of Ms. Sikkelee by her apt counsel on the remainder of the issues in this case.

CONCLUSION

The District Court failed to review the record in the light most favorable to Ms. Sikkelee as the nonmoving party. The District Court made factual determinations against Ms. Sikkelee concerning the cause of the crash, whether the engine was defective when manufactured in 1969, whether the 2004 overhaul was a substantial change, whether it was a foreseeable change, and whether SB366 was an inadequate warning. The District Court committed errors of law by failing to recognize genuine issues of material fact and allowing a jury to decide them. *Amicus Curiae*, The Pennsylvania Association for Justice, requests that Your Honorable Court reverse the District Court's grant of Summary Judgment and remand the case for a jury trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Daryl E. Christopher, this 1st day of February, 2018, certify that the brief of *Amicus Curiae*, The Pennsylvania Association for Justice, was filed electronically and is available for viewing on the Court's ECF system. All counsel of record in this appeal are registered ECF users and service was accomplished by the appellate CM/ECF system.

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CERTIFICATE OF AUTHENTICITY

Counsel hereby certifies that the electronic version of Amicus Curiae's Brief filed via ECF with the Court on February 1, 2018, is identical to the paper copies forwarded to the Court.

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CERTIFICATION OF VIRUS DETECTION SOFTWARE

Counsel for *Amicus Curiae*—The Pennsylvania Association for Justice hereby certifies that the offices of Schmidt Kramer, P.C. has a sophisticated layered approach to antivirus protection, including:

1. all PCs have local AVG that scans files as they are created;

2. the exchange server has ClamAV and AVG for email; and

3. ClamAV and AVG scans all outbound email.

This virus detection system was in operation in our offices at the time of the electronic version of *Amicus Curiae's* Brief was created and filed.

/s/Daryl Christopher
Daryl E. Christopher, Esquire

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies that he is a member in good standing of this Court.

/s/Daryl Christopher
Daryl E. Christopher, Esquire

CERTIFICATE OF COMPLIANCE

This is to certify that this Brief complies with F.R.A.P. 32 (a) (7) (B) and F.R.A.P. 29(d) because the number of words contained in the foregoing brief is 4,601. This number was determined by using the Microsoft Word word count.

This Brief complies with the typeface requirement of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-Point "Bookman Old Style" font.

/s/Daryl Christopher
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