[J-100A-D-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DUANE REOTT AND PATTY REOTT, HUSBAND AND WIFE	:	No. 27 WAP 2011
	:	
	:	Appeal from the Order of the Superior Court entered September 21, 2010 at No. 2 WDA 2010, reversing the Order of the Court of Common Pleas of Butler County, entered December 14, 2009 at No. AD 06-11440 and remanding.
v.	:	
ASIA TREND, INC., CLAM CORPORATION (AS SUCCESSOR-IN-INTEREST TO USL OUTDOOR PRODUCTS, INC.), USL OUTDOOR PRODUCTS, INC., REMINGTON ARMS COMPANY, INC., RA BRANDS LLC AND THE SPORTSMAN'S GUIDE	:	ARGUED: October 19, 2011
APPEAL OF: ASIA TREND, INC., REMINGTON ARMS COMPANY, INC., RA BRANDS, LLC AND THE SPORTSMAN'S GUIDE	:	

DUANE REOTT AND PATTY REOTT, HUSBAND AND WIFE	:	No. 28 WAP 2011
	:	
	:	Appeal from the Order of the Superior Court entered September 21, 2010 at No. 109 WDA 2010, reversing the Order of the Court of Common Pleas of Butler County, entered December 14, 2009 at No. AD 06-11440 and remanding.
v.	:	
ASIA TREND, INC., CLAM CORPORATION (AS SUCCESSOR-IN-INTEREST TO USL OUTDOOR PRODUCTS, INC.) USL OUTDOOR PRODUCTS, INC., REMINGTON ARMS COMPANY, INC., RA BRANDS, LLC AND THE SPORTSMAN'S GUIDE	:	ARGUED: October 19, 2011

APPEAL OF: ASIA TREND, INC., REMINGTON ARMS COMPANY, INC., RA BRANDS, LLC AND THE SPORTSMAN'S GUIDE	:	
DUANE REOTT AND PATTY REOTT, HUSBAND AND WIFE	:	No. 29 WAP 2011
v.	:	Appeal from the Order of the Superior Court entered September 21, 2010 at No. 112 WDA 2010, reversing the Order of the Court of Common Pleas of Butler County, entered December 14, 2009 at No. AD 06-11440 and remanding.
ASIA TREND, INC., CLAM CORPORATION (AS SUCCESSOR-IN-INTEREST TO USL OUTDOOR PRODUCTS, INC.), USL OUTDOOR PRODUCTS, INC., REMINGTON ARMS COMPANY, INC. RA BRANDS LLC AND THE SPORTSMAN'S GUIDE	:	ARGUED: October 19, 2011
APPEAL OF: ASIA TREND, INC., REMINGTON ARMS COMPANY, INC., RA BRANDS, LLC AND THE SPORTSMAN'S GUIDE	:	
DUANE REOTT AND PATTY REOTT, HUSBAND AND WIFE	:	No. 30 WAP 2011
v.	:	Appeal from the Order of the Superior Court entered September 21, 2010 at No. 113 WDA 2010, reversing the Order of the Court of Common Pleas of Butler County, entered December 14, 2009 at No. AD 06-11440 and remanding.
ASIA TREND, INC., CLAM CORPORATION (AS SUCCESSOR-IN-INTEREST TO USL OUTDOOR PRODUCTS, INC.), USL OUTDOOR PRODUCTS, INC., REMINGTON ARMS COMPANY, INC., RA BRANDS, LLC AND THE SPORTSMAN'S GUIDE	:	ARGUED: October 19, 2011

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RA BRANDS, LLC AND THE :
SPORTSMAN'S GUIDE :

DISSENTING OPINION

MADAME JUSTICE TODD **DECIDED: NOVEMBER 26, 2012**

Today's holding is premised on three conclusions. First, the majority concludes that a defendant sued under Section 402A of the Restatement (Second) of Torts ("Restatement") may offer in its defense one of two theories based on a plaintiff's alleged highly reckless conduct: that the plaintiff's highly reckless conduct was the "sole cause" of the injuries he suffered or, alternatively, that the plaintiff's highly reckless conduct was the "superseding cause" of his harm. See Majority Opinion at 23. Second, the majority concludes these theories do not differ substantively, and, as such, need not be considered separately nor treated differently. See id. at 21 & n.13. Third, the majority concludes that each theory is an affirmative defense. See id. at 23.

