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In the Superior Court of Pennsylvania

No. 445 EDA 2015

CARLOS MARTINEZ and
ROSITA DE LOS SANTOS DeMARTINEZ, h/w,

v.

AMERICAN HONDA MOTOR CO., INC.,

Defendant/Appellant.

ANSWER OF PLAINTIFFS/APPELLEES IN OPPOSITION TO HONDA'S APPLICATION FOR REARGUMENT

On appeal from the judgment of the Court of Common Pleas of Philadelphia County, Pennsylvania dated January 21, 2015 at December Term 2011, No. 3763 (Hon. Shelley Robins New)

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I. INTRODUCTION

Defendant/appellant American Honda Motor Co. seeks reargument en banc of this Court's unanimous, unpublished, non–precedential decision affirming the trial court's entry of judgment on the unanimous jury's verdict and denial of Honda's post–trial motions in this crashworthiness suit brought by a plaintiff who, due to a seatbelt defect known in advance to Honda that existed in the 1999 Acura Integra, will spend the remainder of his natural life expectancy of nearly 28 years as a motorized wheelchair–dependent quadriplegic, unable to care for his own needs or the needs of his family.

The fact that the panel's decision is unanimous, unpublished, and non–precedential establishes that en banc reargument is not proper here. Under this Court's rules, unpublished memorandum decisions are not precedential, meaning that the panel's ruling does not bind as precedent the judges of this Court, the trial judges serving in Pennsylvania's Courts of Common Pleas, or the parties in any other case. Moreover, this Court's rules prohibit litigants and judges from even citing to the panel's unpublished and non–precedential ruling in this case — a prohibition that

Honda's Application for Reargument inexplicably violates numerous times by citing to other unpublished and non–precedential rulings of this Court.[1]

If that's not reason enough to deny Honda's Application for Reargument, plenty more reasons for denial exist. In a genre in which stridency and exaggeration are unfortunately commonplace, Honda's Application for Reargument takes these tiresome characteristics to new heights. In the rare instance when a case actually qualifies for the extraordinary remedy of en banc reargument, the need for full–court review shines forth like a beacon, without any need for embellishment. Here, by contrast, not even one of Honda's strained and farfetched bases for reargument is capable of withstanding scrutiny, as plaintiffs demonstrate below.

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[1] Honda's inclusion in its Application for Reargument of citations to this Court's unpublished, non–precedential rulings — thereby necessitating plaintiffs' response in kind — is only one of the ways in which Honda's filing violates this Court's rules.

Honda's Application for Reargument also seeks to evade the applicable 3,000–word limit imposed in Pa. R. App. P. 2544(c) by using a chart appended as Exhibit B that raises arguments and cites to cases mentioned nowhere within the text of Honda's application. Honda's transparently improper attempt to exceed the word limit applicable to its Application for Reargument furnishes yet one more reason to deny relief.

Honda's Application for Reargument confirms, once again, that the amount of bluster and overstatement contained in such a pleading is inversely proportional to the application's merit. Moreover, the application contains quotation snippets from this Court's earlier rulings plucked so far out of context as to be unrecognizable when compared to the actual texts and holdings of the decisions in question.

For all of these reasons, and for the additional reasons set forth below, Honda's Application for Reargument should be denied.

II. RELEVANT FACTUAL HISTORY

On the morning of May 8, 2010, Carlos Martinez was driving himself to work in his 1999 Acura Integra. (R.561a, 613b). Unbeknownst to him, a nail had become embedded in the right rear tire of his vehicle. Although Martinez was obeying the speed limit and operating his vehicle in a safe manner, the nail eventually resulted in the tire's blowout, causing Martinez to lose control of his vehicle. (R.197a-200a, 123b-26b). The vehicle left the roadway and rolled over twice, passenger side leading. (R.203a, 225a, 129b, 150b). The parties agreed that the entry speed for the rollover was 30 mph. *Id.*

Martinez was wearing his seatbelt. (R.274a-75a, 340b). But, during the rollover, the seatbelt provided him with inadequate occupant protection. Specifically, the seatbelt allowed Martinez to move at least 8.25 inches vertically during the rollover accident and strike his head with extreme force on the roof inside that vehicle at the moment when the roof itself came into contact with the ground, causing the catastrophic injuries he suffered. (R.290a, 358a-59a, 418a-20a, 344b, 361b, 424b-26b).

