In the Superior Court of Pennsylvania

No. 267 MDA 2015

JOHN A. CANCELLERI and ROSETTA CANCELLERI, his wife,

Plaintiffs/Appellees,

v.

FORD MOTOR CO.,

Defendant/Appellant.

BRIEF FOR APPELLEES

On appeal from the judgment of the Court of Common Pleas of Lackawanna County, Pennsylvania dated January 20, 2015 at No. 2011–6060

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I. INTRODUCTION

After seeing and hearing all the relevant evidence and the arguments of counsel, a unanimous jury found that plaintiff John A. Cancelleri, then 83 years old, suffered permanent incomplete quadriplegia as the result of a design defect and malfunction in the airbag system of his 2005 Mercury Sable manufactured by defendant Ford Motor Co.

Because the driver's side airbag improperly failed to deploy in a 45–mile–per–hour offset frontal collision, the formerly very active and lively Cancelleri has remained limited to a wheelchair the past five years, his days full of pain and suffering. In addition, his wife of more than 50 years, Rosetta Cancelleri, has been deprived of an active companion and her sole readily available means of transportation, because she never learned to drive and at the age of 89 cannot now be expected to do so.

Defendant Ford Motor Co., in its Brief for Appellant, does not challenge the jury's verdict in favor of plaintiffs as excessive, nor does Ford contend that insufficient evidence exists to uphold the jury's verdict in plaintiffs' favor on the Cancelleris' claims for strict liability design defect crashworthiness or strict liability design defect malfunction. Rather, Ford on appeal exclusively seeks a new trial, arguing principally that the

Supreme Court of Pennsylvania's recent ruling in *Tincher* v. *Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), mandates a retrial of every strict products liability action that resulted in a plaintiff's verdict before *Tincher* issued.

Ford litigated this case in the hope that our Supreme Court in *Tincher* would adopt the Restatement (Third) of Torts as applicable to strict liability law in Pennsylvania. That, of course, did not happen, and what *Tincher* actually does hold, as explained below, does not entitle Ford to a new trial here.

Crashworthiness and malfunction claims — the two types of strict liability claims at issue in this case — are distinct categories of strict liability claims that survive *Tincher* unscathed because they already encompass the risk–utility and consumer expectation approaches that the Supreme Court endorsed in *Tincher*. Moreover, and most critically, here *the jury* was required to decide — and did decide in favor of plaintiffs — that the 2005 Mercury Sable's airbag/restraint system was defective. Ford's repeated assertions to the contrary in its Brief for Appellant are simply untrue. Thus, *Tincher*'s central holding — that a jury rather than the trial judge must determine whether the product is defective — is unquestionably satisfied on this record.

As a result, this is fortunately a case in which the most equitable outcome, given the severity of the injuries involved and the damages the plaintiffs have suffered, coincides precisely with the legally correct outcome.

Tincher does not entitle Ford to a new trial on plaintiffs' crashworthiness claim. Plaintiffs' malfunction claim was properly submitted to the jury and provides an adequate and independent basis for upholding the judgment in plaintiffs' favor. *Tincher* did not overrule existing precedent precluding the introduction into evidence of government or industry standards; rather, the high court's decision in *Tincher* to retain the Restatement (Second) of Torts' approach to strict liability claims compels the rejection of Ford's Third Restatement–based argument in favor of permitting such evidence. Finally, the trial court did not abuse its discretion in precluding Ford from using the very same evidence of government or industry standards to cross–examine plaintiffs' expert engineer, Chris Caruso, who did not rely on such evidence in his direct testimony to the jury. In sum, no basis for a new trial exists.

For all of these reasons, the trial court's judgment should be affirmed.

II. COUNTERSTATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

This Court has held that it will overturn a trial court's denial of a motion for a new trial only where the trial court abused its discretion or committed an error of law that controlled the outcome of the case. *See Colville* v. *Crown Equipment Corp.*, 809 A.2d 916, 926 (Pa. Super. Ct. 2002). This Court views the evidence in the light most favorable to the verdict winner — here the plaintiffs — to determine "whether a new trial would produce a different verdict." *Gunn* v. *Grossman*, 748 A.2d 1235, 1239 (Pa. Super. Ct. 2000). "Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed." *Id.*

Similarly, in *Harman ex rel. Harman* v. *Borah*, 756 A.2d 1116 (Pa. 2000), the Supreme Court of Pennsylvania explained: "[a]lthough all new trial orders are subject to appellate review, it is well–established law that, absent a clear abuse of discretion by the trial court, appellate courts must not interfere with the trial court's authority to grant or deny a new trial." *Id.* at 1121–22.

As the Supreme Court of Pennsylvania explained in *Commonwealth* v. *Travaglia*, 28 A.3d 868 (Pa. 2011), "An abuse of discretion will not be found 'merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill–will, or such lack of support so as to be clearly erroneous.'" *Id.* at 873–84 (quoting *Commonwealth* v. *Laird*, 988 A.2d 618, 636 (Pa. 2010)).

With regard to the admission of evidence, this Court has explained:

> The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus, our standard of review is very narrow . . . . To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

McManamon v. *Washko*, 906 A.2d 1259, 1268 (Pa. Super. Ct. 2006) (internal citations omitted).

And, in *Whyte* v. Robinson, 617 A.2d 380 (Pa. Super. Ct. 1992) (internal citations omitted), this Court explained:

> Pennsylvania trial judges enjoy broad discretion regarding the admissibility of potentially misleading and confusing evidence. Relevance is a threshold consideration in determining the admissibility of evidence. A trial court may, however, properly

> exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Generally for the purposes of this evidentiary rule, "prejudice" means an undue tendency to suggest a decision on an improper basis.

Id. at 383 (internal citations omitted).

III. COUNTERSTATEMENT OF THE CASE

A. Relevant Factual History

1. Liability

On August 20, 2010, plaintiff John Cancelleri was driving his 2005 Mercury Sable vehicle, manufactured by Ford Motor Company and sold by Ray Price Motors, in in a southerly direction on Pennsylvania Route 307. R.20a. He was alone in the car. R.852a. A 2007 Ford Mustang, traveling in the opposite direction, attempted a left turn, crossing into the path of plaintiff's vehicle. R.20a. In the resultant collision, Cancelleri received a 4 inch gash on the top of his head that was perpendicular to his forehead and that bled profusely at the scene. He did not lose consciousness, however. R.748a, 757a, 904a.

Cancelleri was wearing his seatbelt at the time of the collision but did not receive airbag protection. He stated that the gash on the top of his head

occurred when his head hit the windshield during the collision with the Mustang. Although Cancelleri's driver's side airbag did not deploy, the airbag for the empty front passenger side did deploy when the vehicles collided. R.749a, 758a, 2315a–16a, 2338a–40a.

At the time of the collision, Cancelleri was 83 years of age, having been born on June 15, 1927. Cancelleri was married to his wife of more than 50 years, Rosetta, who was 84 years of age at the time of the collision, having been born on July 13, 1926. R.758a, 1060a.

The Mercury Sable that Cancelleri was driving at the time of the accident, designed and manufactured by defendant Ford Motor Co., was equipped with airbags for both the driver and passenger seats. The vehicle was equipped with a single solitary front crash sensor. The airbags were designed to deploy whenever the forward or a side crash sensor signaled a crush of sufficient magnitude to warrant airbag deployment. The electronic crash sensor ("ECS") that was at issue in Cancelleri's crash, the frontal crash sensor, was mounted just above the radiator on a fiberglass material that encased the battery. R.827a.

Deployment of the airbag was designed to occur in three steps. Initially (Step I), the pretensioner would fire and the seat belt would

tighten. R.776a. Milliseconds later, the belt would spool out (Step II), which in effect would hand the occupant over to the airbag, which by this time would be inflated and waiting (Step III). R.777a, 780a. When a crash sensor senses a crush, it would send a signal to the master control of the occupant restraint system — the Restraint Control Module ("RCM") located in the front seat area. The RCM would then signal airbag deployment dependent upon the magnitude of the crush signal. Crash data was also stored in the RCM. Thus, the RCM was both the quarterback for the occupant restraint system, as well as the black box recording crash data. R.844a–46a.

Data received from the RCM after this collision indicated the speed of the vehicles' impact was approximately 45 miles per hour, resulting in Delta V of 20 miles per hour. The data also indicated the first and second steps for the driver airbag deployment had taken place. The pretensioner had fired. The spool out had occurred. But Step III did not occur. The airbag did not deploy. R.776a–78a.

The data retrieved post–accident also showed that the front Electronic Crash Sensor did not experience a crush of the same magnitude as the passenger compartment had experienced. It showed that at the time the driver was experiencing a Delta V of 20 miles per hour, the forward

crash sensor was experiencing a crush of approximately 7 miles per hour. R.776a, 860a–62a.

At trial, plaintiffs introduced the testimony of an expert engineer, Chris Caruso, who not only designed passenger restraint systems that were dependent on crash sensors but also published a manual in which he examined, among other things, the need to properly mount a crash sensor so that it would be responsive to what was actually happening in a crash. Caruso testified that Ford's use of a fiberglass material on which it mounted its front crash sensor was a design defect because when, as happened in Cancelleri's vehicle, the crash caused the fiberglass to be ripped away from the body of the car, the sensor would not experience the full impulse from the crash. R.817a–18a, 822a, 857a, 859a.