While I have no quarrel with the majority's first conclusion, I cannot agree with the second or the third. A defense which posits that the defect in a product played no causative role in bringing about the plaintiff's harm because his injuries were caused solely by his highly reckless conduct is, under Pennsylvania law, substantively different from a defense which contends that, although the product's defect played a part in causing the plaintiff's mishap, the plaintiff's highly reckless conduct is a superseding cause that allows the defendant to avoid liability. Indeed, the two defenses are mutually exclusive. Moreover, a sole cause defense, unlike a defense raising superseding cause, cannot be an affirmative defense because it implicates an essential element of the plaintiff's Section 402A claim, referred to as cause-in-fact.

Accordingly, I respectfully dissent. I would remand this matter to the Superior Court to reconsider whether the trial court correctly denied Appellees' motion for judgment notwithstanding the verdict, with the instructions, as discussed below, that the assertion that a plaintiff's highly reckless conduct was the sole cause of his harm is not an affirmative defense, but the assertion that such conduct was a superseding cause is an affirmative defense.[1] My reasoning is as follows.

In Pennsylvania, a plaintiff suing in tort, be it in negligence or, as here, in strict liability under Section 402A, must prove causation, *i.e.*, the requisite causal connection between the defendant's wrongful act (or, as here, the defect in the product) and his

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[1] According to Appellants, "the tree stand did not collapse when Appellee [Duane Reott] initially stepped onto the platform, but only collapsed when [he] performed the so-called 'Setting the Stand' installation maneuver which [he] knew was not called for in the Instructions." Joint Brief of Appellants at 16. In the Superior Court, Appellants articulated their position as follows:

> Taken in the light most favorable to the verdict, the evidence shows that although Mr. Bizzak [Appellees' expert] testified that there was a defect with the Tree Stand, and further testified that if the locking strap came apart there was nothing to hold the Tree Stand to the tree, Mr. Bizzak failed to irrefutably testify why the locking strap came apart in this particular case (*i.e*. what caused the locking strap to come apart).
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> * * *
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> It is true that the jury could have inferred from the evidence presented that the locking strap came apart simply because [ ] Mr. Reott stood on the Tree Stand and that, as a result of the defect, the Tree Stand gave way. However, it is also true that the jury could have — and apparently did — infer that the locking strap came apart because of Mr. Reott's highly reckless conduct in the manner he set the Tree Stand.

Superior Court Brief of Defendants Remington Arms Company, Inc. & RA Brands LLC, Asia Trend, Inc. and Sportsman Guide at 8 (emphasis original).

injuries. Hamil v. Bashline, 481 Pa. 256, 265, 392 A.2d 1280, 1284 (1978). The element of causation consists of two separate and essential concepts: cause-in-fact and legal, or proximate, cause. Estate of Flickinger v. Ritsky, 452 Pa. 69, 74, 305 A.2d 40, 43 (1973); Whitner v. Lojeski, 437 Pa. 448, 455-57, 263 A.2d 889, 893 (1970). We have defined "cause-in-fact" in the "but for" sense, explaining that a defendant's allegedly wrongful act is a cause-in-fact if the plaintiff proves that the harm he sustained would not have happened, but for the defendant's act. Whitner, 437 Pa. at 457, 263 A.2d at 893. We have defined "legal" or "proximate" cause as that point at which legal responsibility should attach to the defendant as a matter of fairness because the plaintiff has demonstrated (in addition to cause-in-fact) that the defendant's act was a "substantial factor" or a "substantial cause," as opposed to an "insignificant cause" or a "negligible cause," in bringing about the plaintiff's harm. Ford v. Jeffries, 474 Pa. 588, 594-95, 379 A.2d 111, 114 (1977) ("The determination of [legal or proximate cause] simply involves the making of a judgment as to whether the defendant's conduct although a cause in the 'but for' sense is so insignificant that no ordinary mind would think of it as a cause for which a defendant should be held responsible.").[2] Moreover,

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[2] It has been repeatedly noted that the terminology the courts use when discussing the components of causation is less than clear. One commentator writes:

> Causation is sometimes used generically to describe both [cause-in-fact and proximate cause.] Yet, not infrequently, courts also use the phrase "proximate cause" to refer in umbrella fashion to cause in fact and proximate causation together and sometimes also when referring to cause in fact alone, since it is part of the umbrella. To complicate matters further, the Restatement (Second) of Torts uses the term "legal causation" to embrace both issues, such that this term is sometimes used to refer to [cause-in-fact], but more commonly to mean proximate cause. . . . . Because of the varying terminology applied to these two issues, often in the

(…continued)