The evidence at trial showed that Honda, which designed and manufactured the vehicle, knew that the seatbelt was designed in a way that was inadequate to protect the driver of a 1999 Integra from suffering such a devastating head–strike. Some 18 years before Martinez's rollover, Honda conducted a 30–mph rollover test for the Integra that unmistakably established that a seatbelted driver would strike his head on the roof. (R.257a-66a, 335b-37b; 327b). Such a head–strike was an outcome Honda's corporate representative acknowledged, in a videotaped deposition played for the jury, that "Honda doesn't want." (R.1551a, 284b). Yet Honda did nothing to redesign its seatbelt or warn consumers in a manner that would make the vehicle safe for drivers such as Martinez.

Plaintiffs pursued two theories of liability against Honda at trial: design defect and failure to warn. Honda was liable for a design defect because the seatbelt failed to provide meaningful occupant protection to Martinez. The feasible alternative design presented by plaintiffs was an all–belts–to–seat ("ABTS") system as well as a cinching latchplate, which was exactly the design in another vehicle: the 1999 Chrysler Sebring, lawfully manufactured and sold the same year as the 1999 Integra at issue here. (R.277a-79a, 340b-41b). The cinching latchplate, used with the ABTS seatbelt, keeps the lap–belt portion of the seatbelt snug against the occupant, so that even if the car is in a rollover, the occupant's body remains anchored to the bottom of the seat, preventing the occupant's head from contacting the vehicle's roof.[2] (R.290a-91a, 296a, 344b-45b).

Plaintiffs also sought recovery for failure to warn, because Honda completely failed to warn of the hazard at issue — the lack of passenger

[2] Honda's baseless yet repetitive assertions in its Application for Reargument that the safe and feasible alternative–design seatbelt was either unlawful or would not have prevented Mr. Martinez's injuries exemplifies Honda's unyielding unwillingness or inexplicable inability to view the evidence in the light most favorable to the plaintiffs, as Pennsylvania law requires at this juncture. In this case, first a unanimous jury, then the trial judge, and most recently a unanimous three–judge panel of this Court rejected Honda's fact–bound contentions to the contrary, which fail to merit inclusion in Honda's request for full–court review.

protection in the event of a rollover due to an occupant's head striking the roof. (R.294a-97a, 306a, 345b, 348b). Martinez testified at trial that, had he received warning of the defect, he would not have purchased the 1999 Integra, thereby avoiding the catastrophic injuries that he sustained. (R.564a-65a, 614b).

The jury, instructed in accordance with existing Pennsylvania law on each of the separate liability inquiries, specifically and unanimously determined that the vehicle was defective on both independent theories of liability. The jury also specifically and unanimously determined that both defects proximately caused the resulting harm to Martinez. (R.910a-16a, 1222b-28b).

III. HONDA'S APPLICATION FAILS TO DEMONSTRATE THAT EN BANC REARGUMENT OR PANEL RECONSIDERATION OF THIS COURT'S UNANIMOUS, UNPUBLISHED, NON–PRECEDENTIAL RULING IS MERITED

A. The Panel's Unanimous, Unpublished, Non–Precedential Ruling Is Entirely Consistent With This Court's Post–*Tincher* Crashworthiness Rulings And Does Not Conflict With Any Of This Court's Other Precedents Applying *Tincher*

The panel's unanimous, unpublished, non–precedential opinion in this case is fully consistent with both of the other crashworthiness rulings that this Court has decided post–*Tincher* and does not conflict with this

Court's non–crashworthiness decisions applying *Tincher*. Starting from the false premise that this Court's *Tincher*–related rulings are somehow in conflict, Honda then leaps to the non–sequitur that granting reargument in this crashworthiness case tried to a jury pre–*Tincher* — a class of cases so vanishingly small that no other case in this same procedural posture is believed to be awaiting decision from this Court, *see* slip op. at 1 — could remedy this supposedly rampant post–*Tincher* conflict and confusion, which in actuality does not even exist.

