NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

THOMAS J. YENCHO AND REENA YENCHO, HUSBAND AND WIFE, Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
AIRCO WELDING/BOC AND LINCOLN ELECTRIC COMPANY, Appellants	:	
APPEAL OF: THE BOC GROUP, INC. (FORMERLY, "AIRCO") AND LINCOLN ELECTRIC COMPANY, Appellants	:	No. 1690 EDA 2005

Appeal from the Order dated May 19, 2005
In the Court of Common Pleas of Philadelphia County
Civil, No. 0884, February Term, 2003

BEFORE: LALLY-GREEN, GANTMAN, and KELLY, JJ.

MEMORANDUM: **FILED JUNE 15, 2006.**

This is an appeal from an order[1] entering judgment for $264,938.60 in favor of Appellees/plaintiffs below, in a reverse bifurcated personal injury action based on claims of asbestos exposure. We affirm.

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[1] Appellants identify the order of May 19, 2005 as the one underlying this appeal. However, that order, which denies their post trial motions, is not final. ***Raheem v. University of the Arts***, 872 A.2d 1232, 1234 n.2 (Pa. Super. 2005) (appeals to Superior Court lie only from judgment entered after lower court's disposition of post trial motions, not from order denying post trial motions). Because the order entering judgment was docketed prior to submission of Appellants' Notice of Appeal, their appeal is properly before the Court.

During Appellee's[2] employment as a welder from the 1940's through 1986, he worked with welding rods packed in boxes stamped with the word "asbestos." The rods, products manufactured by both Appellants, released particles into the air when handled or used.

In 2001, Appellant was diagnosed with asbestos-related lung cancer,[3] resulting in the removal of the upper lobe of his left lung. This action was filed in 2003, alleging that Appellee had contracted his illness from contact with the welding rods produced by Appellants, who had failed to warn of the hazards associated with such exposure. After the first portion of this reverse bifurcated trial, the jury awarded Appellee a total of $525,000, comprising damages to Appellee for his injury and reparations to Appellee's wife for loss of consortium. After the liability phase, Appellants were held in, and the award was increased by $4,877.20 for delay damages plus 6% interest. This appeal followed, requesting that this Court reverse the order denying Appellants' motion for judgment notwithstanding the verdict, or alternatively, that we grant them a new trial.

We first note that "[t]he entry of judgment notwithstanding a jury verdict . . . is a drastic remedy. A court cannot lightly ignore the findings of

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[2] Appellee will be referred to in the singular although both he and his wife are appellees in this matter.

[3] Appellee's Brief notes that he has since died of the disease.

a duly selected jury." ***Neal by Neal v. Lu***, 530 A.2d 103, 110 (Pa. Super. 1987).

> [T]he evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.

Moure v. Raeuchle, 604 A.2d 1003, 1007 (Pa. 1992) (citations and quotation marks omitted).

Further, the appellate court will not reverse the trial court's grant or denial of a new trial unless its decision presents a clear abuse of discretion or an error of law. ***Harman ex rel Harman v. Borah***, 756 A.2d 1116, 1122 (Pa. 2000). "An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias or ill will." ***Id.*** at 1123.

In all products liability cases, the focus of the plaintiff's case is proof, first, of the existence of a defect in the product; second, of the presence of the defect when the product left the hands of the manufacturer; and third, of the defect as the cause of the injury. ***Schindler v. Sofamor, Inc.***, 774 A.2d 765, 771 (Pa. Super. 2001), *appeal denied,* 786 A.2d 989 (Pa. 2002).

There are three types of defects: design defects; manufacturing defects; and failure-to-warn defects. ***Phillips v. A-Best Products Company***, 665 A.2d 1167, 1170 (Pa. 1995). Here, as in ***Phillips***, only the third type is alleged. "A product is defective due to a failure-to-warn where the product was 'distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product.'" ***Id.*** at 1171 (quoting ***Mackowick v. Westinghouse Electric***, 575 A.2d 100, 102 (Pa. 1990)).

