No. _____

In The

Supreme Court of the United States

JAMES H. JACKSON,

Petitioner,

v.

LOUISVILLE LADDER, INC.
and W.W. GRAINGER, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit erred when it refused to acknowledge that the law of diversity strict liability cases in Pennsylvania is the Restatement (Second) of Torts rather than Restatement (Third) of Torts despite the Pennsylvania Supreme Court's decision of November 19, 2014.

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The Order and Opinion of the United States Court of Appeals appears at App. 1 and App. 7 to the petition and is reported at 2014 U.S. App. LEXIS 17766.

United States Court of Appeals Order denying Petition En Banc and Panel Rehearing dated October 15, 2014 at App. 25.

The Opinion of the United States District Court appears at App. 9 to the petition and is reported at 2014 U.S. Dist. LEXIS 14298.

JURISDICTION

The United States Court of Appeals for the Third Circuit filed its decision on September 16, 2014. A timely petition for rehearing was denied by the United States Court of Appeals on October 15, 2014, and a copy of the order denying rehearing appears at App. 25.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Plaintiff James H. Jackson filed the above-captioned strict liability diversity action against Defendants Louisville Ladder, Inc. and W.W. Grainger, Inc., after suffering injuries when he fell off a ladder on September 16, 2009. After the Court granted Defendants' motion to dismiss, Plaintiff filed an amended complaint on December 5, 2011. In his amended complaint, Plaintiff brought the following three causes of action under Pennsylvania law: (1) a negligence claim against Defendant Louisville Ladder; (2) a strict products liability claim against Defendant Louisville Ladder; and (3) a strict products liability claim against Defendant W.W. Grainger.

As the case progressed, the contested issue arose between the parties concerning whether the Restatement (Third) of Torts, or Restatement (Second) of Torts applied to Plaintiff's strict products liability claims. The Trial Court followed the Third Circuit's prediction that the Pennsylvania Supreme Court would adopt the Restatement (Third) and applied it to the case in its order on Defendants' motion for summary judgment.

Trial was set for July 22, 2013. After a six-day trial, a jury entered a verdict in favor of Defendants. Plaintiff filed a motion for a new trial two days later, on July 31, 2013.

The appeal came before the Third Circuit court for argument on September 9, 2014. A Third Circuit panel consisting of Judges Fisher, Jordan, and

Hardiman denied Jackson's appeal in an opinion dated September 16, 2014.

Judge Jordan stated that the court was bound by their previous determination in *Berrier v. Simplicity Manufacturing, Inc.*, 563 F.3d 38 (3d Cir. Pa. 2009). The Third Circuit refused to reconsider by delaying its opinion until the Supreme Court of Pennsylvania decided this identical issue in *Tincher v. Omega Flex, Inc.*, 64 A.3d 626 (Pa. 2013), *reversed in part and remanded*, No. 17 MAP 2013, 2014 Pa. LEXIS 3031 (Pa. November 19, 2014). The Pennsylvania Supreme Court decided *Tincher* on November 19, 2014 and held that the Restatement (Second) of Torts was to be applied in products liability cases, specifically with regard to section 402A, and that the Restatement (Third) would not be adopted as the law in Pennsylvania.

Jackson was argued and decided by the Third Circuit which is now bound by the *Tincher* decision and must be followed.

Jackson filed a Motion for Reconsideration Nunc Pro Tunc of its Opinion of September 16, 2014 on November 25, 2014, App. 29, and Defendants filed a Response, App. 35. On January 5, 2015, the Third Circuit declined to consider Petitioner's Motion for Reconsideration Nunc Pro Tunc, App. 27.

REASONS FOR GRANTING THE PETITION

After a number of years, the Pennsylvania Supreme Court had before it a case where it was expected to decide whether Pennsylvania would adopt Restatement (Third) of Torts or continue with Restatement (Second) of Torts as is, or with modifications. *Tincher v. Omega Flex, Inc.*, 64 A.3d 626 (Pa. 2013), was cited in Arthur L. Bugay, *Tincher v. Omega Flex, Inc., a Lightning Strike on Pennsylvania Products Liability Law*, Pennsylvania Bar Association Quarterly, Volume LXXXV, pp. 39-46 (January 2014) which referenced the disparity between the federal and state cases on the issue of Pennsylvania's expected decision on *Tincher*.

A district court sitting in diversity must apply Pennsylvania's substantive law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Furthermore, where a case has been decided while there is a pending decision in another case that will be controlling state law when decided, a conflicting decision must be overturned. *See Baker v. Outboard Marine Corp.,* 595 F.2d 176 (3d Cir. Pa. 1979). In *Baker,* the trial court decided that a jury charge using the phrase "unreasonably dangerous" was acceptable in a section 402A action. While that case was decided, another case, *Azzarello v. Black Brothers Co.,* 480 Pa. 547, 391 A.2d 1020 (1978), was pending in the Pennsylvania Supreme Court with a possible outcome that would overrule the *Baker* trial court. *Azzarello* was decided after the *Baker* decision and held that the phrase was not appropriate to be

submitted to the jury. *See Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978). On appeal, the United States Court of Appeals for the Third Circuit held that:

> Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), we, and the district court, are bound in diversity cases by the law of Pennsylvania as it has been determined by the state supreme court. Since that court has now ruled that a trial judge may not instruct the jury that a plaintiff in a section 402A suit must prove that a product is "unreasonably dangerous," we are compelled to hold that the district court committed reversible error when it employed that phrase.
>
> The controlling nature of *Azzarello* on this appeal is unaffected by the fact that *Azzarello* had not yet been decided when the district court charged the jury. In *Vandenbark v. Owens-Illinois Co.,* 311 U.S. 538, 61 S. Ct. 347, 85 L. Ed. 327 (1941), the United States Supreme Court held that "until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law . . . in accordance with the then Controlling decision of the highest state court." *Id*. at 543 (emphasis added). Indeed, the Court recognized explicitly that the result of this rule would be that "intervening and conflicting (state court) decisions will thus cause the reversal of judgments which were correct when entered." *Id*. Therefore, because *Azzarello* controls our disposition of

> this appeal, and because the district court's charge is inconsistent with *Azzarello*, the Bakers are entitled to a new trial.

Baker v. Outboard Marine Corp., 595 F.2d at 182.