This Court has decided, in the aftermath of the Supreme Court of Pennsylvania's ruling in *Tincher* v. *Omega Flex, Inc.*, 104 A.2d 328 (Pa. 2014), three appeals from jury verdicts in crashworthiness cases tried before the Supreme Court had issued its ruling in *Tincher*. In this case and in *Cancelleri* v. *Ford Motor Co.*, 2016 WL 82449 (Pa. Super. Ct. Jan. 7, 2016) (non–precedential memorandum opinion), this Court affirmed the juries' verdicts in favor of the plaintiffs, rejecting the defendant–automakers' remarkably similar arguments for a new trial under *Tincher*. And, in the third case, in which the jury had originally returned a verdict for the defendant–automaker, *see Webb* v. *Volvo Cars of N. Am., LLC*, 148 A.3d 473 (Pa. Super. Ct. 2016), *alloc. denied*, 2017 WL 1756736 (Pa. May 4, 2017), this

Court vacated the trial court's judgment and remanded for a new trial, holding the trial court should have precluded Volvo from introducing evidence of government and industry safety standards in defending against plaintiff's crashworthiness claim. *Id.* at 481–83.

In all three of these post–*Tincher* crashworthiness appeals, as plaintiffs now turn to demonstrate, this Court's decisions were entirely consistent with one another.

Honda's Application for Reargument advances three separate grounds based on *Tincher*. To begin, Honda asserts that some cases suggest that *Tincher* should be applied "broadly," while in this case the panel supposedly applied *Tincher* "narrowly."[3] Honda's contention, stated at such an unhelpfully high level of generality, surely does not present a valid basis for reargument en banc. The impact of *Tincher* on any given case, as

[3] The quotes on which Honda relies as supposedly demonstrating that *Tincher* should be applied "broadly," from two cases tried to a jury post–*Tincher* (in contrast to this case, which was tried to a jury pre–*Tincher*), are taken wildly out of context. *See High* v. *Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. Ct. 2017) (noting that *Tincher*'s significance derives merely from its overruling of *Azzarello*, an overruling that the panel's decision in this case recognized); *Renninger* v. *A&R Machine Shop*, 2017 WL 1326515, at *10 (Pa. Super. Apr. 11, 2017) (stating only that *Tincher* did more than just overrule *Azzarello*).

this Court's precedents demonstrate, necessarily depends on the facts and circumstances of that individual case.

What cannot be denied, however, is that the unanimous panel, in its unpublished and non–precedential ruling, clearly recognized that *Tincher* applied to plaintiffs' crashworthiness claim and that *Tincher* overruled the Pa. Supreme Court's earlier decision in *Azzarello* v. *Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978). A word search reveals that the panel's unanimous, unpublished, non–precedential memorandum opinion mentions *Tincher* by name some 34 times — far more than the opinion cites or refers to any other precedent. To suggest that *Tincher* did not play the most significant role in the panel's decision of this case would require a redefinition of the words "most significant."

Importantly, in *Tincher* the Supreme Court recognized that a careful case–by–case inquiry was necessary to determine whether *Tincher* necessitated a retrial of any products liability case (such as this one) tried under pre–*Tincher* law, and the Court did not conclude that a new trial was necessary even in *Tincher* itself. *See Tincher*, 104 A.2d at 410. Engaging in that very case–by–case inquiry concerning *Tincher*'s impact is precisely what the unanimous panel did here.

The issue whether *Tincher* should be applied "broadly" or "narrowly" to a products liability case arises at such a high level of generality that it would be pointless to grant rehearing en banc to decide that metaphysical question. There can be no doubt that here the panel applied *Tincher* fully and exhaustively in deciding this case. Whether *Tincher* did or did not necessitate a retrial of this case depended not on how broadly or narrowly the ruling was applied but rather on the facts and circumstances of this case.

Next, Honda asserts that the panel should have ordered a new trial because the jury supposedly failed to decide whether the 1999 Acura Integra that rendered Mr. Martinez a quadriplegic was unreasonably dangerous. The unanimous panel in this case properly rejected Honda's argument — in complete harmony with this Court's earlier unanimous, unpublished, non–precedential ruling in *Cancelleri*, 2016 WL 82449, at *3 — holding that:

> The portion of the charge to determine the "practicability of an alternate design" inherently requires the jury to balance factors such as the cost of implementing the design against the relative safety of the alternate design. Accordingly, the jury could not have reached a verdict in the case without conducting a risk utility analysis.