Both Caruso and Jeffrey Pearson, an engineer Ford presented to the jury, agreed that the reason the driver airbag did not deploy was because the front ECS, which signaled the need to deploy, did not experience a crush of the magnitude of the one that was being felt by the RCM in the front occupant department of the Sable. R.817a–18a, 822a, 857a, 859a. Ford's expert, Pearson, attributed this to the fact that the frontal electronic crash sensor had become "disoriented." R.1219a. Plaintiffs' expert, Caruso,

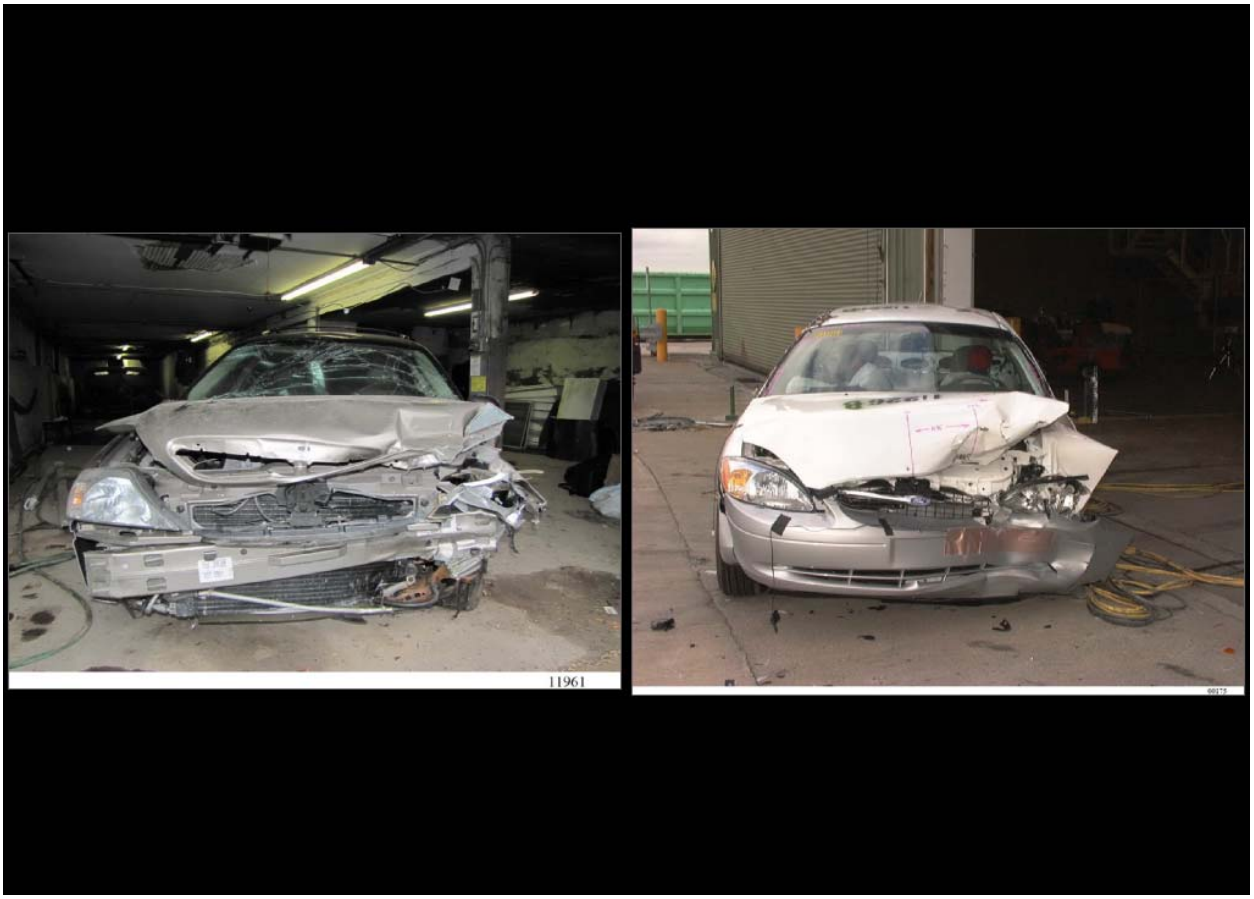
testified that the driver's side airbag did not deploy because the sensor was mounted on a fiberglass material that was not strong enough to withstand the crush. Instead, it tore away from the body of the vehicle during the early stages of the crash and thus never experienced the full extent of the crush. R.817a, 857a, 859a.

Thus, engineers from both sides agreed that the front crash sensor (FCS) on the Cancelleri vehicle did not experience the full magnitude of the crash. Ford's expert, Pearson, attributed this error to "disorientation," but neither he nor any other Ford witness provided the jury with any explanation for the FCS's failure. The only explanation provided to the jury for the FCS's failure was provided by plaintiffs' expert, Caruso, who attributed the failure to the fact that the FCS was mounted on tear–away fiberglass. The jury also heard Caruso offer his opinion that it was Ford's failure to mount the front crash sensor on a material that was strong enough to withstand the rigors of the crash that was the design defect that prevented Cancelleri from receiving airbag protection. Ford's failure to provide any counter explanation for the FCS's "disorientation," as admitted to by Pearson, was tantamount to conceding the defective design

of the passenger restraint system in the Ford manufactured Sable automobile. R.817a–18a, 822a, 857a, 859a.

Caruso also testified that there was a safer alternative that was both feasible and available at the time of the collision. The vehicle should have been equipped with *dual* front crash sensors, which were already in use in vehicles that were on the market in 2005. As to feasibility, Caruso estimated that the cost of adding a second front crash sensor was approximately $7.50 per car. R.864a. Engineer Caruso testified that a dual front crash sensor system would have eliminated the problem because, whether the crash came from the right or from the left, one of the sensors would have experienced the crush directly rather than through vibration. R.863a–64a.

Plaintiffs also relied on one of Ford's own crash tests, Ford Crash Test number 11226, which involved a vehicle–to–vehicle frontal offset crash at 45 miles an hour. In the test, the crash test dummy driver of a vehicle identical to the Mercury Sable received airbag protection, establishing that Ford designed the Mercury Sable to afford its occupants airbag protection in a crash of the same magnitude as the one Cancelleri experienced. R.837a–38a.



R.1b–2b (exhibits P–79q1 and P–87a). In the above reproduction of two trial exhibits that the jury considered, the car in which Cancelleri was traveling at the time of his accident appears on the left, and the Ford test vehicle in which both airbags properly deployed as a result of the collision appears on the right.

Ram Krishnaswami, an engineer who testified as Ford's party representative at trial, admitted that the dual front crash sensor system, which Caruso testified Ford should have used, was available to Ford at the time it designed and manufactured the 2005 Mercury Sable. R.1517a–18a.

Ford's witness, over objection, was permitted to identify two exemplar vehicles that were on the market in 2005 that used a single front crash sensor system. They were the Chevrolet Monte Carlo and Nissan Altima. Ford's witness conceded, however, that both of these vehicles had front crash sensors that were mounted on a steel beam and *not* on fiberglass material (as in the Mercury Sable), which had a tendency to tear away during a high force crash. R.1520a.

Separate and apart from the design defect evidence that the front sensor had failed to experience the crush involved in this collision, and thus had failed to send the correct signal to deploy the driver's airbag, there was an unrelated occurrence which indicated that there was a defect that could not be explained by the improper placement of the front crash sensor. Cancelleri testified that during the collision with the Ford Mustang, he saw the airbag for the empty passenger seat deploy. R.2315a, 2338a–40a. There was no evidence adduced from any party or from any witness that would account for the deployment of the empty passenger side airbag during the initial collision with the Mustang, because if the passenger seat is empty (as it was when the collision occurred) its airbag should not deploy. R.855a.

The deployment of the right front passenger seat airbag in the Mercury Sable and the non–deployment of the driver airbag were reported by one of the first responders at the scene, Kevin Serena, who, at the time, was the Chief of the Springbrook Volunteer Fire Company and who testified at trial. R.749a. These facts were also confirmed by post–crash photographic evidence produced at trial.

Ford attempted to come up with some reasonable after–the–fact explanation for the deployment of an airbag for an unoccupied passenger seat through the testimony of its accident reconstructionist, Jennifer Yaek. Importantly, however, not even she attempted to offer evidence as to how the airbag could have deployed during the initial collision, as Mr. Cancelleri testified it did. R.2315a, 2333a–40a. After the accident, the Mercury Sable came to rest in the branches of a pine tree along the side of the road. R.733a. This became the starting point for Ford's speculative explanation for the airbag deployment into an empty passenger seat.

Ford theorized that the contact between the Mercury Sable and the branches of a pine tree constituted a second impact of sufficient magnitude to trigger the airbag. Ford, however, had to concede the physical facts: the vehicle never made contact with the tree trunk, and yet it came to rest

within seven feet of the initial contact with the pine branches. R.780a, 1351a–52a. Ford also needed to explain why the occupant detection system did not prevent airbag deployment into an empty seat and why the crash data did not record a second impact.