Therefore, where a case is properly decided at trial only to be later overruled by subsequent, controlling case law, the earlier now conflicting decision must be overturned to conform with the new controlling law.

Plaintiff's injury occurred in September 2009, and the instant action was filed in August 2011, both after the Third Circuit resolved to apply the Restatement (Third) of Torts §§1-2 to strict-liability claims. On March 26, 2013, the Pennsylvania Supreme Court granted allocatur in *Tincher v. Omega Flex, Inc.*, 64 A.3d 626 (Pa. 2013) to answer the Restatement (Second), (Third) question – for the third time. *See Berrier v. Simplicity Mfg., Inc.*, 959 A.2d 900 (Pa. 2008) (declining to sub-certification whether Pennsylvania would adopt Restatement (Third)); *Bugosh v. I.U. North America, Inc.*, 942 A.2d 897 (Pa. 2008) (accepting allocatur to answer "[w]hether this Court should apply Section 2 of the Restatement (Third) of Torts"); *Bugosh v. I.U. North America, Inc.*, 971 A.2d 1228 (Pa. 2009) (dismissing appeal as being improvidently granted).

The Supreme Court of Pennsylvania recently issued its opinion in *Tincher* on November 20, 2014 and stated:

> At the Court's request, the parties briefed a question concerning whether adoption of the Third Restatement, if such a decision were to be made, would have retroactive or prospective effect. Having declined to "adopt" the Third Restatement, we need not reach the question of retroactive or prospective application of the ruling. Nevertheless, in light of the decision to overrule Azzarello, questions remain regarding whether Omega Flex should benefit from the application of our Opinion upon remand and, moreover, whether Omega Flex is entitled to a new trial.
>
> Here, Omega Flex preserved and presented its claim that Azzarello should be overruled to the trial court and on appeal; as a result, we hold that Omega Flex is entitled to the benefit of our decision in this regard.

Tincher, 2014 Pa. LEXIS 3031 at 218-219.

It is clear from the *Tincher* ruling that the Restatement (Third) will not be adopted and, therefore, the Restatement (Second) approach to strict liability is the applicable law in Pennsylvania.

Plaintiff presented his claim that the Restatement (Second) should have been the applicable law at trial and is entitled to the benefit of the *Tincher* decision.

Because Judge Jordan's reasoning for applying the Restatement (Third) was based on *Berrier* which is now overruled by *Tincher*, Plaintiff's argument that the Restatement (Second) should have been the

applicable law at trial should be reconsidered, found meritorious, and applied in the current case to reverse the trial court's decision which under *Erie R.R. Co. v. Tompkins* and *Baker v. Outboard Marine Corp.*, is required.

The Third Circuit's Decision in this case must be reversed.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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Date: January 8, 2015

United States Court of Appeals for the Third Circuit

JAMES H. JACKSON, Appellant v.
LOUISVILLE LADDER INC.;
W. W. GRAINGER, INC.

September 9, 2014, Submitted Under
Third Circuit LAR 34.1(a);
September 16, 2014, Filed

No. 14-1360

Notice: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNATIONAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO ***FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1*** GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Counsel: For James H. Jackson, Plaintiff-Appellant: Richard C. Angino, Esq., Daryl E. Christopher, Esq., Angino & Rovner, Harrisburg, PA.

For Louisville Ladder Inc, W W Grainger Inc, Defendants-Appellees: John M. Kunsch, Esq., Sweeney & Sheehan, Philadelphia, PA.

Judges: Before: FISHER, JORDAN, and HARDIMAN Circuit Judges.

Opinion by: JORDAN

Opinion

OPINION OF THE COURT

JORDAN, *Circuit Judge*.

James Jackson appeals the denial of his motion for a new trial by the United States District Court for the Middle District of Pennsylvania. We will affirm.

I. Background

Jackson injured himself when he fell off a step ladder while investigating a ceiling leak at Messiah College, his employer. Louisville Ladder manufactured the ladder. Messiah College purchased the ladder from W.W. Grainger, Inc. (collectively, with Louisville Ladder, "Appellees"). Asserting diversity jurisdiction, Jackson filed a products-liability action in federal court against Appellees. Jackson's Amended Complaint alleged two causes of action under Pennsylvania law: negligence against Louisville Ladder and strict liability against both companies. A primary contention between the parties as the case proceeded was whether the Restatement (Second) of Torts, which provides for liability regardless of fault, or the Restatement (Third) of Torts, which includes a risk-utility analysis, applied to the strict-liability claims. Although the Pennsylvania Supreme Court has not addressed the issue, the District Court determined that, pursuant to our precedent, it would "apply . . . the Restatement (Third) of Torts to Plaintiff's strict liability claims." (App. at 11.)

Before trial, Appellees filed a motion in limine to preclude evidence of other step-ladder accidents because Jackson "ha[d] not established that any of those incidents or injuries were substantially similar" to his. (App. at 18.) The District Court granted the motion. Following a six-day trial, the jury returned a verdict for Appellees. Jackson filed a motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure, which the District Court denied. Jackson timely appealed that order.

II. Discussion[1]

Jackson raises two issues on appeal. First, he argues that the District Court erred in adopting the Restatement (Third) over the Restatement (Second) as applied to strict liability. Second, he contends that the Court committed error by granting Appellees' motion in limine precluding evidence of other accidents and injuries involving ladders because those

[1] The District Court had diversity jurisdiction under 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review whether a district court's denial of a motion for new trial under Rule 59 of the Federal Rules of Civil Procedure constitutes an abuse of discretion. *Klein v. Hollings,* 992 F.2d 1285, 1289 (3d Cir. 1993). "Our degree of scrutiny, however, differs depending on the [proposed] reasons for granting the new trial." *Id.* As to a decision based "purely on a question of law . . . we exercise plenary review. Conversely, the district court's latitude on a new trial motion is broad [regarding] a ruling on a matter that initially rested within the discretion of the court, *e.g.* evidentiary rulings. . . ." *Id.* at 1289-90 (citations omitted).

accidents were substantially similar to the one he suffered. Alternatively, he argues that those past accidents, aggregated in the form of statistical and "epidemiological studies," are not subject to the "substantially similar" requirement. (Appellant's Br. at 12.) None of his arguments are persuasive.