> * * * The jury charge here was adequate because the court made it clear to the jury that it was the arbiter of whether the 1999 Integra's seat belt restraint system was "unreasonably dangerous," and the absence of explicit "risk–utility" language from the court's instruction did not amount to a fundamental error.

Martinez, slip op. at 8.[4]

The claim the Supreme Court considered in *Tincher* was a garden–variety strict liability design defect claim. By contrast, the crashworthiness claims on which the plaintiffs prevailed here and in *Cancelleri* were already recognized under Pennsylvania law as imposing a more rigorous burden of proof on the plaintiff than the run–of–the–mill design defect claim that *Tincher* involved.

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[4] Because this case was tried to a jury pre–*Tincher*, this case does not present an appropriate setting in which to decide how, post–*Tincher*, a jury should be instructed on the question of risk–utility. *See*, *e.g.*, *Webb*, 148 A.3d at 483 (recognizing that resolving the full range of consequences flowing from the Supreme Court's ruling in *Tincher* "is a question best addressed in a post–*Tincher* case" — meaning a case prepared and tried to a jury after *Tincher* issued, and not before as in this case and as in *Webb* itself).

Additionally, Honda's fact–bound assertion that plaintiffs supposedly failed to introduce evidence of the cost of their lawful, safe, and feasible alternative–design seatbelt focuses on an irrelevancy, as Honda's own corporate representative witness confirmed in his videotaped deposition testimony played for the jury that Honda used ABTS seatbelts in other of its vehicles and that Honda had a variety of specific reasons for deciding not to install an ABTS seatbelt in the 1999 Acura Integra, but cost was not one of those reasons. (R.1543a-44a).

In *Tincher*, the trial court refused to allow the case to go to the jury on a "fireworthiness" claim as defendant Omega Flex had requested, which is analogous to the "crashworthiness" doctrine applicable to automobile cases. Here and in *Cancelleri*, by contrast, plaintiffs proved their crashworthiness claims, which necessitated proof of a feasible alternative design. In *Tincher*, the Supreme Court described Omega Flex's invocation of the "fireworthiness" doctrine as "a Third–Restatement–like approach similar to the more familiar 'crashworthiness' exception to the Second Restatement." *Tincher*, 104 A.3d at 341. Because plaintiffs in this case and in *Cancelleri* proved and prevailed on crashworthiness claims that already imposed on them requirements far more stringent than a mere Restatement (Second) design defect claim, the unanimous panels in both this case and in *Cancelleri* correctly ruled that *Tincher* did not necessitate a retrial.

As part of this same contention, and in the introduction to its Application for Reargument, Honda asserts that a new trial is necessary in any pre–*Tincher* case in which a jury was properly instructed, in accordance with pre–*Tincher* law, that a defendant was the guarantor of its product and could be liable if the product lacked any element necessary to make it safe.

In *Tincher*, the Supreme Court endorsed the policy underlying the Restatement (Second) of Torts §402A that a manufacturer is effectively the guarantor of its product's safety. *Tincher*, 104 A.3d at 364–67. Honda asks this Court to journey where the Supreme Court in *Tincher* refused to go — to make a quantum leap to find prejudicial error from the mere inclusion of the "guarantor" and "every element" language in a jury charge. Those same words appeared in the *Tincher* jury charge, but Pennsylvania's highest court purposefully did not hold that the use of those terms in the *Tincher* jury charge mandated a new trial there. And those words also appeared in the trial court's charge to the jury in the *Cancelleri* case, *see Cancelleri*, 2015 WL 263476, at **31–32 (C.C.P. Lackawanna Cty., Pa. Jan. 9, 2015), but this Court likewise unanimously rejected Ford's argument that a new trial was thus necessary. *Cancelleri*, 2016 WL 82449, at *3.

Finally, Honda asserts that en banc review should be granted here to determine whether *Lewis* v. *Coffing Hoist*, 528 A.2d 590 (Pa. 1987), precluding the admission of regulatory–compliance and industry–standards evidence, remains good law in *Tincher*'s aftermath. Once again, however, this Court's rulings fail to contain any conflicting holdings on that issue.

