

[J-29-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JEFFREY K. BEARD, AS	:	No. 35 WAP 2010
ADMINISTRATOR OF THE ESTATE OF	:	
SANDRA L. SELEPEC, DECEASED,	:	Appeal from the Order of Superior Court
	:	entered October 23, 2009 at No. 925
Appellant	:	WDA 2008, reversing the Judgment of
	:	the Court of Common Pleas of Allegheny
v.	:	County entered May 13, 2008 at GD
	:	04-17685.
JOHNSON AND JOHNSON, INC;	:	
ETHICON, INC., A SUBSIDIARY	:	
COMPANY OF JOHNSON AND	:	
JOHNSON, INC.; ETHICON	:	
ENDO-SURGERY, INC., A SUBSIDIARY	:	
COMPANY OF JOHNSON AND	:	ARGUED: April 13, 2011
JOHNSON, INC.; CARDINAL HEALTH,	:	
INC., T/D/B/A CARDINAL HEALTH; AND	:	
CARDINAL HEALTH 414, INC., T/D/B/A	:	
CARDINAL HEALTH,	:	
	:	
Appellees	:	

CONCURRING OPINION

MR. JUSTICE BAER

DECIDED: MARCH 22, 2012

I join the Majority Opinion, but write to distance myself from language in Part I and footnote 18 of Part II to the extent it may be read to express approval of the Restatement (Third) of Torts: Products Liability. In Part I, the Majority addresses what it deems the “continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law” in reference to Appellees’ request that we adopt the Restatement (Third) of Torts and reject our previous adoption of Section 402A of the Restatement

(Second) of Torts. Maj. Slip Op. at 23. As it appears that Appellees failed to raise this issue in their Pa.R.A.P. 1925(b) statement of errors complained of on appeal, I favor merely rejecting Appellees' argument as waived without further discussion of the topic. Nonetheless, as the opinion provides commentary on the issue, I emphasize that the Majority does not express an opinion on behalf of the Court regarding the adoption of the Restatement Third.

In footnote 18, the Majority could be interpreted to favor the adoption of the Restatement Third, by stating, "It may be cogently argued that risk-utility balancing is more legitimately assigned to a jury Indeed, such is the approach of the Restatement Third." Maj. Slip Op. at 16 n. 18. I recognize that the United States Court of Appeals for the Third Circuit utilized my joinder of similar language in a footnote of a concurring and dissenting opinion of former-Justice Newman to predict that I would support the adoption of the Restatement Third. See Berrier v. Simplicity Manufacturing, Inc., 563 F.3d 38, 57 (3d Cir. 2009) (discussing Pa. Dept. of General Services v. United States Mineral Products Co., 898 A.2d 590, 616 n. 2 (Newman, J. dissenting)). In that footnote, Justice Newman merely "recognize[d] the apparent and possible appeal" of the Restatement Third, in the process of concluding that the argument concerning the adoption of the Restatement Third was not before this Court in that case and applying Section 402A of the Restatement Second. Id. Respectfully, the Third Circuit misconstrued my joinder of Justice Newman's footnote as an inclination on my part to adopt the Restatement Third. Until such time as this Court is presented with a case to resolve this difficult issue, I express no opinion on the merits of the adoption of the Restatement Third and will continue to apply the current law of Pennsylvania, which is Section 402A of the Restatement Second.

Madame Justice Todd and Mr. Justice McCaffery join this concurring opinion.