Ostensibly, Appellants present 6 issues for our review. In fact, three of the issues, 1, 2, and 5, are variations on a theme, that expert testimony, rather than Appellee's own observations, was necessary to present his case. Specifically, they contend, Appellee failed to prove that the dust emanating from the rods contained asbestos; that the asbestos encapsulated[4] within the matrix of the rod material could be released; and if so, that it could be released in a form capable of being inhaled. They insist that absent such evidence, Appellee's (incompetent) assertions of having seen dust while using Appellants' products failed to demonstrate either that the particles he noticed actually contained asbestos, or that they were respirable. Thus, Appellants insist, "there was no evidence of a product defect." (Appellants'

[4] There is no discussion as to the comparative carcinogenic effects of asbestos released from encapsulation and the same material used as a protective coating except to the extent that Appellants deny that release from encapsulation is possible. In fact, they address only the matter of encapsulation.

Brief at 16). We are not persuaded, despite Appellants' attempt to deny the recognized malignity of asbestos.[5]

The trial court here concluded that any necessity for expert testimony was obviated by Appellee's unequivocal evidence that the cartons containing Appellants' welding rods, which he identified by manufacturer, product name and specific product number, were marked with the word "asbestos," and that the rods created visible dust when handled. (Trial Ct. Op. at 4-5). This finding comports with our Court's seminal ruling in ***Eckenrod v. GAF Corp.***, 544 A.2d 50, 52 (Pa. Super. 1988), and its progeny: to establish an issue of genuine material fact for resolution by the jury, a plaintiff alleging asbestos-related harm must prove that the injury was in fact caused by a product manufactured or supplied by a specific defendant, that is, he routinely inhaled asbestos fibers shed by a product from a particular, identified source. Accordingly, the plaintiff's case must present evidence of "frequency of the use of the product and the regularity of the plaintiff's employment in proximity thereto." ***Id.*** at 53.

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[5] Appellants posit "the reality of the body's ever-present defense mechanisms, which operate to remove fibers from the respiratory tract and lungs," (Appellants' Reply Brief at 5), as a counterweight to what is termed the "every breath mantra." Whatever the efficacy of the body's curative powers in general, they failed to forestall Appellee's illness. In any event, the "every breath mantra," that is, the notion that each exposure to asbestos constitutes a substantial cause of disease, is one which has been accepted by this Court as a question for the jury. ***See***, *e.g.*, ***Lilley v. Johns-Manville Corp.***, 596 A.2d 203, 210 (Pa. Super. 1991).

"The nexus between a specific asbestos product and a plaintiff's condition may be supplied by a variety of direct and circumstantial evidence." ***McNeal v. Eaton Corp.***, 806 A.2d 899, 903 (Pa. Super. 2002) (citations omitted). Here, Appellee, like the appellant in ***Gilbert v. Monsey Products Co.***, 861 A.2d 275, 276 (Pa. Super. 2004), *appeal denied,* 872 A.2d 1199 (Pa. 2005), "was able to testify and stated that he worked with Appell[ants'] products and inhaled fibers from these products." As Appellants themselves point out, Appellee testified that particles from the rods, which were removed from boxes marked with the word "asbestos," were dispersed into the air. Both this Court and our Supreme Court have found similar lay opinion testimony sufficient to present a genuine issue of material fact for the jury. ***See Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products)***, 861 A.2d 938, 946 (Pa. 2004) (citing ***Harahan v. AC & S, Inc.***, 816 A.2d 296, 298 (Pa. Super. 2004), *appeal denied*, 829 A.2d 350 (Pa. 2003)).

Lack of knowledge is the crux of the failure to warn claim: having received no information from Appellants concerning the danger posed by asbestos inhalation, Appellee was unable to protect himself from the injury that did in fact occur. Thus the defect to be assessed in a failure to warn case is not, as Appellants would have us believe, whether the rods could, defectively, release respirable asbestos, but whether the absence of a warning on a product of known harmful propensities constituted a defect.

Phillips*, *supra*.** Further, as noted, "[t]he question as to whether there was sufficient regularity and frequency so as to cause Appell[ee's] injury is a question for the jury." ***Gilbert*, *supra*.** Appellants here, like the appellant in ***Cauthorn v. Owens Corning, 840 A.2d 1028, 1039 (Pa. Super. 2004), rely on the testimony of defense witnesses to establish that the asbestos-containing product did not possess the chemical properties to behave as Appellee described. However, here, as in ***Cauthorn***, the jury acted within its prerogatives to reject the proffered evidence. In addition, as the trial court points out, Appellee's challenged testimony that he saw dust emitted by welding rods from containers marked "asbestos," was elicited by defense interrogation.[6] Thus the trial court correctly disposed of Appellants' claim as to the necessity of expert testimony on these matters.