Regarding which Restatement applies to strict liability, it is unclear exactly how Jackson thinks that issue should affect the instant appeal; he argues that "[t]his case will be controlled by the [Pennsylvania] Supreme Court's [d]ecision in *Tincher v. Omega Flex, Inc.*" (Appellant's Br. at 7.) The Pennsylvania Supreme Court has granted a Petition for Allowance of Appeal in *Tincher* to decide the following issue: "Whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement." 619 Pa. 395, 64 A.3d 626, 626 (Pa. 2013) (per curiam). That Court has also directed the parties in that case "to brief the question of whether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively." *Id.* at 626-27. Jackson does not ask us to stay his appeal pending *Tincher*'s resolution; instead, he only seems to hope that *Tincher* comes out in his favor prior to the case's disposition.

In any event, we are bound, as the District Court was, by our previous determination in *Berrier v. Simplicity Manufacturing, Inc.,* 563 F.3d 38 (3d Cir. 2009), that the Pennsylvania Supreme Court would apply the Restatement (Third) of Torts. *See id.* at 40

("We predict that if the Pennsylvania Supreme Court were confronted with [a strict-liability] issue, it would adopt the Restatement (Third) of Torts. . . ."). That decision applies in this diversity action. "In the absence of a controlling decision by the Pennsylvania Supreme Court, a federal court applying that state's substantive law must predict how Pennsylvania's highest court would decide this case." *Berrier,* 563 F.3d at 45-46. Jackson does not dispute that the District Court properly concluded that *Berrier* controls. Accordingly, his argument fails.

Regarding Jackson's evidence-related claims, they are foreclosed by our decision in *Barker v. Deere & Co.,* 60 F.3d 158 (3d Cir. 1995), as the District Court correctly concluded. *Barker* established that, in products-liability cases, evidence of prior accidents is not relevant, and is therefore inadmissible, unless the accidents occurred under "substantially similar" circumstances. *Id.* at 162. In *Barker,* we noted that the "foundational requirement of establishing substantial similarity is especially important in cases where the evidence is proffered to show the existence of a design defect." *Id.* In other words, evidence of other accidents is not relevant under Rule 401 of the Federal Rules of Evidence unless those accidents are shown to be substantially similar to the one at issue. *Id.* at 162-63. Jackson did not introduce evidence that the additional accidents occurred on the same ladder model as his or under similar circumstances. In fact, his experts testified that the articles they relied on referred to all types of ladders. Thus, the District Court did not err in precluding that evidence.

Jackson also argues that the evidence of other accidents is actually "epidemiological" data and that the requirement for substantial similarity is "not applicable to epidemiological evidence." (Appellant's Br. at 15.) That argument is without merit. Like the District Court, we are "not persuaded . . . that evidence of ladder accidents is epidemiological in nature." (App. at 8.) This case does not relate to epidemiology, *i.e.,* the study of the incidence of disease in large populations, and the supporting cases cited by Jackson, dealing with epidemiological studies, are simply inapplicable.[2]

III. Conclusion

We will accordingly affirm the District Court's denial of Jackson's motion for a new trial.

---

[2] Alternatively, Jackson argues that the Restatement (Third) of Torts changes the other-evidence standard because it introduced a risk-utility balancing into strict products liability. This argument confuses a substantive standard with the admissibility standard set forth in the Federal Rules of Evidence. Our holding in *Barker,* relating to the admissibility of evidence under Rule 401 of the Federal Rules of Evidence, is not affected by a change in substantive products-liability law.

Jackson also sets forth additional arguments straining to justify his position that the District Court should have admitted the data regarding past ladder accidents. Those arguments are without merit and warrant no further discussion. As set forth above, the District Court's evidentiary determination under Rule 401 was proper.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1360

JAMES H. JACKSON,

Appellant

v.

LOUISVILLE LADDER INC.;
W. W. GRAINGER, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 11-cv-01527)
District Judge: Honorable Yvette Kane

Submitted Under Third Circuit LAR 34.1(a)
September 9, 2014

Before: FISHER, JORDAN, and HARDIMAN *Circuit Judges.*

JUDGMENT

This case came to be considered on the record from the United States District Court for the Middle

District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on September 9, 2014.

On consideration whereof, it is now ORDERED and ADJUDGED by this Court that the order of the District Court signed and entered February 5, 2014, is hereby AFFIRMED. All of the above is in accordance with the opinion of this Court. Costs shall be assessed against appellant.

ATTESTED:

s/ Marcia M. Waldron
Clerk

DATE: September 16, 2014

United States District Court for
the Middle District of Pennsylvania

JAMES H. JACKSON, Plaintiff v.
LOUISVILLE LADDER INC.;
W.W. GRAINGER, INC., Defendants

February 5, 2014, Decided; February 5, 2014, Filed

No. 1:11-cv-1527

Counsel: For James H. Jackson, Plaintiff: Daryl E. Christopher, Kristen N. Sinisi, Richard C., Angino, Angino & Rovner, P.C., Harrisburg, PA.

For Louisville Ladder Inc., W.W. Grainger Inc., Defendants: John M. Kunsch, Sweeney & Sheehan, Philadelphia, PA.

Judges: Yvette Kane, United States District Judge.

Opinion by: Yvette Kane

Opinion

MEMORANDUM

Pending before the Court is Plaintiff James H. Jackson's motion for a new trial. (Doc. No. 110.) The motion has been fully briefed and is ripe for disposition. For the reasons that follow, the Court will deny the motion.

I. BACKGROUND

Plaintiff James H. Jackson filed the above-captioned diversity action against Defendants Louisville Ladder, Inc. and W.W. Granger [sic], Inc., after suffering injuries when he fell off a ladder on September 16, 2009. (Doc. No. 1.) After the Court granted Defendants' motion to dismiss, Plaintiff filed an amended complaint on December 5, 2011. (Doc. No. 16.) In his amended complaint, Plaintiff brought the following three causes of action under Pennsylvania law: (1) a negligence claim against Defendant Louisville Ladder; (2) a strict products liability claim against Defendant Louisville Ladder; and (3) a strict products liability claim against Defendant W.W. Grainger.