Ford's experts theorized, admittedly without a scintilla of physical or forensic evidence, that the original collision had caused the occupant restraint system to become momentarily disabled. R.1527a, 1584a. Ford's experts further theorized that this disability lasted for about five to six seconds, long enough for the pine branch "impact" to activate the airbag before rebooting itself. R.1255a. In a default mode, the airbag could deploy. R.1254a. But Yaek testified there would still need to be an "impact." She testified the vehicle was traveling at a speed of 12 to 14 miles per hour when the vehicle made contact with the branches. R.1313a.

Shortly before trial, Ford conducted tests in which it sought to bolster Yaek's theory. But, all did not go well. Cross–examination of Ford's party representative, Ram Krishnaswami, revealed that in order to produce an impact sufficient to produce airbag deployment, the vehicle needed to be traveling at 16 to 18 miles per hour, and the impact needed to be into a rigid wall. R.1525a.

Thus, in order to believe Ford's explanation for the malfunction of the passenger airbag, the jury would have had to believe that a vehicle weighing more than 2000 pounds would be stopped dead in its tracks merely by contact with pine branches, that the stopping distance for this event would be seven feet, and that the impacted pine branches would have the same effect as colliding into a rigid wall. The jury would also have to disregard the testimony of both the investigating state trooper, Boettcher, as well as plaintiffs' accident reconstructionist, Phillips, both of whom testified the vehicle could not have been traveling more than five miles per hour when it came to rest in the pine branches. R.740a, 781a. Yaek conceded that if the vehicle came into contact with the pine branches at five miles per hour, the passenger side airbag would not have deployed. R.1356a–57a.

Finally, the jury would have had to disbelieve the testimony of the only eyewitness to the event, John Cancelleri, who stated the passenger airbag went off right away. R.2315a, 2338a–40a. Ford did not even attempt to fashion an explanation that would have fit Cancelleri's version of the events. Ford's explanation for the errant passenger airbag deployment was inherently unbelievable, as the jury's verdict in plaintiffs' favor confirms.

2. Damages

Although Cancelleri was less than 5 minutes from his home at the time the collision occurred on August 20, 2010, it was not until Christmas Eve of 2010 that he was finally able to complete the journey to his home.

In the aftermath of the collision, Cancelleri extricated himself from his vehicle. R.758a. He was found by ambulance personnel to be bleeding profusely from an approximate four–inch gash on the top of his head. Despite the fact that the bleeding continued unabated until he was transported to the hospital, Cancelleri was found to be fully oriented as to person, place, and time. R.757a. His Glasgow Coma Scale score was a perfect 15. R.755a. His only visible injury was the gash on the top of his head.

Cancelleri was taken by ambulance to CMC Hospital Emergency Room in Scranton, Pennsylvania, where he was admitted and his head injury was stapled closed. He was kept overnight for observation. The very next morning following the collision, Cancelleri complained to his nurses that he could not feel his legs. An MRI taken later that same day showed that he had suffered as a result of the accident a massive posterior disc herniation at C7–T1, which had impinged upon his spinal cord. R.897a. On

the following day, surgery was performed by a neurosurgeon, Shiripathi Holla, M.D., who removed the disc material and fused his vertebra at C7–T1. R.969a–71a. Cancelleri remained at CMC Hospital until August 30, 2010, when he was transferred to the Allied Rehabilitation Hospital in Scranton. R.979a.

Upon admission to Allied Rehabilitation Hospital for an intensive spinal cord rehabilitation program on August 31, 2010, Cancelleri's treating physician became Michael Wolk, M.D., who testified as a witness at trial. Dr. Wolk is currently the Medical Director of the Allied Rehabilitation Hospital. Before assuming that position, he had been the Director of the Spinal Cord Injury Program. R.961a. Dr. Wolk is Board Certified in both in Physical and Rehabilitative Medicine and also the subspecialty of Spinal Cord Injury Medicine. R.959a. Dr. Wolk testified unequivocally, based on his review of the CMC record as well as his own experience with this patient, that John Cancelleri suffered a spinal cord injury as the result of a disc herniation which occurred in the collision of August 20, 2010. R.1007a–08a.

Dr. Wolk testified that during the first year after the collision, Cancelleri suffered a significant neurological deterioration and a significant

functional deterioration. R.994a. Ultradynamic testing, which was performed by Dr. Ramey, a neurologist, on September 7, 2011, noted that an atonic detrusor, impaired compliance, and overflow incontinence and put Cancelleri's upper urinary tract "at risk." Bladder management options were discussed, and on September 21, 2011, Cancelleri underwent placement of a suprapubic catheter. R.987a.

During the months that followed, Cancelleri was found to be weak and deconditioned and was noted to have experienced several falls. Through Dr. Wolk's intervention, Cancelleri was transferred to Thomas Jefferson University Hospital in October 2011 for further spinal cord evaluation. He was seen there by Joshua Heller, M.D., a neurosurgeon. R.995a. According to Dr. Heller, Cancelleri's increasing pain was likely due to post–operative changes and stress related to a kyphotic deformity in the region of injury. Dr. Heller opined that the risks of surgery to correct the kyphotic deformity posteriorly and decompress the spine outweighed the potential benefits. While hospitalized, Cancelleri was treated for a urinary tract infection. Ultrasound of his lower extremities revealed chronic DVTs (blood clots), and subcutaneous Heparin was initiated. Baclofen was recommended for increased tone. On October 17, 2011, Cancelleri was

transferred to Allied Services Skilled Nursing Rehabilitation Center, where he remained until December 23, 2011.

Allied Services Home Health has provided home–based services to Cancelleri since December 24, 2011, including skilled nursing for surveillance and management of a sacral skin ulcer and the catheter. Cancelleri fell from his bed twice in February; Mrs. Cancelleri had to call for emergency assistance. The sacral ulcer worsened, requiring additional surveillance and intensive treatment, including placement of a wound VAC and visits to the Wound Care Center at Moses Taylor Hospital for debridement and monitoring. R.997a–1002a. The need for frequent position changes, despite pressure relief surfaces on his bed and wheelchair, was emphasized. Cancelleri also developed a blister on his right hip. Physical therapy was provided until February 14, 2012.

Cancelleri received treatment for the chronic sacral wound at Moses Taylor Hospital on at least eleven occasions from February 11 through May 16, 2012. On May 16, 2012, he underwent sharp debridement of crusting to promote wound healing. R.997a–1002a.

At the conclusion of Dr. Wolk's testimony, he was asked the following question concerning the cause of Mr. Cancelleri's injuries:

> Q: Doctor, do you have an opinion based on a reasonable degree of medical certainty, as to the cause of the spinal cord injury suffered by Mr. Cancelleri on . . . August 20, 2010?
>
> A: Yes
>
> Q: What is that opinion?
>
> A: My opinion is his spinal cord injury came as a result of that cervical disc herniation. And that cervical disc herniation was as a result of the motor vehicle accident. This is based upon an appropriate mechanism of injury and a temporal relationship, a timing issue, and the mechanism of injury is consistent with producing that type of injury.

R.1007a–08a.

Dr. Wolk was then questioned about his understanding of the mechanism of the injury:

> Q: What is your understanding of the mechanism of the injury of that collision?
>
> A: So it was a head–on collision which results in a whiplash type of injury. There obviously was contact as he needed sutures for his scalp. But just that mechanism of injury, the head–on collision with again a forceful flexion, whether it be striking or not striking an object with his head, is enough to result in a disc herniation.

R.1008a.

Dr. Wolk's qualifications to testify were not contested by Ford, nor was he cross–examined by Ford, nor did Ford choose to present any

conflicting medical testimony; thus Dr. Wolk's opinions concerning the nature and extent of Mr. Cancelleri's injuries stood unrebutted before the jury. R.965a, 1012a.

Plaintiffs then presented the testimony of the life care planner who had developed a plan for Cancelleri. The life care planner testified extensively as to the modalities that would be necessary to address Cancelleri's physical deficits at the time of trial and in the future. At the conclusion of her testimony, she offered an opinion that the cost of future medical care to Cancelleri, including modifications to his home, as well as the need for personal attendant care, to be $1,200,000.00. R.1059a. As with Dr. Wolk, Ms. Yudkoff's credentials to testify were not challenged, nor was she cross–examined by Ford. R.1029a, 1059a. Although Ford had submitted a life care plan of a specialist hired by them, they chose not to call this witness to testify. Thus, Ms. Yudkoff's life care plan was unrebutted by Ford.

Rosetta Cancelleri testified that she and her husband will have been married 59 years in November of 2014. She was, at the time of her testimony, 88 years of age. She was asked to describe how her husband

spent his time after retiring to Covington Township, Pennsylvania. Her response was:

> Very active, very active, inside, outside. And we were always together. We'd get up in the morning. And he would say, What are we doing today? Either go shopping or out in the yard, visit our daughter or the other daughter and grandsons, all their games. We were always together. We had a full, full life.

R.1062a–63a.

Mrs. Cancelleri testified that not only did she not drive at the time of trial, she has never had a driver's license. Her husband was her source of transportation throughout her life. "He did everything. He drove me any place I wanted to go from morning until night, church, shopping, visiting, we were always together." R.1063a.