Appellants also contend that the jury verdict cannot stand as it found them liable on the basis of substantially rebutted evidence while exonerating the codefendants based on uncontested evidence. In essence, Appellants complain that the verdict was inconsistent. However, in Pennsylvania, a jury's findings are presumed to be consistent, and will be defeated where the verdict cannot be supported by any reasonable theory. ***Hall v.***

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[6] The medical expert called on Appellee's behalf testified that every medical professional who examined him concluded that his lung cancer was attributable to asbestos exposure. (N.T., 3/26/04, at 15). Moreover, the expert explained that even though visible dust might not, because of its size, be respirable, where such particles existed, microscopic and thus breathable dust would probably be present as well. (***Id.*** at 10).

Jackson, 788 A.2d 390, 398 (Pa. Super. 2001). The trial court here explained that the differences in assignment of liability were based on "qualitative and quantitative differences in the level of [Appellee's] exposure of (sic) the other [defendants'] products." (Trial Ct. Op. at 6). Moreover, as the court points out, the jury, acting within its prerogatives, rejected the evidence presented against the other defendants, while accepting that which was adverse to Appellants. We find no error in this regard.

Next Appellants complain that the trial court improperly refused to allow them to withdraw the videotaped cross examination of Appellee's medical expert who offered what Appellants claim were incompetent opinions, specifically on the subject of welding rods. In support of their claim, Appellants rely on ***Smith v. Barker***, 534 A. 2d 533, 535-36 (Pa. Super. 1987), *appeal denied,* 549 A.2d 137 (Pa. 1988); ***Pascone v. Thomas Jefferson University***, 516 A.2d 384, 387-88 (Pa. Super. 1986); and Pa.R.C.P. 4020(d).[7] We are not convinced.

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[7] Pa.R.C.P. 4020(d) provides that

> A party shall not be deemed to make a person his or her own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in subdivision (a)(2) [not applicable here] of this rule. At the trial or hearing any party may rebut any relevant evidence

We first note that "[t]he admission of expert testimony is a matter for the discretion of the trial court and will not be remanded, overruled or disturbed unless there was a clear abuse of discretion." ***Rafter v. Raymark Industries, Inc.***, 632 A.2d 897, 899 (Pa. Super. 1993) (citation omitted).

Both of the cases Appellants cite for support are distinguishable from this one. In ***Smith***, ***supra***, the defense chose not to present its cross examination of the plaintiff's medical expert where the plaintiff's "alleged injuries were subjective in nature (headaches and dizziness)." ***Id.*** at 535. Despite the lack of unchallenged expert testimony from the plaintiff, the jury reached a verdict for the defense. In ***Pascone***, ***supra***, the testimony was sought to be introduced during rebuttal, and was precluded because the assumed bases for many of the leading and suggestive questions posed to the defendant's expert had not been proven. Thus in the former case, the prohibited testimony could have been deemed unnecessary rather than damaging, and in any event its absence was not prejudicial since the jury rejected the unrebutted evidence of the losing party; in the latter the testimony was, in fact, found to be misleading and properly precluded on that basis.

> contained in a deposition whether introduced by that party or by any other party.

Pa.R.C.P. 4020(d).

Here, neither of those circumstances obtains, nor does Rule 4020(d) govern. In ***Wiley v. Snedaker***, 765 A.2d 816, 817 (Pa. Super. 2000), we reversed the trial court's refusal to permit the plaintiff to introduce the deposition of the defense medical expert during her case in chief. The ***Wiley*** Court found that, having been freely given, the witness' testimony was available to either party. The same is true in this case.

Moreover, as the Explanatory Comment to Rule 4020 makes clear, Rules 4020(a)(5) and 4017.1(g)[8] represent a relaxation of the requirement that an available medical witness appear at trial. Thus appearance by medical witnesses via video deposition has become commonplace. While adopted to ameliorate possible hardships imposed by the costs involved in in-person appearances, these rules, by implication, equate the medical expert's deposition with in-person testimony. As noted, ***Rafter***, ***supra***, whether or not such evidence may be heard by the jury is a matter for the discretion of the trial court which here properly allowed the evidence to come in.

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[8] Pa.R.C.P. 4017.1(g) provides:

> In addition to the uses permitted by Rule 4020 a videotape deposition of a medical witness or any witness called as an expert, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.

As to the specific deficiencies attributed to the expert's qualifications, and as to the claim of information exceeding the boundaries of the expert report, here, too, we are not convinced.