As the case progressed, a contested issue arose between the parties concerning whether the Restatement (Third) of Torts, or Restatement (Second) of Torts applied to Plaintiff's strict products liability claims. (Doc. No. 86.) The Court followed the Third Circuit's prediction that the Pennsylvania Supreme Court would adopt the Restatement (Third) and applied it to the case in its order on Defendants' motion for summary judgment. (*Id.*)

Trial was set for July 22, 2013. On June 20, 2013, Defendants filed a *motion in limine* to preclude evidence of other accidents and injuries involving ladders. (Doc. No. 62.) In the memorandum and order dated July 22, 2013, the Court granted Defendants' motion and ordered that "Plaintiff is precluded from offering evidence of other accidents or injuries involving

ladders, including statistics about ladder injuries and deaths" at the trial. (Doc. No. 94.) During the six-day trial, the Court sustained several objections by Defendants where it deemed Plaintiff's questions to run afoul of its order precluding other accident evidence. (See Trial Transcript at 291, 312-315, 834-835, 836-839, 861-864.) Following the trial, a jury entered a verdict in favor of Defendants. Plaintiff filed a motion for a new trial two days later, on July 31, 2013. (Doc. No. 109.

II. LEGAL STANDARD

"The court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court. . . ." Fed. R. Civ. P. 59(a)(1)(A). The decision whether to grant a new trial following a jury verdict is within the sound discretion of the trial court. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980); *Blancha v. Raymark Indus.*, 972 F.2d 507, 512 (3d Cir. 1992). The standard to be applied to a motion for new trial varies depending on the grounds upon which the motion rests. *Klein v. Hollings*, 992 F.2d 1285, 1289-90 (3d Cir. 1993). When the motion is based on matters within the district court's discretion, such as evidentiary rulings or prejudicial statements by counsel, the court has broad latitude in ordering a new trial. *Id.* (citing *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 187 (3d Cir. 1990); *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90

(3d Cir. 1960)). When the motion argues that the jury's decision is against the weight of the evidence, however, the motion may be granted "only where the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991). Of course, a Court must proceed cautiously and avoid simply substituting its own judgment of the facts and credibility of the facts for those of the jury. *Id.*

Federal Rule of Civil Procedure 61 provides, *inter alia*, that "[n]o error in either the admission or the exclusion of evidence . . . is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice." The United States Court of Appeals for the Third Circuit has held that "[a] motion for a new trial should be granted where substantial errors occurred in admission or rejection of evidence." *Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 676 (3d Cir. 2002). However, errors in evidentiary rulings cannot be the basis for a new trial if the errors are harmless. Non-constitutional errors are "harmless only if it is 'highly probable' that the errors did not affect the outcome of the case." *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 917 (3d Cir. 1985).

III. DISCUSSION

In his motion for a new trial, Plaintiff alleges that the Court erred: (1) adopting the Restatement (Third) of Torts to his strict products liability claim; (2) granting Defendants' motion *in limine* to preclude the evidence of other accidents and injuries involving ladders; and (3) refusing to permit evidence of other accidents inasmuch as the evidence was admissible as an exception to hearsay, for impeachment purposes, and as facts underlying an expert's opinion under Federal Rules of Evidence 703 and 705. (Doc. Nos. 109, 110, 131.) The Court will address these arguments in turn.

A. Restatement (Third) of Torts

First, Plaintiff asserts that the Court erred in adopting and applying the Restatement (Third) of Torts to his strict products liability claim, because Plaintiff argues the Supreme Court of Pennsylvania has definitively held that the Restatement (Second) applies to strict products liability actions. (Doc. Nos. 110 at 7, 131 at 3.) Defendants contend that the Court correctly applied precedent in favor of the Restatement (Third). (Doc. No. 130 at 6-8.)

The Court fully considered the parties' relative positions regarding the application of the Restatement (Second) or the Restatement (Third) of Torts to strict products liability claims in its order on Defendants' motion for summary judgment. There, the

Court held that the Restatement (Third) of Torts applies:

> [T]he Third Circuit has predicted that "if the Pennsylvania Supreme Court were confronted with this issue, it would adopt the Restatement (Third) of Torts, §§ 1 and 2." . . . "Once the United States Court of Appeals for the Third Circuit predicts how a state's highest court would resolve an issue, district courts within the circuit are bound by this prediction 'unless the state supreme court issues a contrary decision or it appears from a subsequent decision of the appellate courts that the court of appeals erred.'" Because the Third Circuit has made a prediction on this issue, and the Pennsylvania Supreme Court has not offered a definitive answer, the Court will follow the guidance of the Third Circuit and apply Sections 1 and 2 of the Restatement (Third) to Plaintiff's strict liability claims.

(Doc. No. 86 at 7-11 (citations omitted).) Nothing has changed since the Court issued its order. Although it is true that the Pennsylvania Supreme Court has recently applied provisions of the Restatement (Second) of Torts, *see Reott v. Asia Trend, Inc.*, 618 Pa. 228, 55 A.3d 1088 (Pa. 2012), it has not definitely resolved the issue, as indicated by the Pennsylvania Supreme Court's grant of *allocatur* in *Tincher v. Omega Flex, Inc.*, 619 Pa. 395, 64 A.3d 626 (Pa. 2013), to address this exact question. Because this remains an open question without a definite resolution from the

Pennsylvania Supreme Court, the Court is obligated to follow the prediction of the Third Circuit as to what the Supreme Court will do when confronted with the question. *See Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 40 (3d Cir. 2009). Thus, the Court will not grant a new trial based on this argument.

B. Evidence of Other Accidents

Plaintiff contends that the Court erred in granting Defendants' motion *in limine* to preclude evidence of other accidents and injuries involving ladders. Both Plaintiff's liability experts and Defendants' liability expert reference the fact that there are more than 100,000 ladder accidents annually, many of which result in death, in their expert reports. (Doc. Nos. 110-1, 110-2, 110-3, 110-4, 110-5.) The Court granted Defendants' motion to preclude such reference to other ladder accidents because Plaintiff could not establish that the accidents are substantially similar. (Doc. No. 94.) The Court did not devise this standard on its own; rather, the Third Circuit has held that evidence of "other accidents" is admissible only if the proponent can demonstrate that the accidents occurred under "substantially similar" circumstances. *Barker v. Deere & Co.*, 60 F.3d 158, 162 (3d Cir. 1995).