Pennsylvania jurisprudence embraces the concept of "superseding cause." 474 Pa. at 597, 379 A.2d at 115. Accordingly, a defendant whose wrongful act was a cause-in-fact and the proximate cause in producing the plaintiff's harm will be relieved of all liability if an intervening force came into play and so substantially interrupted the chain of events as to be deemed the superseding, and ultimately, the responsible cause of the harm. Id.[3]

Some time ago, the Superior Court expressed the view that "[t]he progress of the law in extending liability without fault to product suppliers should not be in disregard of fundamentals pertaining to the tort law of causation." Oehler v. Davis, 298 A.2d 895, 895 (Pa. Super. 1972). Adhering to this perspective, in Burch v. Sears, Roebuck and Co., 467 A.2d 615 (Pa. Super. 1983), the court identified two scenarios in which a plaintiff's highly reckless conduct could be introduced in a Section 402A action: where the defendant asserted that (1) the plaintiff's conduct was the sole cause of his harm,

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(continued…)

> same jurisdiction and sometimes in the same judicial opinion, a lawyer reading cases involving either of these issues — ["cause-in-fact"] or "proximate cause"— must read each decision cautiously to ascertain which issue the court truly has addressed.

David G. Owen, Owens Hornbook on Product Liability, § 11.1 (Thompson West 2d ed. 2008).

[3] The majority aptly notes Professor Dan B. Dodds' observation that, in some jurisdictions, when a plaintiff's conduct constitutes a superseding cause and thereby becomes the legally responsible cause of his harm, that conduct is designated the "sole proximate cause." See Majority Opinion at 21 n.13 (citing Dan B. Dodds, The Law of Torts § 196 (West 2000)). However, the conclusion the majority draws from this observation, that "leading scholars in the area fail to recognize any substantive difference between sole and superseding causes in plaintiff misconduct cases," see Majority Opinion at 21 n.13, is simply incorrect. There is no support for the proposition that cause-in-fact, which is what the term "sole cause" means in this context, and superseding cause are one in the same.

and thus, the defective product was not a cause-in-fact; or (2) the plaintiff's conduct broke the chain causation, of which the defective product was part, and thus, was a superseding cause. The Superior Court reasoned that such an issue of causation was raised "when the plaintiff's action is so reckless that the plaintiff would have been injured despite the curing of any alleged defect, or is so extraordinary and unforeseeable as to constitute a superseding cause." 467 A.2d at 619. Subsequently, the court reiterated and applied this approach in a handful of cases.[4]

In the instant case, the trial judge, the Honorable Marilyn J. Horan, followed this approach from Bursch and linked a plaintiff's highly reckless conduct to the causation element in his case, thus rejecting Appellees' contention that such conduct was an affirmative defense that Appellants were required to prove. See Trial Court Opinion, 12/14/09, at 4. On appeal, the Superior Court set forth the two scenarios in the Bursch approach in short-hand fashion. The court stated that a plaintiff's highly reckless conduct is admissible when a defendant offers it to show that such conduct was either "the sole cause" — *i.e.*, it, and no other factor, including the product's defect, played a role in causing the plaintiff's harm — or such conduct was "a superseding cause" — *i.e.*,

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[4] See, e.g., Clark v. Bil-Jax, Inc., 763 A.2d 920, 925 (Pa. Super. 2000) (evidence of plaintiff's highly reckless conduct was inadmissible because it was not the case that, had the defect in metal scaffolding been cured prior to the accident, the decedent would not have been electrocuted); Madonna v. Harley Davidson, Inc., 708 A.2d 507, 509 (Pa. Super. 1998) (evidence of the plaintiff's highly reckless conduct was properly admitted as it showed that, even if the admitted defect in upper mounting bolt on the motorcycle was cured, the accident in which decedent lost control would have occurred anyway, as decedent was driving with a blood alcohol level of .14 percent); Childers v. Power Line Equip. Rentals, 681 A.2d 201, 208 (Pa. Super. 1997) (evidence of the plaintiff's conduct was not admissible because the conduct reflected lack of due care, not recklessness); Gottfried v. American Can Co., 489 A.2d 222, 225 (Pa. Super. 1985) (verdict in tin can manufacturer's favor upheld because a jury could have found that plaintiff cut herself on an exposed, sharp edge of the partially opened can as a result of not looking where she placed her hand).

an intervening force that was so extraordinary and unforeseeable that it is legally responsible for the harm, even though the product's defect played a causative role. See Reott v. Asia Trend, Inc., 7 A.3d 830, 837 (Pa. Super. 2010). Then, the Superior Court accepted Appellees' contention and declared a plaintiff's highly reckless conduct to be an affirmative defense in both scenarios in products liability actions. Id.