Appellants argue that any opinion given by Appellee's expert, Dr. Epstein, on the subject of the release of asbestos by welding rods was beyond his expertise, thus violating Rule 4020(a)(5) with regard to the rules of evidence, and Pa.R.C.P. 4003.5, regarding the scope of his report, and was thus so prejudicial as to constitute reversible error. When asked directly whether "it would be fair to say that you're not exactly an expert on welding rods," Dr. Epstein replied that he did have some expertise on that subject. (Deposition of Paul E. Epstein, M.D., 3/26/04, at 126-27). This exchange represents the crux of the material Appellants would have us deem more prejudicial than probative, and violative of the evidentiary rules.[9]

Appellant analogizes that case to ***Viguers v. Philip Morris USA, Inc.***, 837 A.2d 534 (Pa. Super. 2003), *aff'd.*, 881 A.2d 1262 (Pa. 2005), in which this Court found that a physician who had studied the tobacco industry and treated smokers was "not qualified to give his opinion regarding the defective design of [the defendant's] cigarettes, and the feasibility of safer cigarette alternatives," ***id.*** at 539-40, because he lacked "expertise in the

[9] The whole objectionable cross examination occupies 2 1/2 pages out of a 150 page deposition, and of the approximately 64 lines of text, approximately 11 concern the expert's alleged lack of familiarity with welding.

design and manufacture of cigarettes." ***Id.*** at 539. However, as ***Viguers*** also points out, our Supreme Court has ruled that

> To be qualified to testify in a given field, a witness needs only to possess more expertise than is within the ordinary range of training, knowledge, intelligence, or experience. Ordinarily, therefore, the test to be applied is whether the witness has a reasonable pretension to specialized knowledge on the subject matter in question.

Id. (quoting ***Flanagan v. Labe***, 690 A.2d 183, 185 (Pa. 1997)).

Here, Dr. Epstein acquired his practical experience of and information about welding not only as a physician treating pulmonary diseases, but as an educator teaching others about such illnesses. Moreover, his testimony concerning Appellant's cancer was that it was caused both by asbestos exposure and cigarette smoking. (Deposition of Paul E. Epstein, M.D., 3/26/04, at 142). He also opined that if asbestos were contained in the welding rods, its release "could have contributed to the overall burden of asbestos in the lung." (***Id.*** at 126). Dr. Epstein's qualification of his statement obviates Appellants insistence that the presentation of his testimony was unequivocally prejudicial.

Insofar as Appellant's claim that Dr. Epstein's testimony exceeds the scope of his report is concerned, the initial paragraph of his report recounts Appellee's work history as a welder, and includes in the description of each job that exposure to asbestos was involved. (Letter Report of Paul E.

Epstein, M.D., 1/5/04, at 1). For all of these reasons, we find no error in the introduction of his testimony.

Finally, Appellants assign error to the trial court's refusal to conduct a risk/utility analysis "to determine, as matter of law, whether the products at issue were 'unreasonably dangerous.'" (Appellant's Brief, ***supra***). They then assume resolution of such an analysis in their favor: "[T]he trial record established that welding rods have a high degree of utility, and there was no evidence that they could cause an asbestos related injury." (Appellants' Brief at 28). Thus, the argument continues, Appellee's failure to warn claim should never have been submitted to the jury, the rods having been proven by the defense expert not to be unreasonably dangerous, and no warning was necessary.

While we find Appellant's major premise inconsistent with its minor one - a product's possessing a high degree of utility does not invalidate evidence of its tendency to cause harm[10] - we are compelled to agree that Appellee's claim should not have been submitted to the jury. In ***Azzarello v. Black Bros. Company***, 391 A.2d 1020 (Pa. 1978), upon which Appellants rely for the necessity of a risk/utility analysis here, our Supreme

[10] This merely reiterates Appellants' insistence that the defect alleged is the release of encapsulated asbestos, not the failure to warn, and their further contention that encapsulated asbestos, the only form of the substance they mention, is permanently fixed, as a fly in amber. However, as already noted, failure to warn cases proceed from the premise that the product under consideration is potentially dangerous, but that its hazards may be contained or eliminated by the addition of warnings.

Court examined jury instructions proper to product liability cases as opposed to those cases in which negligence is claimed. The Court concluded that the trial court erred in instructing the jury that the appellee's burden to prove the appellant's product unreasonably dangerous was error; in a strict liability matter, the hazard posed by the product, and thus the plaintiff's right to recovery, were declared to be questions of social policy for the court to decide as a matter of law. However, the Court made clear that cases "where an unavoidably unsafe product is involved or where there is an averment of inadequate or absence of warnings," were not before it. ***Id.*** at 1027 n.11.