She was then asked about how her husband's accident has affected her life:

> Very difficult, very difficult. I lost my companionship. My companionship now is sitting by a wheelchair. We would go out every place before. And it's difficult getting him ready in the morning getting him in for breakfast, he needs everything. And then at night same thing. So it's been difficult, very hard because I always have to look to somebody for a ride to the store, even to buy a card, church. I have lost everything.

R.1065a–66a.

Then she was asked about what had happened to her husband that affected her life, now and in the future:

> Well, my life has changed because I'm limited. I can't go anywhere, not to leave him alone. And if I go, I have to get somebody in to be with him.

R.1067a.

B. Relevant Procedural History

Plaintiffs commenced this case by filing a complaint against Ford Motor Co. and Ray Price Motors, Inc. (the dealer from which Cancelleri had purchased his automobile) on October 11, 2011. The complaint alleged that a 2005 Mercury Sable vehicle manufactured by Ford was defective in that it failed to offer airbag protection to the driver and thus was uncrashworthy. Alternative theories of liability were asserted against Ford in the form of a design defect and a malfunction. R.18a–31a. Ford filed an answer to the complaint and shortly thereafter assumed the defense for co–defendant Ray Price Motors, Inc. R.32a–50a, 52a–70a.

Before the start of trial, the parties filed numerous motions in limine. Relevant to Ford's appeal, plaintiff filed a Motion to Preclude Evidence of Industry and Government Standards, State of the Art Concepts, Industry

Custom, and Defendant's Reasonableness in Design or Manufacture of the Product. R.71a–74a. The trial court granted plaintiffs' motion by means of a memorandum and order filed July 21, 2014. R.283a–88a. Ford filed a Motion in Limine to Apply the Restatement (Third) of Torts: Products Liability to Plaintiffs' Crashworthiness Claims and to Admit Evidence of Industry Customs and Standards. R.207a–17a. The trial court denied Ford's motion by means of a memorandum opinion and order also filed on July 21, 2014. R.1948a–55a.

Following extensive discovery, trial began on August 11, 2014. At the conclusion of the evidence, because no evidence had been adduced by either side against Ray Price Motors, plaintiffs agreed to withdraw their claim against Ray Price Motors. R.1629a. On August 21, 2014, the jury returned a unanimous verdict in favor of the plaintiffs in the amount of $5,940,706.86. R.1660a–61a.

Plaintiffs thereafter timely filed Motions for Delay Damages and Taxable Costs. R.1665a–97a. On September 2, 2014, Ford filed its Motion for Post–Trial Relief requesting either judgment notwithstanding the verdict or a new trial. On November 19, 2014, the Supreme Court of Pennsylvania issued its ruling in *Tincher*, 104 A.3d 328. Soon thereafter, Ford filed in the

trial court a Notice of Supplemental Authority arguing that *Tincher* necessitated a new trial. R.2396a–463a. Plaintiffs filed a response in opposition, pointing out that *Tincher* did not require a retrial of this case and that the jury's verdict in favor of plaintiffs was entirely consistent with *Tincher*. R.2512a–20a. Thereafter, Ford filed a reply on the *Tincher* issue, and plaintiffs filed a surreply. R.2521a–28a, 2529a–35a.

On January 9, 2015, the trial court issued a 60–page opinion denying Ford's post–trial motions. With regard to Ford's motion seeking j.n.o.v. on plaintiffs' crashworthiness and malfunction claims, the trial court in its opinion demonstrated in detail that plaintiffs introduced sufficient evidence to uphold the jury's verdict in plaintiffs' favor on each element of a crashworthiness claim and a malfunction claim. Rule 1925(a) opinion at 8–31. The trial court's opinion also rejected Ford's contention that the Pa. Supreme Court's ruling in *Tincher* necessitated a new trial. Rule 1925(a) opinion at 5–7, 57–59.

With regard to plaintiffs' malfunction claim, the trial court in its opinion explained that it properly charged the jury on that theory. Rule 1925(a) opinion at 17–31. As the trial court's opinion makes clear, the jury's verdict in favor of plaintiffs demonstrates that the jury found in plaintiffs'

favor on both grounds for liability submitted to the jury: crashworthiness and malfunction. Rule 1925(a) opinion at 32 ("we have already found that the Cancelleris proved the elements necessary to establish their design defect claim under the crashworthiness doctrine and their malfunction claim"). Lastly, the trial court rejected Ford's argument that *Tincher* mandated the admission of evidence of governmental or industry standards, and the trial court further concluded that its refusal to allow Ford's counsel to cross–examine plaintiffs' engineering expert using such governmental or industry standards was proper because Caruso did not rely on those standards in testifying about the basis for his opinions before the jury. Rule 1925(a) opinion at 53–57.

IV. SUMMARY OF THE ARGUMENT

The Supreme Court of Pennsylvania's recent ruling in *Tincher* v. *Omega Flex, Inc.*, 104 A.2d 328 (Pa. 2014), contains four holdings of relevance to this appeal. First, the Court ruled that the Second Restatement, and not the Third Restatement, would continue to govern strict products liability claims under Pennsylvania law. *Id.* at 399. Second, the Court ruled that the jury as fact–finder, rather than solely the trial judge, must decide

whether the product in question suffers from a design defect. *Id.* at 406–08. Third, the Court ruled that a careful case–by–case inquiry was necessary to determine whether *Tincher* necessitated a retrial of any products liability case tried under pre–*Tincher* law, and the Court did not even conclude that a new trial was necessary in *Tincher* itself. *Id.* at 410. Fourth and finally, the Court explained that a plaintiff pursuing a strict liability design defect claim may establish a defendant's liability using either or both a risk–utility or consumer expectation approach. *Id.* at 406.

In this case, as the trial court's lengthy and detailed Rule 1925(a) opinion confirms, *Tincher* does not necessitate a retrial. The jury verdict slip and the trial court's instructions to the jury required the jury to decide, as the jury did decide in plaintiffs' favor, that the automobile's airbag/ restraint system was defective. Thus, notwithstanding Ford's inaccurate arguments to the contrary, the trial of this case already satisfied *Tincher*'s central holding — that the jury rather than the trial judge must decide the existence of a defect.

Ford's other new trial arguments are likewise without merit. The garden–variety products liability claim at issue in *Tincher* was not the basis for Ford's liability in this case, in which plaintiffs pursued claims for

crashworthiness and malfunction. In finding for plaintiffs on those claims, the jury in this case already had to engage in, and resolve favorably to plaintiffs, the very sort of risk–utility and consumer expectation inquiries that *Tincher* contemplates.

Moreover, because *Tincher* rejected any *per se* requirement of a new trial in every pending case tried under pre–*Tincher* law, Ford's assertions that it should be entitled to a new trial here simply fails to persuade. Despite the Pennsylvania Supreme Court's express refusal to adopt the Third Restatement approach, which would have allowed defendants to introduce evidence relevant to negligence and government and industry standards, Ford's appellate arguments proceed as if the Court adopted the Third Restatement approach in substance while rejecting that approach in name alone. Nothing could be further from the truth. There is simply nothing in *Tincher* to suggest that any of the evidence that the trial court properly excluded under the Second Restatement would now be admissible or that the exclusion of such evidence represented harmful error on this record.

This case involved a previously healthy and happy 83–year–old man who was rendered a quadriplegic when the driver's side airbag failed to

deploy in a violent, high–speed, head–on collision that occurred while he was operating a 2005 Mercury Sable that Ford manufactured. As a result, John A. Cancelleri was required to spend the remaining years of his life in pain and suffering, needing full–time care, unable to transport himself or his elderly wife anywhere outside their home. Ford should consider itself fortunate that these injuries did not befall a much younger plaintiff, because then the damages awarded would surely have been far higher.

Given everything that this case involves, including a record that more than satisfies the requirements of the high court's recent ruling in *Tincher*, Ford's appellate pursuit of a new trial is not merely cold–hearted, but it is also entirely without merit. As a result, this Court should affirm both the trial court's judgment and its denial of Ford's post–trial motion.

V. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion In Holding That *Tincher* Does Not Require A New Trial On Plaintiffs' Crashworthiness And Malfunction Claims

1. Notwithstanding Ford's protestations to the contrary, the jury in this case was specifically asked to find, and did in fact find, that the 2005 Mercury Sable's airbag/ restraint system was defectively designed

After the jury had rendered its verdict in this case, while post–trial motions were pending, the Supreme Court of Pennsylvania issued its opinion in *Tincher* v. *Omega Flex, Inc.*, 104 A.2d 328 (Pa. 2014). This lengthy opinion analyzed much of the history of Section 402A of the Restatement (Second) of Torts beginning with the landmark 1966 decision of *Webb* v. *Zern*, 220 A.2d 853 (Pa. 1966), in which Pennsylvania became the very first state to adopt Section 402A, which had been promulgated only one year earlier. While *Tincher* discusses many aspects of strict liability, two things are abundantly clear: *first*, Pennsylvania remains firmly committed to the Second Restatement approach to strict liability in tort, rejecting the concepts of the Third Restatement in so doing; and *second*, the central holding of *Tincher* is that the jury, rather than the trial judge, must determine whether a product is defective in a strict product liability actions

arising under Pennsylvania law. *See Tincher*, 104 A.3d at 407 ("whether a party has met the burden to prove the elements of the strict liability cause of action are issues for the finder of fact, whether that finder of fact is a judge or jury").

