

FEDERAL COURT FLUBS PENNSYLVANIA STRICT-LIABILITY LAW IN MEDICAL-DEVICE SUIT

by
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In *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the Pennsylvania Supreme Court overruled Pennsylvania's extremely rigid form of strict product liability. *Tincher's* reworking of Pennsylvania strict-liability law, however, should have little to no impact on prescription medical-products cases because Pennsylvania has long excluded prescription medical products entirely from strict liability. *Hahn v. Richter*, 673 A.2d 888 (Pa. 1996).

Unfortunately, one Pennsylvania federal court recently allowed a strict-liability manufacturing-defect claim to proceed in a medical-device case based on a misconstruction of both *Tincher* specifically and Pennsylvania product-liability law generally.

In *Wagner v. Kimberly-Clark Corp.*, 2016 WL 7079571, ___ F.Supp.3d ___ (E.D. Pa. Dec. 1, 2016), which involved a surgically installed feeding tube, the court was unwilling to dismiss plaintiff's strict-liability manufacturing-defect claim. In so doing, the court ignored the Pennsylvania Supreme Court's ruling in *Lance v. Wyeth*, 85 A.3d 434 (Pa. 2014):

Although [some] federal courts ... allow strict liability claims to proceed when a manufacturing defect is alleged, the decisions of these courts pre-date *Lance*. There, the Pennsylvania Supreme Court reiterated the principle that a strict liability claim based on a defective prescription drug is barred. In explaining this principle, the Court did not exempt from this bar a claim based on a manufacturing defect.

Terrell v. Davol, Inc., 2014 WL 3746532, at *5 (E.D. Pa. July 30, 2014). Instead, *Wagner* relies exclusively on pre-*Lance* cases that allowed strict-liability manufacturing-defect claims. *Wagner*, 2016 WL 7079571 at *4.

With this outdated frame of reference, the *Wagner* court applied the *Tincher* ruling that "[n]o product is expressly exempt [from strict liability] and, as a result, the presumption is that strict liability may be available with respect to any product, provided that the evidence is sufficient to prove a defect." *Id.* at *4. But *Tincher* recognized an exception. See *Tincher*, 104 A.3d at 382 ("but see *Hahn* ... (manufacturer immune from strict liability defective design claim premised upon sale of prescription drugs without adequate warning)") (emphasis added). *Wagner* involves a medical device, so the court discounted the exception by ignoring overwhelming precedent, in Pennsylvania and nationally, equating prescription drugs and prescription medical devices for purposes of applying strict liability. In other words, *Wagner* reads *Tincher*, a case about gas pipes, as purposely, but silently, drawing a distinction between prescription drugs and prescription medical devices, and then concludes that a surgically installed feeding tube is more like the gas pipe at issue in *Tincher* than the prescription drug at issue in *Hahn*. *Wagner*, 2016 WL 7079571, at *5-6.

Wagner relies on outdated cases and a non-prescription medical-products case to arrive at the conclusion that Pennsylvania would recognize strict-liability manufacturing-defect claims for medical devices. It is nonsensical that *Tincher*, which reined in strict products liability across the board, would somehow impliedly expand strict liability in the prescription medical products area. *Wagner* is an unsupported expansion of Pennsylvania prescription medical product-liability law. *Tincher* completely revamped strict liability in Pennsylvania (for the better). But strict liability does not apply to prescription medical products in Pennsylvania and never has in any form. *Tincher* does not change that.

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