Presently, the majority places this Court's imprimatur on the Superior Court's declaration and holds: "[W]e agree with the Superior Court that, in order to avoid liability, a defendant raising a claim of highly reckless conduct must indeed plead and prove such claim as an affirmative defense. Moreover, this evidence must further establish that the highly reckless conduct was the sole or superseding cause of the injuries sustained." Majority Opinion at 3 (emphasis added).[5] Though the defense the majority articulates is cast in the alternative, in terms of sole or superseding cause, the majority draws no distinction between the two. Thus, from this point forward, under the majority's holding, in Pennsylvania, a defendant who raises the plaintiff's highly reckless

[5] The majority reasons that a plaintiff's highly reckless conduct should be an affirmative defense, given the parallels between it and the type of behavior that underlies a plaintiff's assumption of the risk, which is, in Pennsylvania, an affirmative defense; the similarities between conduct that may be deemed highly reckless when using a product and conduct that is labeled product misuse; the fact that some jurisdictions consider product misuse an affirmative defense; and the "consistency" with which the Superior Court has treated a plaintiff's highly reckless conduct, assumption of the risk, and product misuse as affirmative defenses. See Majority Opinion at 20.

For my part, for the reasons I discuss herein, the similarities that exist in the acts of a plaintiff characterized as highly reckless, or as assumption of the risk, or as product misuse, and the decisions from other jurisdictions as to the nature of a product misuse defense under their respective common law rules or statutory schemes governing products liability actions, provide an insufficient basis for the majority's holding. Further, in my view, the nature of the defense the Superior Court formulated in Burch is not a question the Superior Court has heretofore addressed. Therefore, I do not see the consistency in Superior Court decisions on the question before us that the majority finds compelling, and, at any rate, I would not consider such consistency persuasive, should it exist, given settled principles on the issue of causation.

conduct as a defense in a Section 402A action bears the burden of proof on the issue, *i.e.*, he bears both the burden of production and persuasion, regardless of whether he claims such conduct was the sole cause or the superseding cause of the injuries the plaintiff sustained.[6]

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[6] The treatise Standard Pennsylvania Practice succinctly explains the burdens of production and persuasion that comprise the burden of proof as follows:

> The term "burden of proof" has been defined as the duty of establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent. Thus, the term imports the duty of ultimately establishing a given proposition, and it marks the peculiar duty of the party who has the risk of any given proposition on which parties are at issue and who will lose if he does not establish this proposition. When a party is assigned the burden of proof, it must produce sufficient evidence to make a *prima facie* claim for the relief sought or lose summarily. Where the burdened party has presented evidence such that it does not lose summarily, the burden of proof is no longer [relevant] and the fact finder must decide which party prevails based on the weight of the evidence.
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> The concept of burden of proof is to be distinguished from the duty of producing evidence at the beginning or at any subsequent stage of the trial in order to make or meet a prima facie case. The duty of going forward with the evidence requires that if the plaintiff has made out a prima facie case, the defendant should then go forward to meet the plaintiff's case, and that when evidence of the defendant rebuts that of the plaintiff, the plaintiff must then again go forward to rebut the defendant's evidence. Although the burden of going forward with the evidence may shift from one party to the other as the trial progresses, the burden of proof does not shift during the trial but remains on the same party throughout.

8 Standard Pennsylvania Practice § 49:63 (2012).

For two reasons, both based on principles related to the necessary element of causation in a Section 402A action, see supra pp. 5-6, I conclude that a defendant's assertion that a plaintiff's highly reckless conduct was the sole cause of his harm is not, and, indeed, cannot be, an affirmative defense. First, it does not operate as an affirmative defense. In Pennsylvania, an affirmative defense embraces matters of confession and avoidance as understood at common law. Coldren v. Peterman, 763 A.2d 905, 908 (Pa. Super. 2000). That is, the defense does not deny the averments set forth in the plaintiff's complaint. Instead, it accepts the plaintiff's averments as true and states new facts on the theory that such new facts dispose of the claim the plaintiff made. Id. To illustrate, the statute of limitations and immunity from suit are affirmative defenses. A defendant who raises them accepts the truth of the complaint's allegations and admits that the plaintiff has proven his case, but, then states new facts that enables him to avoid the liability he would otherwise sustain. See Pa.R.Civ.P. 1030.