Ford agrees, contending in the very first argument point of its Brief for Appellant that whether the Mercury Sable's airbag/restraint system "was unreasonably dangerous is a jury question." Brief for Appellant at 18. According to Ford, a new trial is necessary here because the jury supposedly was not asked to determine whether the Mercury Sable's airbag/restraint system was defectively designed. In actuality, however, both the trial court's instructions to the jury and the verdict form on which the jury recorded its verdict in plaintiffs' favor confirm that the jury was asked to decide, and in fact did decide, that the Mercury Sable's airbag/restraint system was defectively designed. R.1663a–64a.

The trial court delivered the following instructions to the jury before deliberations began:

> The Cancelleris claim that John Cancelleri was injured by the airbag restraint system of his 2005 Mercury Sable due to a design defect. More specifically, their theory is that the 2005 Mercury Sable had a defect in the crash sensoring aspect of his system. The basic concept under this theory is that the vehicle

> at issue was defectively designed because its design made it unsafe for its intended use.
>
> * * *
>
> This part of the instruction is extremely important because the Cancelleris are attempting to prevail under several theories of recovery. The first is called a design defect. * * *
>
> To prevail under the design defect theory, the Cancelleris have the burden of proving that each of the following is more likely true than not: that the airbag restraint system in the 2005 Mercury Sable was defectively designed; that the defective design was the factual cause of producing or exacerbating Mr. Cancelleri's injuries; that had an alternative, safer design existed, that Mr. Cancelleri would not have suffered such injuries had the alternative design been used. * * *
>
> * * *
>
> If you find that the airbag restraint system of the 2005 Mercury Sable at the time it left Ford's control lacked any element necessary to make it safe for its intended use or contained any condition that made it unsafe for its intended use and that there was an alternative safer practical design that would have prevented Mr. Cancelleri's injuries, then the system was defective, and Ford is liable for the harm that produced the injuries above and beyond those that were probably caused by the Sable's original collision * * * .

R.1650a–51a.

Eliminating any doubt whatsoever concerning whether the jury in this case was asked to find whether the Mercury Sable's airbag/restraint system was defective, question one on the jury's verdict form stated:

> Do you find that the airbag/restraint system in the subject 2005 Mercury Sable was defective in its design and that there was an alternative, safer and practicable design?

R.1663a.

The jury in this case expressly answered that question "Yes." R.1660a (transcript of reading of jury's verdict sheet); 1663a (completed jury verdict slip).

It is thus beyond any doubt that the jury in this case was asked to find, and did in fact find in plaintiffs' favor, whether the 2005 Mercury Sable's airbag/restraint system was defectively designed. This was assuredly not a case in which the jury was instructed that the trial court had already found that the product in question was defective, and the jury's inquiry was thus limited to deciding whether the defect at issue was or was not a contributing cause of the plaintiff's injuries.

2. The jury's verdict for plaintiffs on claims of crashworthiness and malfunction fits comfortably within *Tincher*'s strict product liability framework

The distinctions between the type of strict liability claim at issue in *Tincher* and the crashworthiness and malfunction claims at issue in this case are numerous and of critical significance.

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, by contrast, plaintiffs proved their crashworthiness claim, which necessitated proof of a feasible alternative design. In *Tincher*, the Pa. 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 proved and prevailed on a crashworthiness claim that already imposed on them requirements far more stringent than a mere Restatement (Second) design defect claim, *Tincher*'s rejection of *Azzarello* v. *Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), does not necessitate a new trial here.

In addition, here the jury was charged that it could find in favor of plaintiffs on their design defect claim under a malfunction theory — a theory not at issue in *Tincher*. In discussing the history of strict liability jurisprudence in Pennsylvania, the decision in *Tincher* recognizes the existence of malfunction–based strict liability claims, but nothing in *Tincher* explicitly states or implicitly suggests that the *Tincher* decision was

intended to alter the manner in which a plaintiff must prove a defendant's liability on a strict liability malfunction claim. *See Tincher*, 104 A.3d at 362–63.

The most recent Pa. Supreme Court case that the *Tincher* decision cites (*see* 104 A.3d at 363) as establishing the existence of a malfunction claim — *Barnish* v. *KWI Bldg. Co.*, 980 A.2d 535 (Pa. 2009) — recognized that a malfunction claim requires proof of consumer expectation (*id.* at 542) and is analogous to a *res ipsa loquitur* claim sounding in negligence (*id.* at 541). Thus, proving a valid malfunction claim, which both the jury's verdict and the trial court's Rule 1925(a) opinion confirm plaintiffs did here, already fits quite comfortably into the post–*Azzarello* regime that *Tincher* has heralded.

3. Plaintiffs satisfied the evidentiary standards required under the alternative theories of risk utility and consumer expectation as set forth in *Tincher*

Tincher explains that, in the non–crashworthiness context, a strict liability design defect claim may proceed under either (or both) a risk–utility or consumer expectation analysis. Even if this standard was to apply

to a crashworthiness claim, plaintiffs' evidence sufficed to establish a jury issue under either theory.

With respect to risk utility, plaintiffs' engineering expert, Christopher Caruso, opined that there was an alternative design for the airbag system for the 2004–2005 model year Mercury Sable that would have made it safe and was both economically feasible and available. R.862a–64a. Ford could have put in place a dual forward sensor system that would not have failed to detect an angle collision from any side. Ford admitted that it was aware of the dual design system and that such a system was available for use in the 2005 Mercury Sable. R.1517a–18a. In fact, the jury heard testimony that such a dual system was in use by other manufacturers of vehicles at the relevant time. Even Ford's expert admitted that there were dual front crash sensor systems available in 2005. R.1238a. In addition, plaintiffs' engineer Caruso testified that for the sum of $7.50 per car, Ford could have put in place such a dual front crash sensor system. R.864a. Thus, there was ample evidence from which the jury could conclude, as it did conclude, that a dual forward sensor system was both feasible and available in 2005.

In charging the jury, the trial court allowed the jury to consider the total use and utility of plaintiffs' proposed alternative design to make the

airbag/restraint system of the 2005 Mercury Sable safe. R.1651a. The chief thrust of *Tincher* is to relocate the *Azzarello* risk–utility calculus from the judge to the jury, which is precisely what already occurred during the trial of this case.

With respect to the consumer expectation analysis, plaintiffs produced a crash test run by defendant Ford, labeled number 11226, which consisted of a two–car frontal collision at 45 mph. Not only did the conditions of the test mirror what happened in Cancelleri's collision, but the readings from the Restraint Control Module of both the test and Cancelleri's vehicle were almost identical. R.11b. The test was intended by Ford to prove that a driver in a crash of this magnitude would receive airbag protection. The dummies used in the test received airbag protection; Mr. Cancelleri, in a real life duplication of that collision, did not.

Surely no jury would find that a driver involved in an accident was entitled to receive less protection than that which was given to crash test dummies in a nearly identical test. Ford's crash test number 11226 established that even Ford expected that an airbag would be deployed in a crash of the magnitude experienced by Cancelleri. Because a consumer would expect airbag protection in a crash substantially similar to one

where the crash dummies received airbag protection, the non–deployment of an airbag under these circumstances would be unacceptable to the ordinary consumer. Thus, the evidence adduced by plaintiffs in this case satisfied the consumer expectation test set forth in *Tincher*.

Tincher specifically approved the consumer expectation test described in the California precedent of *Barker* v. *Lowell Engineering Co.*, 573 P.2d 443 (Cal. 1978). In fact, *Tincher* cited *Barker* numerous times. *See Tincher*, 104 A.3d at 368, 378, 389, 391–92, 402–03, 406, 407 n.29, 408–09.

The consumer expectation test as set forth in *Barker* stated as follows:

> [A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design.

Barker, 573 P.2d at 446. Thus, if a product fails to perform as safely as an ordinary consumer would expect when used in the intended and reasonably foreseeable manner, it may be considered defective.

Tincher also repeatedly referred to another California case in which the consumer expectation test was employed, *Soule* v. *General Motors Corp.*, 882 P.2d 298 (Cal. 1994). *See Tincher*, 104 A.3d at 388, 391–93, 398–99, 407–08

& n.29. In interpreting *Barker*, the court in *Soule* stated that, at a minimum, a product is defective in design if it fails to perform as safely as the ordinary consumer would expect. This principle acknowledges the relationship between strict tort liability for defective products and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation "that it (will) safely do the job for which it was built." *Soule*, 882 P.2d at 308.