In this Court's precedential ruling in *Webb*, this Court observed:

> We conclude that the overruling of *Azzarello* does not provide this panel with a sufficient basis for disregarding the evidentiary rule expressed in *Lewis* and *Gaudio*. While it is clear after *Tincher* that the firm division between strict liability and negligence concepts no longer exists, it is not clear that the prohibition on evidence of government or industry standards no longer applies. *Lewis*, in particular, noted that a defective design could be widespread in an industry. *Lewis*, 528 A.2d at 594. The *Tincher* opinion does not undermine that rationale for excluding governmental or industry standards evidence.

Webb, 148 A.3d at 483. This Court continued, "We believe the continued vitality of the prohibition on government and industry standards evidence is a question best addressed in a post–*Tincher* case." *Id.* This case, like *Webb*, is a pre–*Tincher* case, meaning that the jury trial occurred before the Supreme Court issued its ruling in *Tincher*.

In both this case and in *Cancelleri*, two entirely different three–judge panels, in two different unanimous, unpublished, non–precedential rulings, rejected the defendants' arguments that *Tincher* overruled *Lewis* and required the admission of government or industry standards evidence in a case tried to a jury pre–*Tincher.* In another quote wrested entirely out of context from *Renninger*, Honda at page 7 of its reargument application argues that, in *Renninger*, this Court "held" that *Tincher* deprived *Lewis* of

its status as binding precedent. In fact, the opposite is true. *Renninger* recognized that "[t]he *Tincher* Court went on to discuss *Lewis* in detail, but it did not expressly overrule *Lewis*, or any case other than *Azzarello*." *Renninger*, 2017 WL 1326515, at *7. Ultimately, on the issue of admission of government or industry standards evidence, this Court in *Renninger* concluded that because "[n]either party to the instant appeal has offered any substantive argument for or against the admission of such evidence in Pennsylvania after *Tincher*, * * * we do not have occasion to express an opinion" on the matter. *Id.* at *11.

Thus, Honda's contention that *Renninger* is somehow in conflict with *Webb* (both of which were written by Judge Stabile) or with this Court's rulings in this case or in *Cancelleri* on the issue of admitting evidence of government or industry standards finds absolutely no support in *Renninger*'s actual language or its actual holding.

As plaintiffs have shown above, Honda's contention that this Court's post–*Tincher* rulings are somehow in conflict is entirely without support. Furthermore, Honda's argument that granting reargument en banc to review a unanimous, unpublished, non–precedential ruling of this Court, arising in the vanishingly small class of crashworthiness cases tried to a

verdict pre–*Tincher*, would somehow afford a useful opportunity to resolve such imagined conflicts defies reality.

B. The Panel's Unanimous, Unpublished, Non–Precedential Ruling Properly Recognized That *Amato* Does Not Necessitate Reversal And That The Trial Court's Instructions On Warnings Did Not Amount To Reversible Error Under The Specific Circumstances Of This Case

In *Amato* v. *Bell & Gossett*, 116 A.3d 607 (Pa. Super. Ct. 2015), *alloc. granted in part*, 130 A.3d 1283 (Pa. 2016), *alloc. dismissed as improvidently granted*, 150 A.3d 956 (Pa. 2016), this Court observed:

> In the instant matter, Crane's claim is that it was entitled to a failure–to–warn instruction incorporating considerations of reasonableness. Because *Tincher* returned such considerations to the purview of the jury as a question of fact in cases concerning strict liability, we hold that it is applicable to the case *sub judice*.

Id. at 620.

In *Amato*, this Court did not consider or address in any detail how *Tincher* might possibly apply to a failure–to–warn claim, because this Court held that the defendant's requested jury instruction was properly disallowed because it was irrelevant to the defendant's theory of non–liability. *See Amato*, 116 A.3d at 621–23. Whether the "unreasonably dangerous" jury instruction that the defendant requested in *Amato* should

have been given on plaintiff's failure to warn claim in that case was the issue the Supreme Court granted allowance of appeal to consider. *See Amato*, 130 A.3d 1283 (Pa. 2016) (order granting allowance of appeal).