Clearly, a defendant in a Section 402A action who asserts that a plaintiff's highly reckless conduct was the only reason he was injured — *i.e*., it was the sole cause of his harm — is not accepting the truth of the allegations in the plaintiff's complaint that the defective product was a cause-in-fact and the proximate cause of his injuries, and, then, avoiding liability with new facts. Rather, in making the assertion, the defendant is denying the averments in the plaintiff's complaint which establish the element of causation, specifically cause-in-fact, which is part of the plaintiff's case. Thus, such an assertion is not an affirmative defense.

Second, and more significantly, a defendant's contention that the plaintiff's highly reckless conduct was the sole cause of the plaintiff's harm argues that the plaintiff cannot meet his burden of proving the element of causation, specifically, his burden to establish cause-in-fact. In other words, a defendant who posits that a plaintiff was

engaged in highly reckless conduct and that such conduct was the sole cause of his injuries is rebutting the plaintiff's Section 402A claim as to cause-in-fact, contending that the plaintiff has failed to establish, as every plaintiff in a Section 402A action must, that but for the defect in the product, the harm he sustained would not have happened.

We said as much in Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975) (plurality).[7] There, the plaintiff, whose husband was killed when the helicopter he was piloting crashed while in flight, brought a Section 402A action claiming that the helicopter was defectively designed because it did not give the average pilot enough time to effect autorotation safely. In discussing the trial court's charge on the elements of the plaintiff's case, the lead opinion, authored by Chief Justice Jones,

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[7] The majority dismisses Berkebile as a plurality opinion and, further, is critical of the guidance I derive from the lead opinion authored by Chief Justice Jones in that case. See Majority Opinion at 18-20 & n.12. Since its issuance, in 1975, Chief Justice Jones' opinion in Berkebile has been cited with approval by our Court in any number of majority opinions as to the foundational principles that govern Section 402A actions. I, therefore, presently consider Berkible to be an authoritative statement of Pennsylvania law. See, e.g., Beard v. Johnson and Johnson, Inc., __ Pa. __, 41 A.2d 823, 829 n.8 (2012); Pennsylvania Dept. of Gen. Services v. United States Mineral Products Co., 587 Pa. 236, 264, 898 A.2d 590, 607 (2006); Spino v. John S. Tilley Ladder Co., 548 Pa. 286, 293, 696 A.2d 1169, 1172 (1997); Davis v. Berwind Corp., 547 Pa. 260, 267, 690 A.2d 186, 190 (1997); Kimco Development Corp. v. Michael D's Carpet Outlets, 536 Pa. 1, 8, 637 A.2d 603, 606 (1993); Walton v. Avco Corp., 530 Pa. 568, 576, 610 A.2d 454, 458 (1992); Mackowick v. Westinghouse Elec. Corp., 525 Pa. 52, 56, 575 A.2d 100,102 (1990); Lewis v. Coffing Hoist Div., Diff-Norton Co., 515 Pa. 334, 343, 528 A.2d 590, 594 (1987); Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978). See also Lewis v. Rego Co., 757 F.2d 66, 70-71 & n.4 (3d Cir. 1985) (accepting Berkebile as Pennsylvania precedent,); Dambacher By Dambacher v. Mallis, 485 A.2d 408, 426 (Pa. Super. 1984) (same).

As to the majority's objections to Berkibile's treatment of evidence of "abnormal use," any response I might have is beside the point. As I explain, see supra n.5, the issue of product misuse forms no part of my analysis in the present appeal as to what role evidence of the plaintiff's highly reckless conduct as the sole cause of his injuries must play in the litigation of a Section 402A action on the element of causation in the plaintiff's case.

stated that references in the jury charge to the defendant's evidence regarding the time it took decedent to attempt placing the helicopter in autorotation were erroneous because they essentially directed a verdict against the plaintiff on her theory regarding the helicopter's defective design. At the same time, however, Chief Justice Jones explained that the evidence was relevant to rebut the plaintiff's proof on causation because it tended to show that, even if the helicopter was defective, decedent took longer to attempt autorotation than even a non-defective helicopter would have allowed him. 462 Pa. at 99, 337 A.2d at 901. That is, the evidence negated the plaintiff's proof that, were it not for the defect in the helicopter, the crash and decedent's death would not have occurred. See id. ("If the jury were to conclude, for example, that a non-defective system would allow two seconds for autorotation and that the decedent did not attempt autorotation for three seconds; even if a defect was shown, it could not have been the proximate cause [or, more accurately, the cause-in-fact] of the crash.").