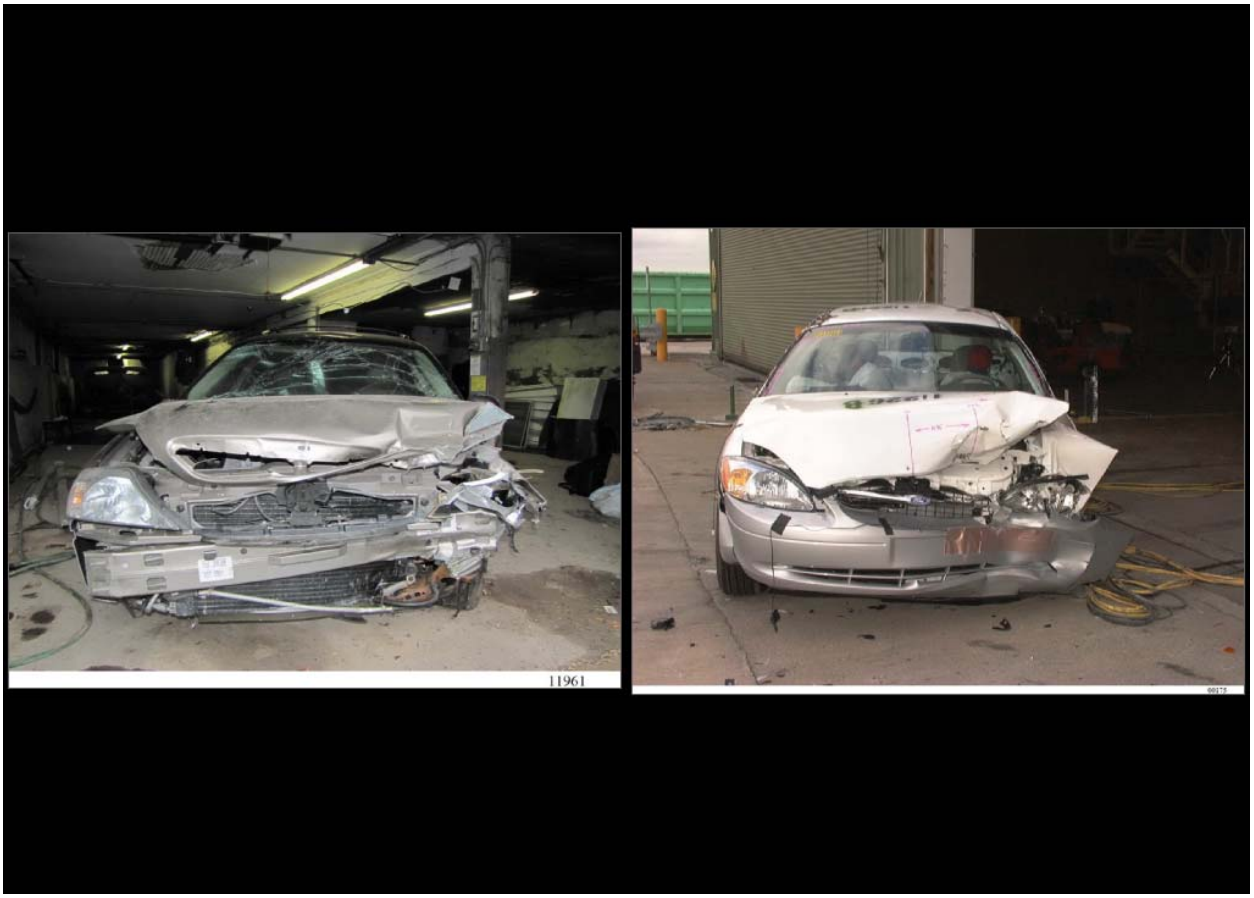
An earlier California case in which the consumer expectation test applied was *Campbell* v. *General Motors Corp.*, 649 P.2d 224 (Cal. 1982). Campbell, while riding as a passenger in a bus that General Motors manufactured, was thrown from her seat when the bus took a sharp turn. *Id.* at 226. She sued General Motors, alleging that the vehicle was defectively designed because there was no "grab bar" within easy reach of her seat. *Id.* At trial, Campbell presented no expert testimony. *Id.* at 231–32. Her lawyer simply submitted photographs of the interior of the bus showing where the safety bars and handles were located in relation to the seat which Campbell had occupied. *Id.* at 226, 232. In reversing the trial court's entry of a nonsuit, the Supreme Court of California held that it was enough for Campbell to show the objective conditions of the product so

that the jury could employ its own sense of whether the product met ordinary expectations as to its safety under the circumstances that the evidence presented. *Id.* at 232–33. Because public transportation is a matter of common experience, no expert testimony was necessary to enable a jury to reach a decision in plaintiff's favor. *Id.* at 233.

In this case, the Cancelleris presented evidence in the forms of photographs and an actual in–person viewing of the 2005 Mercury Sable vehicle designed and manufactured by Ford that had been devastated by a frontal impact collision. Like the jury in *Campbell*, the jurors in this case case had, from their own experience, ample evidence from which to determine whether a crash of that magnitude should have produced airbag deployment. The consumer expectation test is a subjective test. Here, the degree of damage to the Cancelleris' vehicle, which the jurors observed with their own eyes, provided the same sufficient evidentiary basis for a decision in plaintiffs' favor under the consumer expectation text that the photographs shown to the jury in the *Campbell* case provided.

The jury was also presented with photographs from which they could compare the damage inflicted on the Cancelleri's Mercury Sable to

that which occurred to the almost identical vehicle in the aforementioned crash test, 11226.



R.1b–2b (exhibits P–79q1 and P–87a). In the above reproduction of the two relevant trial exhibits, the car in which Cancelleri was traveling at the time of his accident appears on the left, and the Ford test vehicle in which both airbags properly deployed as a result of the collision appears on the right. It strains credulity to believe that a jury could have reasoned that a crash test dummy should receive more protection than a human consumer in an almost identical collision.

Though the result in *Tincher* was not known at the time the trial court charged the jury in this case, the trial court's charge in this case more than satisfies the *Tincher* test. In accordance with *Tincher*, the trial court served as a gatekeeper in allowing the jury to make the determination of whether the 2005 Mercury Sable was crashworthy within the concept of crashworthiness derived from Section 402(A) of the Restatement (Second) of Torts. As stated in *Tincher*:

> This Court has explained that, "[w]hen a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict." On appeal, this Court examines jury instructions to determine whether the trial court abused its discretion or offered an inaccurate statement of law controlling the outcome of the case. A jury is adequate "unless the issues are not made clear, the jury was misled by the instructions, or there was an omission from the charge amounting to a fundamental error." *Commonwealth v. Chambers*, 980 A.2d 35, 49–50 (Pa. 2009); *see also, Price v. Guy*, 735 A.2d 668, 670 (Pa. 1999).

Tincher, 104 A.3d at 351.

When viewed in its totality, as it must be viewed, the trial court's charge to the jury in this case made it clear that the finding of whether the airbag system employed by Ford in the 2005 Mercury Sable was defective was a decision for the jury, and the jury alone, to make. Thus, *Tincher*'s holding that defectiveness was a decision for the jury to make rather than

the trial judge was both anticipated and followed by the trial court in its charge to the jury in this case.

Ford's arguments at the trial of this case, requesting the admission of evidence and jury instructions in accordance with the Restatement (Third) of Torts, were resoundingly rejected in *Tincher*. As *Tincher* makes clear, Pennsylvania's highest court has opted to continue to ascribe to the underlying principles of Pennsylvania strict liability law — with its focus is on the nature of the product and the consumer's reasonable expectations with respect to the product — rather than on the conduct of either the manufacturer or the person injured. *See Tincher*, 104 A.3d at 369. And, contrary to Ford's suggestion, despite overruling *Azzarello*, the Court endorsed the policy underlying the Restatement (Second) of Torts §402A that a manufacturer is effectively the guarantor of its product's safety. *See Tincher*, 104 A.3d at 364–67. In short, Ford asks this Court to go where the Supreme Court in *Tincher* refused to journey — to make a quantum leap to find prejudicial error from the mere inclusion of the "guarantor" and "every element" language in a jury charge.[*]

[*] The Pennsylvania Supreme Court determined that a manufacturer is effectively the guarantor of its products safety in the case of *Salvador* v.

As the trial court recognized in its Rule 1925(b) opinion, the verdict in this case reflects the jury's findings in plaintiffs' favor on both of plaintiffs' strict liability claims, for crashworthiness and malfunction. *See* Rule 1925(a) opinion at 8–31. In *Halper* v. *Jewish Family & Children's Serv.*, 963 A.2d 1282 (Pa. 2009), the Supreme Court of Pennsylvania endorsed and adopted the so–called "general–verdict rule," which provides that "when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal." *Id.* at 1288–89 (internal quotations omitted). As the Supreme Court further explained, "[a] defendant who fails to request a special verdict form in a civil case will be barred on appeal from complaining that the jury may have relied on a factual theory unsupported by the evidence when there

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Atlantic Steel Boiler Co., 319 A.2d 903, 907 (Pa. 1974). *Salvador* was twice cited with approval, albeit for a different proposition of law, in *Tincher*. *See* 104 A.3d at 364, 401. *Tincher* did not criticize, let alone overrule, *Salvador*. Using the word "guarantor" simply paraphrases what Section 402A of the Restatement (Second) of Torts has interjected into Pennsylvania's jurisprudence — a seller of a product deemed to be dangerous by a fact–finder does not have to be guilty of any negligence at all. The term "guarantor" is simply a means for explaining that a seller would be held responsible for harm caused by its product even if the seller is entirely without fault.

was sufficient evidence to support another theory properly before the jury." *Id.* at 1289.