Plaintiff first argues that the Court erred in applying this standard because evidence related to the number of ladder accidents per year is epidemiological in nature and epidemiological evidence differs

from evidence of "other accidents." (Doc. No. 110 at 10-13.) Plaintiff therefore asserts that the "substantially similar" circumstances standard should not apply. (*Id.*) "Epidemiology deals with population samples and seeks to generalize those results; it goes from the specific, i.e., a sample, to the general, i.e., a population." *Blum by Blum v. Merril Dow*, 705 A.2d 1314, 1323-24 (Pa. Super. Ct. 1997), *aff'd*, 564 Pa. 3, 764 A.2d 1 (2000). In support, Plaintiff references a definition that the Pennsylvania Superior Court provided for epidemiology: "[e]pidemiology is the study of a distribution and determinants of disease in human populations."[1] *Id.* at 1320 n.4 Plaintiff extrapolates from this that "epidemiology is the study of the causation of a condition," and thus the Court should not have precluded his evidence under the "substantially similar" standard. (*Id.* at 12.) However, ladder accidents are not "disease[s] in human populations," and the Court is not persuaded by Plaintiff's argument that evidence of ladder accidents is epidemiological in nature. Moreover, the cases cited by Plaintiff for this proposition deal with just that: disease. *See id.*; *McDaniel v. Merck, Sharp & Dohme*, 367 Pa. Super. 600, 533 A.2d 436, 440 n. 6 (Pa. Super. Ct. 1987).

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[1] "Epidemiologists consider whether causation may be inferred by comparing the incidence of a disease in a group of humans who have been exposed to the substance in question with the incidence in a group of humans who have not been exposed to the substance." *Id.*

The Court is also unpersuaded by Plaintiff's second argument, that inasmuch as the Court has applied the Restatement (Third) of Torts, the "risk-utility" principles set forth therein mandate the admissibility of other accident evidence. (*Id.* at 13-17.) Plaintiff essentially asks the Court to conclude that the Restatement (Third) of Torts demolished the "substantially similar" standard used in Barker. However, both Restatements incorporate risk utility principles, *see Riley v. Warren Mfg., Inc.*, 455 Pa. Super. 384, 688 A.2d 221, 224 (Pa. Super. Ct. 1997), and the Court finds no basis or authority to conclude that the Restatement (Third) of Torts has rendered the Third Circuit's mandated "substantially similar" standard obsolete. Rather, the Court still finds that this case is analogous to *Barker*, in which the plaintiff sought to introduce evidence of accidents involving tractors. As the Third Circuit explained: "The jury was invited to infer that over 500 lives per year would be saved if there were a rollover bar on the Deere 620 tractor. We fail to comprehend how any of the prior accidents were 'substantially similar' to the case before us. All of the evidence of prior tractor accidents that was introduced as direct evidence of a design defect should have been excluded as irrelevant." *Barker*, 60 F.3d at 163.

Lastly, the Court is not persuaded by Plaintiff's argument that all ladders are substantially similar, or that Plaintiff established such through its testimony. (Doc. No. 131 at 14.) In *Barker*, the Court rejected statistical evidence as not substantially similar

which "concerned tractors generally, not specifically John Deere tractors and not Deere 620 tractors." *Barker v. Deere & Co.*, 60 F.3d 158, 163 (3d Cir. 1995) Here, Plaintiff can point to no other accidents involving a Louisville Ladder Model AS2106 six foot aluminum step ladder. Although Plaintiff was free to elicit evidence suggesting that ladders can be quite dangerous, and that there are risks inherent in using a ladder, Plaintiff cannot introduce evidence of other prior accidents unless he can establish that they were substantially similar. Plaintiff's evidence does not meet this standard. *See Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp. 2d 530, 536 (E.D. Pa. 2005) *Soldo v. Sandoz Pharmaceuticals Corp.*, 244 F. Supp. 2d 434, 550 (W.D. Pa. 2003). As Plaintiff was unable to show the accidents were substantially similar, the Court did not err in its order precluding all such evidence.

C. Other bases for evidence

Plaintiff lastly contends that the excluded evidence was admissible (1) as an exception to hearsay; (2) for impeachment purposes; and (3) as facts underlying an expert's opinion under Federal Rules of Evidence 703 and 705. The Court will address these arguments in turn.

1. Hearsay exception

Plaintiff argues that the evidence of other accidents, contained in periodicals and peer-reviewed papers, is admissible as it falls under the treatise

exception to the hearsay rule, and therefore should be admitted as substantive evidence. (Doc. No. 110 at 17-18.) However, the federal rules of evidence are clear that evidence must be relevant to be admissible. Fed. R. Evid. 402. Exceptions to hearsay still must meet the other requirements in the Rules to be admissible at trial. *See United States v. Marin*, 669 F.2d 73, 84 (2d Cir.1982) (noting that evidence admitted as a hearsay exception must be relevant evidence); *see also Cambra v. Rest. Sch.*, 04-2688, 2005 U.S. Dist. LEXIS 26231, 2005 WL 2886220, at *1 (E.D. Pa. Nov. 2, 2005);

In its order granting the motion *in limine* and excluding evidence of other accidents, the Court did so on the basis that the evidence of other accidents was irrelevant under *Barker* and Federal Rule of Evidence 402, not because it was impermissible hearsay. (Doc. No. 94 at 3-5.) The Court in *Barker* was clear that other accident evidence that did not meet the "substantially similar" standard should have been excluded as irrelevant. *Barker*, 60 F.3d at 163. Thus, it does matter that the evidence in the treatises generally fits the profile of a hearsay exception; the Court already determined that evidence of other accidents was irrelevant, and therefore could not be used as substantive evidence. The treatise exception to the hearsay rule does not change this outcome and does not form a basis for admission of the irrelevant evidence of other accidents.

2. Impeachment

Plaintiff also argues that the evidence regarding other injuries and accidents was admissible as evidence to impeach Defendants' expert Michael Van Bree. (Doc. No. 110 at 19.) Specifically, Plaintiff asserts that Mr. Van Bree:

> testified that over the course of his expert career, he has never found that a ladder accident he investigated was "caused" by a defective product manufactured by Louisville. He also testified that the "common", "typical" damage was to the location of the first step and knee bracing and not a design defect. At a minimum, Plaintiff should have been permitted to introduce evidence regarding the number and seriousness of ladder accidents, injuries, and deaths to impeach Mr. Van Bree's testimony.