Honda's Application for Reargument misportrays the panel's unanimous, unpublished, non–precedential ruling in this case as failing to recognize that the Supreme Court had dismissed *Amato* as improvidently granted. To begin with, undoubtedly the panel recognized that the Supreme Court's granting of allowance of appeal in *Amato* did not deprive this Court's ruling in *Amato* of precedential value. Rather, this Court's ruling in *Amato* retained precedential value unless and until the Supreme Court overturned it, which of course has not happened.

The panel's actual holding with regard to *Amato*'s effect on this case was as follows:

> In the instant matter, however, we need not consider whether the trial court's instruction to the jury on Appellees' failure to warn theory of liability complied with *Tincher*, as any such failure would amount to harmless error. Because the jury returned a verdict against Honda on both of Appellees' theories of liability, Honda's argument that it is entitled to a new trial fails as Honda cannot demonstrate that the court's instruction prejudiced it or that the allegedly erroneous instruction was responsible for the verdict. *See Chanthavong v. Tran*, 682 A.2d 334, 340 (Pa. Super. 1996) (holding that, "[t]o constitute

> reversible error, a jury instruction must not only be erroneous, but must also be harmful to the complaining party.") (citations omitted)).

Slip op. at 11. The panel did not hold, as Honda misrepresents in its Application for Reargument, that *Amato* was no longer good law. Rather, the panel merely held that Honda's *Amato*–based argument for reversal failed because it amounted to, at most, harmless error.

A second, dispositive reason also exists for rejecting Honda's request for reargument based on *Amato*. In *Amato*, the defendant specifically requested a jury instruction that would have charged the jury on the issue of "unreasonably dangerous" on the plaintiff's failure to warn claim. *See Amato*, 116 A.3d at 622. In this case, by contrast, Honda never requested any jury instruction on plaintiffs' failure–to–warn claim (R.923a-39a), let alone an instruction such as the one the defendant requested in *Amato*, 116 A.3d at 622, which sought to interject the concept of "unreasonably dangerous" into the jury's determination of a failure to warn claim. Nor did Honda's counsel object to the omission of such "unreasonably dangerous" language when the trial court in this case formulated and delivered its failure–to–warn jury charge. R.731a-32a, 741a-42a, 771a-72a, 963b, 965b, 1016b-17b, 1210b.

As a result, Honda's assertion that *Tincher* or *Amato* somehow should affect a jury's consideration of a strict liability failure–to–warn claim has been waived in the context of this case. *See* Pa. R. App. P. 302(a) & (b) (recognizing that an issue not raised in the trial court is waived on appeal and that a "specific exception" must be taken to preserve appellate review of an omission from a jury charge); *Broxie* v. *Household Finance Co.*, 372 A.2d 741, 743 (Pa. 1977) ("It has long been the law in this Commonwealth that in order to preserve for appellate review an issue concerning the correctness of a trial court's charge to the jury, the complaining party must submit a specific point for charge or make a timely, specific objection to the charge as given.").

Turning next to Honda's argument that the trial court here gave an improper "heeding presumption" instruction on plaintiffs' failure to warn claim, the panel in its unanimous, unpublished, non–precedential ruling simply did not agree:

> Our review of the relevant jury instruction reveals that, contrary to Honda's assertion, the court did not, in a vacuum, instruct the jury that it "must presume that Mr. Martinez would have followed any adequate warning." Honda's Brief at 42.

Slip op. at 15.

In this case, the plaintiffs' evidence established that Mr. Martinez would not have purchased the vehicle had an adequate rollover warning been provided. Honda provided the jury with no evidence to contradict or call into question that testimony. Thus, the unrebutted evidence of record was that Martinez would have heeded an adequate rollover warning. *See Maya* v. *Johnson & Johnson*, 97 A.3d 1203, 1219 (Pa. Super. Ct. 2014) (rejecting defendant's challenge involving "heeding instruction" charge where the plaintiff testified, as here, that an adequate warning would have been heeded).

Here, it was not the trial judge's jury charge that made the heeding presumption irrebuttable. Rather, it was Martinez's own testimony that he would have heeded an adequate warning, combined with Honda's failure to challenge his statement or introduce any evidence to the contrary. It was the evidence actually before the jury, rather than the challenged jury instruction, that precluded Honda from being able to convince the jury or even attempt to argue through counsel that Martinez would not have heeded an adequate warning.