Subsequent to ***Azzarello***, examination of the necessity for the risk/utility analysis has produced an almost uniform conclusion favoring that method of determining inherent and unreasonable dangerousness. This Court in ***Dambacher by Dambacher v. Mallis***, 485 A.2d 408, 426 (Pa. Super. 1984), addressed the ***Azzarello*** Court's conclusion that "the term "unreasonably dangerous" "impose[s] on the trial court the responsibility of deciding, as a matter of law and by resolving considerations of 'social policy', whether 'the risk of loss should be placed upon the supplier.'" (quoting ***Azzarello*** at 1025). We noted that '[c]ourt control of jury action is more extensive [in product liability cases] than in the ordinary negligence action," ***id.*** at 422 (citation omitted), specifically suggesting that in failure to warn cases, the jury should be instructed "that it is to consider whether the product was safe in the absence of warnings or in light of the warnings that

were given." ***Dambacher, supra*** at 426. The Court concluded that in failure to warn cases, there is no need to depart from strict liability principles. Rather, "[t]he emphasis need only be altered slightly to focus not so much on the product itself as on the safety of the product in light of the warnings that the seller gave, or failed to give." ***Id.*** at 427. Despite its holding that in a failure to warn case the social policy decision is both crucial and "relatively simple," ***id.*** at 423, in a footnote to what can be described as *obiter dictum* the ***Dambacher*** Court also injected a warning as to the practicality of a risk/benefit analysis, finding that:

> risk/utility analysis is not well suited to an inadequate warnings case, for in a warnings case, as distinguished from a defective design case, the utility of a product will remain constant whether or not a warning is added, but the risk will not. In a defective design case, in contrast, it may be expected that a change in design may detract from the utility of the product. Use of a risk/utility analysis in an inadequate warnings case, moreover, may well lead to absolute liability.

Id. at 427 n.7 (citations omitted).

In ***Coward v. Owens-Corning Fiberglas Corp.***, 729 A.2d 614 (Pa. Super. 1999), we further refined consideration of failure to warn cases to those which involved toxic substances. We noted that in failure to warn cases, in order to "facilitate recovery of damages,"

> the plaintiff must show first that the hazardous condition of the product was a cause in fact of his injury, and then that the absence or inadequacy of warnings addressing that condition was the legal cause of his injury. In toxic substance cases, such a showing would require that the

> plaintiff show first that his injuries were, in fact, caused by exposure to the product in question, and then that but for the absence of the warning he would not have been exposed.

Id. at 619 (citations omitted).

We then concluded that in the context of cases involving toxic substances, by requiring that a plaintiff

> demonstrate failure-to-warn defect causation by introduction of affirmative evidence, we would, in some cases, preclude recovery, even where the evidence proved that the dangerous propensities of the product in fact caused the plaintiff's injuries. Moreover, the manufacturer would derive no incentive to market products labeled for safe use even as the dangerous propensities of its products caused death or serious injury. Such results are especially troublesome where, as here, the plaintiffs were exposed in the course of their employment under circumstances that provided them no meaningful choice of whether to avoid exposure. We are thus compelled to recognize that the burden of production currently applicable to strict liability cases poses potential inequity in the context of toxic substance cases where the plaintiff faced exposure in the course of this employment.

Id. at 620 (citations omitted).

Despite these caveats, as our Supreme Court has reiterated in a failure to warn case involving silicosis contracted by the plaintiff from contact with silica sand:

> The determination of whether an alleged defect would render a product "unreasonably dangerous" is a question of law. **Thus, it is incumbent upon the trial judge to "decide whether, under plaintiff's averment of the facts, recovery would be justified" prior to submitting the case to the jury.**

Phillips*, *supra at 1171 n.5 (citations omitted) (emphasis added).