(*Id.*)

The Court initially notes that it is not clear how the statements and statistics regarding other injuries and accidents involving ladders serve to impeach the testimony of Van Bree cited generally by Plaintiff and, therefore, it does not find that the statistics should have been admissible for impeachment.

Moreover, even assuming, *arguendo*, that the excluded evidence was relevant for the limited purposes of impeaching Mr. Van Bree, the Court finds the evidence would nevertheless be improper under Federal Rule of Evidence 403. Rule 403 provides that "[t]he

court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. *See Barker*, 60 F.3d at 167 ("Even if the district court is able to conclude that any of the accidents are relevant, the court should proceed to analyze the evidence under Rule 403 of the Federal Rules of Evidence to eliminate the danger of unfair prejudice.") Although *Barker* did not address whether the other accident evidence in that case ran afoul of Rule 403, the Third Circuit vacated and remanded for a new trial because it found that the jury's consideration of the irrelevant evidence improperly affected the outcome of the trial. *Id.* at 164-65. Moreover, courts following *Barker* have concluded that experts relying on evidence of other accidents and injuries that were not "substantially similar" is unduly prejudicial and confusing. *See Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 550 (W.D. Pa. 2003) ("Plaintiff's expert witnesses may not rely on evidence of other injuries and other indications because such reliance would be likely to lead to jury misdecision based on inflamed passions, confusion of issues or the like.") (internal quotations and citations omitted). In the present matter, the Court concluded such evidence was irrelevant to proving a design defect and issued an order accordingly. (Doc. No. 94.) Exposing the jury to this irrelevant evidence runs a heavy risk of confusion and prejudice, as in *Soldo*. Thus, even if the evidence were relevant for impeachment purposes,

the Court finds it would still be impermissible under Rule 403, and the Court did not err in excluding it.

3. Facts underlying an expert's opinion

Plaintiff also asserts that the excluded statements and statistics from the treatises should have been admitted under Federal Rules of Evidence 703 and 705, in order to assist the jury in evaluating the expert opinions of Dr. Vinson and Dr. Glancey. Rule 705 provides that "Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination." Federal Rule of Evidence 703 states that:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. *But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.*

Fed. R. Evid. 703 (emphasis added)

The Court has already found that the facts or data relating to other accidents is generally inadmissible as irrelevant under *Barker*; thus, this information is only available to the jury under Federal Rule of Evidence 703 if the probative value in helping the jury evaluate the opinion "substantially outweighs their prejudicial effect;" this is an even higher standard for admissibility than the test outlined in Federal Rule of Evidence 403, which calls for the exclusion of relevant evidence if its "probative value is substantially outweighed" by dangers of confusion or undue prejudice. As the Court found there is a high likelihood of prejudice or confusion by inclusion of the evidence of other accidents, *see Soldo*, 244 F. Supp. 2d at 550, the evidence of other accidents is not admissible by virtue of Federal Rule of Evidence 703. *See Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*, 739 F.2d 1028, 1033 (5th Cir.1984) ("[T]o say that Rule 703 permits an expert to base his opinion upon materials that would otherwise be inadmissible does not necessarily mean that materials independently excluded by the court by reason of another rule of evidence will automatically be admitted under Rule 703."). To the extent Federal Rule of Evidence 705 is the basis under which Plaintiff seeks to include the evidence, similar reasons for exclusion apply. *See United States v. Gillis*, 773 F.2d 549, 554 (4th Cir. 1985) ("Rule 705 does not end the inquiry. In determining whether to allow an expert to testify to the facts underlying an opinion, the court must inquire whether, under [Federal Rule of Evidence 403], the testimony should be excluded because its probative

value is substantially outweighed by the danger of unfair prejudice.").

IV. CONCLUSION

The Court is satisfied that it did not err in granting Defendants' motion to preclude evidence of other accidents, and that it did not err in sustaining Defendants' objections when Plaintiff's counsel violated the Court's order. Thus, the Court will deny Plaintiff's motion for a new trial. An order consistent with this memorandum follows.

ORDER

ACCORDINGLY, on this 5th day of February 2014, for the reasons set forth in the accompanying memorandum, **IT IS HEREBY ORDERED THAT** Plaintiff's motion for a new trial is **DENIED**.

/s/ Yvette Kane

Yvette Kane, District Judge

United States District Court

Middle District of Pennsylvania

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1360

JAMES H. JACKSON,

Appellant

v.

LOUISVILLE LADDER INC.;
W. W. GRAINGER, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 11-cv-1527)
District Judge: Hon. Yvette Kane

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge,* RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, and KRAUSE, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: October 15, 2014
tyw/cc: Richard C. Angino, Esq.
John M. Kunsch, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1360

Jackson v. Louisville Ladder Inc.

To: Clerk

1) Motion by Appellant to Reconsider Nunc Pro Tunc the Third Circuit's Prior Decisions Based Upon the Pennsylvania Supreme Court's November 19, 2014 Decision in Tincher v. Omega Flex, Inc.

2) Response by Appellees to Motion to Reconsider

No action can be taken on the foregoing. With the issuance of this Court's mandate, the Court's decision became final and the Court lost any authority to alter or change its decision. We decline to treat the motion to reconsider as a motion to recall the mandate as the motion does not address any of the factors for recalling the mandate. *See American Iron & Steel Institute v. EPA,* 560 F.2d 589 (3d Cir. 1977); *Greater Boston Television Corp. v. FCC,* 463 F.2d 268; *U.S. v. Holland,* 1 F.3d 454 (7th [sic] 1993) (recall and stay pending cert.). Any further review must be sought in the United States Supreme Court.

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: January 5, 2015
CJG/cc: Richard C. Angino, Esq
John M. Kunsch, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT OF PENNSYLVANIA

NO. 14-1360

JAMES H. JACKSON

Appellant

v.

LOUISVILLE LADDER, INC. and
W.W. GRAINGER, INC.