Thus, in my view, the majority's ruling herein — that the assertion made by the defendant in a Section 402A case that the plaintiff's highly reckless conduct was the sole cause of his injuries must be pled and proven as an affirmative defense — impermissibly shifts the burden of proof on the element of causation from the plaintiff to the defendant, requires the defendant to disprove cause-in-fact, and effectively overturns any number of this Court's decisions in which we have stated that the element of causation in a products liability action is for the plaintiff to prove See, e.g., Spino, 548 Pa. at 293, 696 A.2d at 1172. Further, the majority's holding runs the real risk of the issuance of confusing jury instructions on causation and on the respective burdens of proof that are placed on the parties in products liability cases. In addition, it could lead to fatally inconsistent jury findings on the element of causation in the plaintiff's case and that same element which is now an element in the defendant's highly reckless conduct

affirmative defense. Accordingly, I would not declare the assertion that the plaintiff's highly reckless conduct was the sole cause of this harm to be an affirmative defense. Instead, I would consider and treat it as a defense that denies and rebuts the plaintiff's case on the element of causation.

By contrast, there are no similar principles in the law that prevent us from declaring that the assertion that a plaintiff's highly reckless conduct was a superseding cause is an affirmative defense, and, indeed, I agree with the majority's ruling to do so. The assertion has the earmarks of an affirmative defense since it avoids the liability that would otherwise be imposed upon a defendant by a plaintiff who has established the elements of his case, including cause-in-fact and proximate cause. See Coldren, supra. Further, the policies underlying Section 402A are advanced by requiring a defendant who placed a defective product in the stream of commerce that caused harm to prove, as contended, that he should be, nonetheless, insulated from all responsibility because the plaintiff's conduct, which combined with his product's defect to produce a harmful result, was so significant as to break the chain of proximate cause.[8]

However, my formulation of the defense would differ from that offered by the majority, and would, in keeping with this Court's past reliance on the Restatement, be guided by its principles. In accordance with the Restatement, I would define a plaintiff's highly reckless conduct (as did the Superior Court) as conduct that demonstrates the plaintiff knew, or had reason to know, of facts which created a high degree of risk of physical harm and deliberately proceeded to act, or failed to act, in conscious disregard

[8] We have recognized: "Section 402A reflects the social policy that a seller or manufacturer is best able to shoulder the costs and to administer the risks involved when a product is released into the stream of commerce. Having derived a benefit from engaging in business, manufacturers and sellers are particularly able to allocate the losses incurred through cost increases and insurance." Davis, 547 Pa. at 266, 690 A.2d at 189-90.

of, or indifference to, that risk. See Restatement (Second) of Torts, § 500 ("Reckless Disregard for Safety Defined"), *cited with approval in*, Hutchinson v Luddy, 582 Pa. 114, 122-23, 870 A.2d 766, 771 (2005); Restatement (Second) of Torts § 502 ("Reckless Disregard of One's Own Safety"). Further, because the Restatement factors for deciding whether, in a negligence action, the act of a third person or other force intervenes and constitutes a superseding cause are well-suited to and appropriate for determining whether the highly reckless conduct of a plaintiff seeking recovery under Section 402A was the superseding cause of his harm, I would use those factors for the determination of superseding cause in this context. See id. § 442 (considerations regarding superseding cause include whether intervening force was unforeseeable, operated independently, and brought about harm different in kind from that which would otherwise have resulted from the actor's wrongful act); Ford, 474 Pa. at 597, 379 A.2d at 115 (citing the Restatement for determining when an intervening force is a superseding cause of the plaintiff's injury).

For these reasons, I respectfully dissent and would remand this matter to the Superior Court to reconsider its decision with respect to Appellees' motion for a judgment notwithstanding the verdict, with the instructions that the assertion that a plaintiff's highly reckless conduct was a superseding cause is an affirmative defense, but that the assertion that such conduct was the sole cause of the plaintiff's harm is not.[9]

[9] Unlike the majority, I am confident that a defense attorney in any particular Section 402A case will pursue, on his client's behalf, the highly reckless conduct defense that is borne out by the facts and bear the burden of proof the law imposes. See Majority Opinion at n.13. ("[I]f the Dissent's position concerning sole cause versus superseding cause would be accepted, we can foresee no astute defense counsel ever pleading superseding cause, and thereby imposing upon himself a burden of proof.").