Our Court in ***Andaloro v. Armstrong World Industries, Inc.***, 799 A.2d 71 (Pa. Super. 2002), *appeal denied,* 823 A.2d 1443 (Pa. 2003), reexamined the question of inherent dangerousness specifically with regard to asbestos. There the appellant/manufacturers assigned error to the trial court's affirmative statement during the jury charge that asbestos products are so inherently dangerous as to require warnings. The claim was advanced that such an instruction "essentially eliminated [the appellees'] burden of proof, excusing them from the duty to show that [the appellant's] products were unreasonably dangerous without a warning." ***Id.*** at 87. We concluded that such an argument "'misconstrues the content and purpose of the court's instruction," which "signals the court's recognition of the legal question to be answered by the trial judge before a strict liability case may proceed to the jury." ***Id.***

In the instant matter, Appellants requested that the risk/utility assessment be made by the court, which declined to do so on the basis that the issue was one for the jury. (N.T., 5/11/04, at 34-37). This was, as ***Azzarello***, ***Phillips***, ***Dambacher***, and ***Andoloro*** make clear, an error of law.

However, having said so much, we decline to invalidate the jury's decision. Appellants' method of presenting the necessity for an ***Azzarello*** analysis was to move for dismissal on the theory that having proven through

expert testimony that the welding rods were incapable of emitting asbestos dust, they were entitled to a dismissal of Appellee's case. In so doing, they ignore a most critical element of the case law governing the risk/analysis test, namely, that because it is a matter of law for the trial court's resolution, and once formulated on the basis of facts presented by the plaintiff, the court's position must be conveyed to the jury. It then prefaces the jury's determination as to whether, in a failure to warn case, notice was actually necessary for the particular product under consideration, since the function of the jury charge is clarification of the legal principles "arising from the claims before the jury." ***Ferrer v. Trustees of the University of Pennsylvania***, 825 A.2d 591, 612 (Pa. 2002). Thus it is the obligation of a party who perceives an error in the court's instructions to raise objections.

Here Appellants contest not the absence of a jury instruction on the ***Azzarello*** principle, that is, the necessary coda to examination of the risk/benefit question which should have been their focus, but rather, assign error to the court's failure to dismiss the action against them. They have consistently asserted only that the risk/benefit issue was improperly submitted as decisional matter to the jury. Although any request Appellants might have advanced for a jury instruction could well have been denied or granted in a way opposite to that which they desired, no request was ever made nor objection raised. Accordingly, their claim is waived. ***See Harding v. Consolidated Railroad Corp.***, 620 A.2d 1185, 1194 (Pa. Super 1993)

(issue waived where party raised no challenge to court's failure to give requested instructed).

Order affirmed.

Lally-Green, J. files a Dissenting Statement.

Judgment Entered.

Prothonotary

Date: JUN 15 2006

THOMAS J. YENCHO AND REENA YENCHO, HUSBAND AND WIFE, Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
AIRCO WELDING/BOC AND LINCOLN ELECTRIC COMPANY, Appellants	:	
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BEFORE: LALLY-GREEN, GANTMAN, and KELLY, JJ.

DISSENTING STATEMENT BY LALLY-GREEN, J.: **FILED JUNE 15, 2006.**

My respected colleagues in the majority conclude that the issue of whether the trial court should have conducted a risk/utility analysis before submitting this case to the jury is waived because Appellant did not object to the jury instruction. I respectfully disagree. I would conclude that the issue is properly before us and that a risk/utility analysis, as the majority correctly explains, was necessary pursuant to our Supreme Court's holding in ***Azzarello v. Black Bros. Company***, 391 A.2d 1020 (Pa. 1978).

Appellant requested on the record that the court perform an ***Azzarello*** risk/utility analysis before jury instruction began. The highly regarded trial judge stated that he believed this to be a jury question. N.T., 5/11/04, at 39. This was an error of law. ***See Riley v. Warren Mfg.***, 688 A.2d 221,

224 (Pa. Super. 1997), and ***Schindler v. Sofamor, Inc.***, 774 A.2d 765, 772 (Pa. Super. 2001). In my view, it was not necessary to object to the jury instructions because Appellant had earlier asserted on the record that risk/utility was not a jury question at all.

Furthermore, my review of the limited certified record reveals no evidence to support a finding that Appellant's product causes asbestosis and, thus, that it is unreasonably dangerous. Therefore, I cannot accept the honorable trial judge's summary conclusion, as stated in his Rule 1925 opinion, that if he had performed a risk/utility analysis, "the risks clearly outweigh the utility of Appellant's products." Trial Court Opinion, 8/12/05, at 5. Accordingly, I respectfully dissent and would remand this case for a new trial with instructions that the trial judge perform a full risk/utility analysis, as required by ***Azzarello***, before considering whether to submit this case to the jury.