Appellees

APPELLANTS MOTION TO RECONSIDER NUNC PRO TUNC THE THIRD CIRCUIT'S PRIOR DECISIONS BASED UPON THE PENNSYLVANIA SUPREME COURT'S NOVEMBER 19, 2014 DECISION IN TINCHER V. OMEGA FLEX, INC.

Appeal from the Decision dated October 15, 2014, denying Appellant's Petition for Rehearing En Banc, and the Appeal from the Opinion dated September 16, 2014, affirming the Order and Opinion of the United States District Court for the Middle District of Pennsylvania, Civil Action No. 1:11-cv-1527, dated February 5, 2014, denying Plaintiff's Motion for New Trial

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Plaintiff/Appellant requests the Third Circuit Court of Appeals to reconsider nunc pro tunc their prior decisions regarding the issue of whether the Restatement Second or the Restatement Third of Torts should apply in strict liability actions, decision dated October 15, 2014, denying Appellant's Petition for Rehearing En Banc, **Exhibit A**, and Opinion dated September 16, 2014, affirming the Order and Opinion of the United States District Court for the Middle District of Pennsylvania, Civil Action No. 1:11-cv-1527, dated February 5, 2014, denying Plaintiff's Motion for New Trial, **Exhibit B**, in light of the recent Pennsylvania Supreme Court decision of November 19, 2014, in *Tincher v. Omega Flex, Inc.,* No. 17 MAP 2013, 2014 Pa. LEXIS 3031 (Pa. Supreme November 19, 2014), **Exhibit C**, reversing, in part, and remanding, 60 A.3d 860 (Pa.Super. 2012).

I. FACTUAL BACKGROUND

1. Plaintiff James H. Jackson filed the above-captioned diversity action against Defendants Louisville Ladder, Inc. and W.W. Granger [sic], Inc., after suffering injuries when he fell off a ladder on September 16, 2009. After the Court granted Defendants'

motion to dismiss, Plaintiff filed an amended complaint on December 5, 2011. In his amended complaint, Plaintiff brought the following three causes of action under Pennsylvania law: (1) a negligence claim against Defendant Louisville Ladder; (2) a strict products liability claim against Defendant Louisville Ladder; and (3) a strict products liability claim against Defendant W.W. Granger [sic].

2. As the case progressed, the contested issue arose between the parties concerning whether the Restatement Third of Torts, or Restatement Second of Torts applied to Plaintiff's strict products liability claims. The Court followed the Third Circuit's prediction that the Pennsylvania Supreme Court would adopt the Restatement Third and applied it to the case in its order on Defendants' motion for summary judgment. *Id*.

3. Trial was set for July 22, 2013. After a six-day trial a jury entered a verdict in favor of Defendants. Plaintiff filed a motion for a new trial two days later, on July 31, 2013.

4. The appeal came before this court for argument on September 9, 2014. Plaintiff renewed his argument that the District Court erred in adopting the Restatement Third over the Restatement Second as applied to strict liability. The reasoning behind this argument was that the Pennsylvania Supreme Court would be imminently deciding whether courts should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of

the Third Restatement with their decision in *Tincher v. Omega Flex Inc.*, 64 A.3d 626 (Pa. 2013), granting petition for allowance of appeal,

5. Oral argument scheduled for September 9, 2014 was denied and Judge Jordan issued an opinion on September 16, 2014, **Exhibit B**.

6. Judge Jordan also dismissed Plaintiffs' other two issues argued on appeal and denied the Motion for a New Trial.

7. Plaintiffs' Motion for Reconsideration was denied on October 15, 2014, **Exhibit A**.

II. DISCUSSION

After a number of years, the Pennsylvania Supreme Court has finally decided that it will continue with the Restatement of Torts Second with modifications *Tincher v. Omega Flex, Inc.,* No. 17 MAP 2013, 2014 Pa, LEXIS 3031 (Pa. Supreme November 19, 2014), reversing, in part, and remanding, 60 A.3d 860 (Pa.Super. 2012).The Supreme Court issued its opinion in *Tincher* on November 19, 2014 and stated:

> At the Court's request, the parties briefed a question concerning whether adoption of the Third Restatement, if such a decision were to be made, would have retroactive or prospective effect. *Having declined to "adopt" the Third Restatement,* we need not reach the question of retroactive or prospective application of the ruling. Nevertheless, in light of the decision to overrule Azzarello, questions

> remain regarding whether Omega Flex should benefit from the application of our Opinion upon remand and, moreover, whether Omega Flex is entitled to a new trial, Here, Omega Flex preserved and presented its claim that *Azzarello* should be overruled to the trial court and on appeal; as a result, we hold that Omega Flex is entitled to the benefit of our decision in this regard.

Tincher v. Omega Flex, Inc., slip op. at 136, 2014 Pa. LEXIS 3031 at 218-219.

It is clear from the *Tincher* ruling that the Restatement Third will not be adopted and, therefore, the Restatement Second approach to strict liability is the applicable law in Pennsylvania.

Plaintiff presented his claim that the Restatement Second should have been the applicable law at trial and is entitled to the benefit of the *Tincher* decision.

Because Judge Jordan's reasoning for applying the Restatement Third was based on *Berrier v. Simplicity Manufacturing Inc.*, 563 F.3d 38 (3d Cir. 2009), which is now overruled by *Tincher,* Plaintiff's argument that the Second Restatement should have been the applicable law at trial should be reconsidered, found meritorious, and applied in the current case to reverse the trial court's decision.

Plaintiff has 90 days since Your Court denied Plaintiff's/Appellant's Petition for Rehearing En Banc, October 15, 2014, **Exhibit A**, to file a Petition

for Writ of Certiorari to Your Court and the Supreme Court of the United States. Plaintiff will file such Writ if Your Court refuses to grant Plaintiff's Motion for Reconsideration in light of *Tincher*.

WHEREFORE, Plaintiff requests the Third Circuit Court of Appeals to reconsider Judge Jordan's Opinion of September 16, 2014, in light of the Pennsylvania Supreme Court's decision in *Tincher* and reverse the trial court's February 5, 2014 Order denying Plaintiff's Motion for a New Trial.

Respectfully submitted,

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s/Richard C. Angino

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Dated: November 25, 2014

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 14-1360

JAMES H. JACKSON

Appellant

v.

LOUISVILLE LADDER, INC,
AND W.W. GRAINGER, INC.