As Pennsylvania's highest court proceeded to hold in *Halper*, "because a general verdict was returned and the evidence supported one of the [plaintiffs'] theories, the verdict must stand." *Id.* Thus, so long as this Court concludes that a new trial is not merited on at least one of plaintiffs' claims — crashworthiness or malfunction — the jury's verdict in plaintiffs' favor must stand.

To summarize, the Pa. Supreme Court's ruling *Tincher* establishes the following with respect to this case: (1) *Tincher* did not recognize a *per se* need for a new trial in any case that proceeded to verdict under *Azzarello*'s principles; (2) *Tincher* has no effect on a crashworthiness claim such as this, because such a claim was already recognized as outside of the Second Restatement; (3) *Tincher* has no effect on plaintiffs' malfunction claim, because *Tincher* did not involve that type of claim, and such a claim has already been understood to encompass both negligence and consumer expectation principles; and (4) more than sufficient evidence exists in the record of this case to uphold the jury's verdict in plaintiffs' favor on either a risk–utility or consumer expectation analysis.

For all of these reasons, this Court should hold that the trial court did not abuse its discretion in ruling that Ford was not entitled to a new trial of plaintiffs' crashworthiness and malfunction claims under *Tincher*.

4. *Tincher* does not require the admission of evidence of industry or government standards, nor would allowing such evidence be consistent with the Pa. Supreme Court's decision to retain the Second Restatement's approach to strict liability claims

The Supreme Court of Pennsylvania's ruling in *Tincher* — because it did not adopt Restatement (Third) of Torts — does not overrule longstanding Pennsylvania precedent establishing the inadmissiblity of industry and governmental standards in a products liability case. *See Tincher*, at **31–33 (discussing but not critiquing, let alone overruling, the Court's decades–old decision in *Lewis* v. *Coffing Hoist*, 528 A.2d 590 (Pa. 1987)). The rationale of *Lewis* comes not from *Azzarello*, but from the express language of §402(A) of the Restatement (Second) of Torts, to wit:

> **§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer**
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts §402A (1965).

The probative value of industry or government standards is to show that the manufacturer has used care in the preparation and sale of his product. Not only is this irrelevant to a strict liability claim, but is directly prohibited by the language of the Second Restatement, quoted above.

Therefore, it is beyond any reasonable interpretation of *Tincher* to conclude that industry standards and compliance with Federal Motor Vehicle Safety Standards are now admissible in a products liability case (particularly a crashworthiness one). *See, e.g., Tincher*, 104 A.3d at 400 (distinguishing tort of strict product liability from "traditional claims of negligence" associated with the "colloquial notion of fault"); *see also Gaudio*

v. *Ford Motor Co.*, 976 A.2d 524, 542–43 (Pa. Super. Ct. 2009) ("We first note our agreement with the trial court's initial decision not to allow evidence of compliance with industry or government standards" (cited in *Tincher*, 104 A.3d at 341)). It must be remembered that *Tincher,* while overruling *Azzarello*, otherwise embraced §402(A) of the Restatement (Second) of Torts.

In *Lewis*, the Supreme Court of Pennsylvania concluded that "the question of whether or not the defendant has complied with industry standards improperly focuses on the quality of the defendant's conduct in making its design choice, and not on the attributes of the product itself." *Lewis*, 528 A.2d at 593–94 (citing *Lenhardt* v. *Ford Motor Co.*, 683 P.2d 1097, 1100 (Wash. 1984)). Accordingly, the Court held that "such evidence should be excluded because it tends to mislead the jury's attention from their proper inquiry," namely "the quality or design of the product in question." *Lewis*, 528 A.2d at 594. The Supreme Court also concluded that "there is no relevance to the fact that such a design is widespread in the industry." *Id.*

In *Tincher*, the Supreme Court discussed its earlier holding in *Lewis* without any hint of criticism, explaining that "The *Lewis* Court observed

that jurisdictions with various approaches agreed that relevant at trial is the condition of the product rather than the reasonableness of the manufacturer's conduct." *Tincher*, 104 A.3d at 368. Obviously, to allow the manufacturer's conduct to become the focus of the trial would undermine the main thrust of the Second Restatement approach. It is the product itself that must withstand the scrutiny of the fact–finder. *See Nathan* v. *Techtronic Indus. N. Am., Inc.*, 2015 WL 679150, at *5 (M.D. Pa. Feb. 17, 2015) ("under the *Tincher* formulation of the Second Restatement the focus remains upon the condition of the product rather than the conduct of the manufacturer").

This Court should also reject Ford's argument that the trial court abused its discretion in excluding government and industry standards evidence for a separate and independent reason — such evidence was not even relevant to Ford's actual defense strategy at trial.

As the closing argument that Ford's lead counsel presented to the jury reveals, Ford's argument on plaintiffs' design defect claim was exclusively that the driver's side airbag properly did not deploy during the collision because the actual force that the crash exerted on the sensor was below the level at which an airbag properly should deploy. R.1633a–36a. Ford's strategy in defense of plaintiffs' design defect claim was to make the

question of the force that the crash would have exerted on the airbag sensor a battle of the experts. Ford's expert testified that the crash did not exert sufficient force on the sensor to make the airbag deploy, while plaintiffs' expert testified to the contrary that the forces exerted in the crash were sufficient for the airbag to deploy. Plaintiffs also showed the jury the photographs of Ford Crash Test No. 11226, which involved a front offset vehicle–to–vehicle crash at 45 miles an hour in which the crash test dummy driver of a vehicle identically positioned to the Mercury Sable received airbag protection, as proof that the Mercury Sable was designed to afford occupants airbag protection in a crash of the same magnitude as the one Cancelleri experienced. And the jury also examined the Cancelleris' 2005 Mercury Sable first–hand, to decide for themselves given the impact to the front side of the automobile whether the driver's side airbag should have deployed.

Based on all the evidence, the jury found as a fact that the 2005 Mercury Sable's airbag deployment sensor was defectively designed. The trial court upheld the sufficiency of the evidence to support the jury's finding in that regard, and Ford does not challenge the sufficiency of the evidence to support that finding on appeal.

The evidence of industry and governmental standards whose exclusion Ford now claims entitles it to a new trial is simply not relevant to the defense that Ford actually presented at trial. According to Ford, the driver's side airbag in the 2005 Mercury Sable properly did not deploy, because the forces in the accident were not sufficiently strong to trigger the airbag's deployment. The industry and governmental standards evidence that Ford sought to introduce thus had no bearing on Ford's defense to plaintiffs' crashworthiness claim.

In *Amato* v. *Bell & Gossett*, 2015 WL 1743192, at *9 (Pa. Super. Ct. Apr. 17, 2015), this Court necessarily considered whether proposed jury instructions that the defendant contended should have been allowed under *Tincher* were in fact relevant to the defendant's theory of defense. In *Amato*, this Court recognized that the requested jury instruction was properly disallowed because it would not have furthered the defendant's theory of non–liability. *Id.* at *11. Similarly, here, Ford's defense to plaintiffs' crashworthiness claim is in no way furthered by admission of the industry and governmental standards evidence whose exclusion Ford protests. Thus, the trial court did not abuse its discretion in excluding that evidence in this case even if *Tincher* would somehow mandate its admission in a

different case in which such evidence actually was material to the defendant's defense.

To summarize, for the reasons explained above, the trial court did not abuse its discretion in recognizing that *Tincher* did not alter existing Pennsylvania law to mandate the admission of industry and government standards evidence in a strict products liability case. Moreover, even if *Tincher* could somehow be read to allow such evidence in an appropriate case, this is not such a case because the evidence lacked any relevance to Ford's defense to plaintiffs' crashworthiness claim.

B. The Trial Court Did Not Abuse Its Discretion In Allowing The Jury To Consider Plaintiffs' Malfunction Claim Or In Charging The Jury On That Theory

Ford next argues that the Court should not have charged the jury on malfunction and further argues that plaintiffs failed to establish the requisite elements of a malfunction defect claim. There is no question that plaintiffs are permitted to bring a product liability action for design defect and malfunction in the same case. *See Blumer* v. *Ford Motor Co.*, 20 A.3d 1222, 1229 (Pa. Super. Ct. 2011).

The theories of liability presented at trial by the plaintiffs were design defect and malfunction. The jury specifically found that the airbag/ restraint system in the subject 2005 Mercury Sable was defective in its design and that there was an alternative, safer and practicable design. Plaintiffs also presented evidence of a malfunction, involving the deployment of the airbag for the unoccupied passenger seat.

At trial, plaintiffs introduced evidence eliminating abnormal use or any reasonable, secondary causes. Cancelleri testified that he took the car to Ray Price to get it serviced and did not have any problems with the car for a five–year period. He testified that he never had a situation where the dashboard lit up or an indicator light said there was a problem with the car. R.2345a. Plaintiffs also submitted into evidence service records from Ray Price Motors, which indicated that Cancelleri took his 2005 Mercury Sable for regular service visits. See Plaintiffs' Exhibit #4. In addition, the jury heard Cancelleri testify that his airbag did not deploy and that the passenger side airbag went off right away in the collision. R.2338a–39a. Furthermore, no expert for Ford or for plaintiffs, for that matter, could offer any reasonable other cause for the failure of the driver's airbag to deploy at the same time the airbag for the empty passenger seat did deploy.