The panel thus properly held, under the unique facts of this case, that Honda was not entitled to any relief on its argument that the trial court

improperly delivered a heeding instruction to the jury. Honda's application for reargument fails to point to any other cases in which the only evidence concerning whether the plaintiff would have followed an adequate warning was the plaintiff's own, entirely unrebutted statement that he would have. As a result, surely this is not an appropriate case for reconsidering the scope of any heeding presumption because that presumption played no role in the jury's verdict here, as the panel's unanimous, unpublished, non–precedential ruling correctly recognized.

C. The Panel's Unanimous, Unpublished, Non–Precedential Ruling Upholds As Proper A Crashworthiness Jury Instruction Substantively Identical To The Jury Instruction This Court Recognized As Proper In *Gaudio*

Honda's final ground for reargument asserts that the trial court supposedly failed to give a proper jury charge on the issue of crashworthiness by omitting any mention of the second of the three crashworthiness prongs.

The crashworthiness charge that this Court approved as proper in *Gaudio* v. *Ford Motor Co.*, 986 A.2d 524 (Pa. Super. Ct. 2009), fully refutes Honda's argument. In *Gaudio*, this Court explained:

> Gaudio contends that the trial court failed to include any definition of crashworthiness in its instruction. Again, however,

> we conclude that the instruction provided to the jury by the trial court adequately described the applicable law at issue:
>
> > In this case [Gaudio] has the burden of proving that the design of the product was defective, that an alternative safer design practical under the circumstances existed. That [the Deceased's] injuries were caused or exacerbated by the defective design of the product and that [the Deceased] would not have suffered these injuries if the alternative design were used. If after considering all of the evidence you feel persuaded that the propositions are more probably true than not, your verdict must be for [Gaudio]. Otherwise your verdict must be for [Ford].
>
> This charge correctly advised the jury of the specific elements of a crashworthiness claim, as set forth in our decision in *Kupetz*[v. *Deere & Co.*, 644 A.2d 1213 (Pa. Super. Ct. 1994)].

Gaudio, 976 A.2d at 550–51. The crashworthiness charge that this Court approved as proper in *Gaudio* is indistinguishable from the jury charge that the trial court used here. Notwithstanding Honda's argument to the contrary, the jury here could not have found Honda liable without finding that Mr. Martinez would not have suffered his injuries if the alternate design was used.

The trial court in this case carefully instructed the jury to find liability against Honda only if: (a) the seatbelt system was defective; and (b) the defect caused injuries to Martinez solely when the roof of the vehicle struck the ground. (R.871a-75a, 1184b-88b).

Moreover, it was undisputed that Martinez was wearing his seatbelt and received his injuries solely as the result of striking his head on the roof when the roof of the vehicle struck the ground. (R.761a-62a, 971b). Plaintiffs' evidence established that the defective nature of the Integra seatbelt restraint system (8.25 inches of vertical excursion) allowed the tragedy to occur and that the lawfully available ABTS and cinching latchplate alternative design would have altogether avoided any striking of Martinez's head on the roof of the vehicle. (R.303a, 347b). By avoiding the head–strike on the roof, the cervical injuries Martinez sustained in the rollover accident would have been "eliminated." (R.425a-27a, 431b-33b). Even Honda's own biomechanical engineering expert, Dr. Roger Nightingale, conceded that, if Martinez did not strike his head on the roof, he would not have received his injuries. (R.725a-26a, 938b-39b).

The jury ultimately believed plaintiffs' experts that the alternative design would have kept Martinez's head off the roof, thereby resulting in the elimination of his injuries. In accordance with Pennsylvania law, Martinez was entitled to recover in full from Honda for the injuries sustained from any defect in the restraint system during the second

collision of the rollover accident (*i.e.*, "solely when the roof of the vehicle struck the ground").

In sum, the unanimous three–judge panel properly held that the trial court did not abuse its discretion in rejecting Honda's challenge to the crashworthiness charge. Honda's disagreement with the unanimous panel's non–precedential resolution of this issue does not come close to satisfying the demanding criteria for reargument en banc.

IV. CONCLUSION

For the foregoing reasons, Honda's Application for Reargument should be denied.

Respectfully submitted,

Dated: May 17, 2017

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