Appellees

ANSWER OF APPELLEES TO APPELLANT'S MOTION TO RECONSIDER NUNC PRO TUNC THE THIRD CIRCUIT'S PRIOR DECISIONS BASED UPON THE PENNSYLVANIA SUPREME COURT'S NOVEMBER 19, 2014 DECISION IN TINCHER V. OMEGA FLEX, INC.

Appeal from a February 5, 2014 Order Entered
by the United States District Court for the
Middle District of Pennsylvania
Civil Action No. 1:11-CV-1527
The Honorable Yvette Kane

(Filed Dec. 4, 2014)

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Louisville Ladder, Inc. and
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Appellees, Louisville Ladder, Inc. (hereinafter "Louisville Ladder") and W.W. Grainger, Inc. (hereinafter "Grainger), request this Honorable Court to deny Appellant's Motion to Reconsider Nunc Pro Tunc the September 16, 2014 and October 15, 2014 decisions of this Court. Appellant's Motion was filed on November 26, 2014, more than one month after this Court issued a mandate, terminating the Third Circuit's jurisdiction over the case and transferring jurisdiction back to the United States District Court for the Middle District of Pennsylvania. A copy of this Court's October 23, 2014 filing, including the mandate, Opinion of the Court and mandate letter from Marcia M. Waldron to the Middle District is attached hereto as **Exhibit "A."** Accordingly, this Court cannot grant any relief to Appellant James Jackson based upon the November 19, 2014 decision of the Pennsylvania Supreme Court in *Tincher v. Omega Flex, Inc.,* No. 17 MAP 2013, 2014 WL 6474923 (Pa. Nov. 17 2014).

Louisville Ladder and Grainger specifically respond to Appellee's Motion for Reconsideration as follows:

I. FACTUAL BACKGROUND

1. Admitted. By way of further answer, James Jackson's accident occurred on September 16, 2009, after this Court issued its decision in *Berrier v. Simplicity Mfg.,* 563 F.3d 38 (3d Cir. 2009) on April 21, 2009. Mr. Jackson filed his original Complaint in the Middle District on on [sic] August 17, 2011, after this Court issued its opinions in both *Berrier* and *Covell v. Bell Sports, Inc.,* 651 F.3d 357 (3d Cir. 2011). Accordingly, Mr. Jackson chose to have his strict liability claims decided under the Restatement (Third) of Torts.

2. Admitted. By way of further answer, The District Court correctly applied the Restatement (Third) of Torts: Product Liability §§1 and 2 to plaintiff's strict liability claims. *See Kordek v. Becton, Dickinson and Co.,* 921 F.Supp.2d 422, 430 (E.D. Pa. 2013); *Largoza v. General Elec. Co.,* 538 F.Supp. 1164, 1165 (E.D. Pa. 1982).

3. Admitted. By way of further answer, Appellant proceeded to trial on both his strict liability and negligence claims.

4. Admitted in part, denied in part. It is admitted that, on appeal, Mr. Jackson raised two issues: (1) whether the District Court erred in ruling that the provisions of the Restatement (Third) of Torts applied to his strict liability claims; and (2) whether the District Court erred in precluding evidence of other accidents or injuries involving ladders, Louisville Ladder and Grainger deny Appellant's self-serving

characterizations of his appeal. Further, Mr. Jackson's appeal has been fully and finally adjudicated by this Court, which issued a mandate on October 23, 2014 and returned jurisdiction back to the District Court.

5. It is admitted that there was no oral argument and that Judge Jordan issued an opinion on September 16, 2014.

6. Denied as stated. It is admitted that this Court denied Mr. Jackson's appeal in its entirety, holding that the District Court properly applied the *Berrier* decision to Appellant's strict liability claims and affirming the District Court's exclusion of evidence of other accidents and injuries involving ladders.

7. Admitted. By way of further answer, after it denied Appellant's Petition for Rehearing on October 15, 2014, this Court issued a mandate on October 23, 2014, **Exhibit "A."**

II. DISCUSSION

This Court issued a mandate and transferred jurisdiction over this matter to the Middle District on October 23, 2014, prior to the issuance of the *Tincher* decision by the Pennsylvania Supreme Court and more than one month prior to the untimely filing of this Motion for Reconsideration by Appellant. Prior to the issuance of the mandate, Mr. Jackson had a full and fair opportunity to litigate the issues he raised on

appeal, including the District Court's decision to follow the *Berrier* decision and apply the Restatement (Third) of Torts to his strict liability claims. This Court denied his appeal in an Opinion issued on September 16, 2014 and further denied his Petition for Rehearing in a Decision dated October 15, 2014. It is well settled that a decision of the highest state court issued after a case is no longer *sub judice,* as in this case, cannot be used to invalidate this Court's decision and the judgment entered before the mandate was issued. *See Allstate Ins. Co. v. Drumheller,* 115 Fed.Appx. 528 (3d. Cir. 2004).

In addition, Appellant has misinterpreted the import of the *Tincher* decision, citing only that the Pennsylvania Supreme Court has declined to formally adopt the Restatement (Third) of Torts. In fact, although the *Tincher* decision reaffirmed Pennsylvania's adoption of Restatement (Second) of Torts §402A, the decision transforms Pennsylvania law regarding strict liability, citing "appreciation of certain principles contained" in the Restatement Third and noting "that Restatement has certainly informed our consideration of the proper approach to strict liability." *Tincher,* 2014 WL 6474923 at *1. Overruling its prior decision in *Azzarello v. Black Brothers Company,* 480 Pa. 547, 391 A.2d 1020 (Pa. 1978), the *Tincher* Court held that, in a design defect case, a "plaintiff may prove defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the

probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Tincher,* 2014 WL 6474923 at *1. Therefore, Pennsylvania law now incorporates in part the analysis of the Restatement (Third) for a plaintiff to establish a prima facie case of strict liability. Accordingly, even if this Court procedurally could provide some relief to Appellant, there is no substantive basis for the Court to do so.

CONCLUSION

For the reasons set forth above, Appellees, Louisville Ladder, Inc. and W.W. Grainger, Inc., respectfully requests that this deny Appellant's Motion for Reconsideration.

SWEENEY & SHEEHAN

BY: /s/ John M. Kunsch
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