To recover under a malfunction theory, a plaintiff must establish: (1) the occurrence of a malfunction; (2) evidence eliminating abnormal use; and (3) evidence eliminating reasonable secondary causes. *See Barnish*, 980 A.2d at 541.

Ford maintains that because plaintiffs pursued a specific design defect theory, a malfunction claim should have gone to the jury. However, plaintiffs' malfunction theory was derived from a wholly different set of circumstances not related in any way to the defect in the forward electronic crash sensor. Plaintiffs' malfunction theory was based on the fact that during the vehicle's crash with the Mustang, Cancelleri did not receive airbag protection, but his empty passenger seat did. There simply was no testimony from either side that would connect the passenger air bag deployment to any defect in the design of the forward electronic crash sensor. To the contrary, the malfunction theory focuses on a problem with the Restraint Control Module. The RCM appears to have signaled the driver's side to initiate tightening of the seatbelt, followed by a spooling out of the seatbelt, but sent the final signal to deploy to the passenger airbag instead of the driver's side airbag. Neither side presented any evidence of the existence of a distinct defect in the RCM, but a fact–finder

could clearly deduce from the evidence presented that the RCM had malfunctioned. Thus, plaintiffs' malfunction theory was derived from a factual scenario that was not encompassed within plaintiffs' evidence of a specific defect in the front electronic crash sensor.

The doctrine of malfunction is an alternate evidentiary method whereby a plaintiff may prove the existence of a defect. It has been described as follows:

> In most instances the plaintiff will produce direct evidence of the product's defective condition. In some instances, however, the plaintiff may not be able to prove the precise nature of the defect in which case reliance may be had on the "malfunction" theory of product liability. This theory encompasses nothing more than circumstantial evidence of product malfunction. It permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction. It thereby relieves the plaintiff from demonstrating precisely the defect yet it permits the trier–of–fact to infer one existed from evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes.

Rogers v. *Johnson & Johnson Products, Inc.*, 565 A.2d 751, 754 (Pa. 1989).

Plaintiffs' expert, Chris Caruso, also testified concerning evidence of a malfunction in the 2005 Mercury Sable:

> Q. I thought you told this jury that it had an occupant classification system?

A. I did.

Q. How is that explained? This when you look at the previous information is looked at that the passenger side was unbuckled and the seat was empty. This deploying of the passenger bag would be a malfunction.

A. You should that's the whole purpose of occupant detection or occupant classification. Never ever, ever deploy an airbag if there is a risk of there being a child there. And obviously why deploy an airbag if there is an empty seat. There would be no reason to. You are wasting the consumer's money because they have to go back and get that repaired.

R.854a–55a.

Plaintiffs presented evidence that Cancelleri's driver's side airbag did not deploy and the passenger side airbag deployed into an empty passenger seat. This constituted direct evidence of product malfunction. Plaintiffs' engineering expert, Caruso, further testified that Ford's theory that the deployment of the passenger airbag occurred when the car made contact at a slow rate of speed with tree branches trees was incorrect. R.854a–55a, 868a–76a.

Contrary to defendant's assertion that Caruso ignored the second collision with the spruce tree, Caruso based his opinion on both the opinions of plaintiffs' accident reconstructionist, Donald Phillips, as well as the investigating State Trooper, Trooper Boettcher, that when the 2005

Sable came into contact with the pine tree branches, it was going approximately 5 mph. R.876a. Ford's expert, Jennifer Yaek, testified that the passenger side airbag probably would not deploy if the speed of the Sable was moving at 5 mph when it came into contact with the tree. R.1357a. Therefore, plaintiffs offered evidence in their case in chief, through Trooper Boettcher and Don Phillips, as well as via cross–examination of Yaek, that the contact with the pine tree branches could not have been an explanation for the passenger airbag's deployment.

By contrast, defendant's theory of non–liability on plaintiffs' malfunction claim depended upon the jury's acceptance of the existence of a secondary collision with pine tree branches as an explanation for the deployment of the passenger airbag. However, defendant's explanation was contrary to Cancelleri's testimony concerning when the passenger airbag deployed. Because the jury must have accepted Cancelleri's version of the events, plaintiffs have met their burden of proving that there was a malfunction in the passenger restraint system, and the trial court thus properly allowed the jury to consider that adequate and independent basis for Ford's liability.

The trial court, in its Rule 1925(a) opinion, carefully and with exacting detail rejected Ford's contentions that plaintiffs' malfunction claim should not have gone to the jury. *See* Rule 1925(a) opinion at 17–31.

Lastly on this point, the trial court's opinion confirms that Ford's challenge to the trial court's malfunction jury charge lacks merit. As the trial court's Rule 1925(a) opinion notes at page 38, the jury charge that the trial court gave to the jury in this case closely mirrored the instructions that this Court approved for a strict liability malfunction claim in *Raskin* v. *Ford Motor Co.*, 837 A.2d 518, 523 (Pa. Super. Ct. 2003).

Nor did the trial court abuse its discretion in rejecting Ford's argument that a jury question during deliberations demonstrated that the jury was overly confused by the trial court's submission of the Cancelleris' malfunction claim to the jury. As the trial court correctly explained, Ford's position is "purely conjectural." Rule 1925(a) opinion at 39. As the trial court's opinion goes on to observe, "any supposed jury confusion alleged by Ford was evidently resolved within thirty minutes of our second instruction [on plaintiffs' malfunction claim] when the jury returned a unanimous verdict" in plaintiffs' favor. Rule 1925(a) opinion at 40.

In sum, the trial court did not abuse its considerable discretion in allowing plaintiffs' malfunction claim to go to the jury or in charging the jury in accordance with existing Pennsylvania appellate caselaw on that claim.

C. The Trial Court Did Not Abuse Its Considerable Discretion In Precluding Ford From Cross–Examining Plaintiffs' Engineering Expert On Government Or Industry Standards That Were Not A Basis For That Expert's Direct Testimony

As explained above in the Counterstatement of the Scope and Standards of Review section of this brief, a trial judge enjoys considerable discretion in determining the admissibility of evidence. Plaintiffs have already demonstrated, above that the trial court in this case did not abuse its considerable discretion in precluding Ford from introducing government or industry standards into evidence.

In the final argument section of its Brief for Appellant, Ford seeks to attack from another angle the trial court's entirely proper preclusion of evidence of industry and government standards. According to Ford's final argument on appeal, even if *Tincher* does not mandate overturning the preclusion under Pennsylvania law of evidence of government or industry

standards in a product liability case, such evidence nevertheless should have been admissible in this case during Ford's cross–examination of plaintiffs' engineering expert, Caruso.

Because the trial court had granted plaintiffs' motion in limine to preclude evidence of industry or government standards, counsel for plaintiffs at trial was careful not to have Caruso testify concerning tests conducted by the NHTSA and IIHS during his direct testimony.

In *Lewis*, the Pa. Supreme Court concluded that "the question of whether or not the defendant has complied with industry standards improperly focuses on the quality of the defendant's conduct in making its design choice, and not on the attributes of the product itself." *Lewis*, 528 A.2d at 593–94. Accordingly, the Court held that "such evidence should be excluded because it tends to mislead the jury's attention from their proper inquiry," namely "the quality or design of the product in question." *Id.* at 594. The Supreme Court also indicated that "there is no relevance to the fact that such a design is widespread in the industry." *Id.* Pennsylvania law remains unchanged in these respects post–*Tincher*. *See Nathan*, 2015 WL 679150, at *5 ("under the *Tincher* formulation of the Second Restatement the

focus remains upon the condition of the product rather than the conduct of the manufacturer").

Counsel for plaintiffs was careful in not having Caruso testify on direct concerning the tests conducted by NHTSA and the IIHS because a plaintiff "may open the door" to the introduction of evidence of compliance with industry or government standards by a defendant if a plaintiff's witness testifies about industry and government standards during direct examination. *See Gaudio*, 976 A.2d at 544. Ford is simply wrong to suggest that it nevertheless has the right under Pennsylvania law to cross–examine Caruso using this evidence of industry or government standards when Caruso did not rely on any such evidence as the explanation for his opinion when he provided his explanation to the jury in this case.

Ford's fallback argument — that it should have been allowed to cross–examine Caruso using the industry or government standards so long as the evidence was not identified as industry or government standards evidence — was properly precluded by the trial court because it would have been fraught with peril.

Even if counsel for the parties and the witness were able to faithfully conceal the origins of the evidence from the jury — which requires a large leap of faith in the crucible of an active trial proceeding — it is difficult to imagine how a witness can be expected to testify about or a jury to evaluate the reliability of testing that was performed by an entity or entities that must remain unidentified.

Under Pennsylvania law, the trial judge did not abuse his discretion in precluding Ford from relying on evidence of government or industry standards in cross–examining Caruso, because Caruso did not rely on any such evidence as the explanation that he provided at trial for the opinions that he presented to the jury.

VI. CONCLUSION

For all of the foregoing reasons, this Court should uphold the trial court's judgment and affirm the trial court's denial of Ford's post–trial motion.

Respectfully submitted,

Dated: July 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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