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IN THE
SUPERIOR COURT OF PENNSYLVANIA

NO. 445 EDA 2015

CARLOS MARTINEZ AND ROSITA DE LOS SANTOS DE MARTINEZ, H/W,
Plaintiffs-Appellees,

v.

AMERICAN HONDA MOTOR CO., INC.
Defendant-Appellant.

On Appeal from the January 21, 2015 Judgment of the
Court of Common Pleas, Philadelphia County
Case No. 03763
The Honorable Shelly Robins New

DEFINITIVE BRIEF PURSUANT TO PA. R.A.P. 2154(B) FOR APPELLANT AMERICAN HONDA MOTOR CO., INC.

James M. Beck (#37137)
David J. Bird (#92424)
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103-2762
Tel: (215) 851-8100
Fax: (215) 851-1420

Theodore J. Boutrous, Jr. (PHV)
Theane Evangelis (PHV)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel: (213) 229-7000
Fax: (213) 229-7520

William J. Conroy (#36433)
Katherine A. Wang (#204158)
CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312
Tel: (610) 964-1900
Fax: (610) 964-1981

Attorneys for Defendant-Appellant American Honda Motor Co., Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

Constitutional Provisions

Statutes

Rules

Regulations

Treatises

TABLE OF AUTHORITIES *(continued)*

Page(s)

Other Authorities

INTRODUCTION

Defendant American Honda Motor Co., Inc. ("Honda") appeals from a record-setting $55 million jury verdict that punishes it for using a federally authorized seat belt design found in nearly every vehicle in the United States—rather than Plaintiffs' alternative design that was not safer and could not be legally sold—and for purportedly not warning plaintiff Carlos Martinez that he could be injured in the event of a rollover accident. Not only is this verdict wholly unsupported by the evidence, but it would also require car manufacturers to violate federal safety standards. That result cannot stand.

At minimum, the Supreme Court's intervening decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), requires a new trial. *Tincher* overruled *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), and heralded a new era of Pennsylvania product-liability law. This case was tried under repudiated *Azzarello* standards: the trial court relieved Plaintiffs of their burden of proving that their vehicle was "unreasonably dangerous," instructed the jury that Honda was a "guarantor" and was liable if the vehicle lacked "any element necessary to make it safe," and barred Honda's evidence that Plaintiffs' vehicle complied with all applicable government and industry standards—when Plaintiffs' claimed alternative design did not. Under *Tincher*, these errors require a new trial. Despite extensive supplemental briefing on *Tincher*'s significance, the trial court

effectively gave the Supreme Court's landmark decision the back of the hand, declaring that *Tincher* did not "mandate[] any change in the [trial court's] legal or evidentiary ruling[s]." The trial court compounded its error by ruling that *Tincher* had no effect on warning-defect claims, ignoring this Court's contrary holding in *Amato v. Bell & Gossett*, 116 A.3d 607 (Pa. Super. 2015).

The trial court's disregard for controlling authority similarly infected its jury instructions. It relieved Plaintiffs of their burden of proving a critical element of crashworthiness in violation of this Court's decision in *Colville v. Crown Equipment Corp.*, 809 A.2d 916, 922-23 (Pa. Super. 2002), which ordered a new trial *for the exact same error*. Post-verdict, this Court confirmed the proper elements of a crashworthiness claim in *Parr v. Ford Motor Co.*, 109 A.3d 682 (Pa. Super. 2014) (en banc), *allocatur denied,* 123 A.3d 331 (Pa. 2015). But the trial court stood by its erroneous charge, not even mentioning *Parr* in its post-trial ruling.

Regarding Plaintiffs' warning-defect claim, Honda directed the trial court to this Court's numerous decisions holding that, outside asbestos and workplace-safety contexts, a jury may not be instructed to presume that a plaintiff would have heeded a warning had one been given. The trial court gave such a "heeding presumption" anyway, and doubled down on its error by charging the jury that the presumption was irrebuttable. That unprecedented jury instruction severely

prejudiced Honda because Plaintiffs proffered *no* evidence that Mr. Martinez could have heeded any additional warning, since they conceded that Mr. Martinez never possessed (let alone read) the owner's manual for his used vehicle. Once again, the post-trial order did not even mention the precedent disapproving such a jury instruction.

Instead, the trial court spent nearly its entire opinion addressing Honda's venue challenge and a single evidentiary ruling (regarding subsequent remedial measures) raised on page 62 of Honda's post-trial brief. The trial court's order almost completely avoids the core issues in this case—*Tincher*, preemption, the incomplete crashworthiness jury instruction, and the irrebuttable heading presumption—and makes virtually no attempt to reconcile its rulings with governing law.

These errors require reversal so that this Court's precedent, and that of the Supreme Court, is followed by the trial courts of this state.

STATEMENT OF JURISDICTION

The trial court denied Honda's timely motion for post-trial relief and entered judgment in Plaintiffs' favor on January 21, 2015. (Jan. 21, 2015 Order and Opinion ("Op.") (Addendum B)). Honda noticed its appeal to this Court on February 6, 2015 (R. 103-04a). The Court has jurisdiction under 42 Pa. C.S. §742.

ORDER IN QUESTION

The order being appealed from states: "AND NOW this 21 day of January, 2015, after consideration of the pleadings and oral argument, and after review of the record and the law it is hereby ORDERED and DECREED that the post verdict motions are DENIED." (Jan. 21, 2015 Order (Addendum B)).

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Supreme Court's decision in *Tincher* requires a new trial because the trial court: (i) failed to instruct the jury that Plaintiffs had the burden of proving that the product was "unreasonably dangerous," (ii) charged the jury with *Azzarello*'s vague and confusing "guarantor"/"any element" instruction, which *Tincher* rejected, (iii) barred Honda from introducing evidence of applicable regulatory and industry standards, and (iv) denied *Tincher*'s applicability to warning claims.

Trial Court's Answer: No.

2. Whether the trial court's design defect jury instruction was erroneous for omitting the second crashworthiness element and misstating the third element.

Trial Court's Answer: No.

3. Whether the trial court erroneously instructed the jury on Plaintiffs' warning-defect claim by imposing an irrebuttable heeding presumption.

Trial Court's Answer: No.

4. Whether Honda is entitled to judgment n.o.v. on the design-defect claim because the only alternative design Plaintiffs presented to the jury was unlawful under federal regulations.

Trial Court's Answer: No answer given.

5. Whether Plaintiffs' unlawful design-defect claim is preempted by federal motor vehicle regulations.

Trial Court's Answer: No.

6. Whether Honda is entitled to judgment n.o.v. on the warning-defect claim because Plaintiffs offered no causation evidence that Mr. Martinez would have heeded any additional warning.

Trial Court's Answer: No.

7. Whether the excessive damages award violates Pennsylvania law and Due Process.

Trial Court's Answer: No.

8. Whether refusal to transfer venue warrants that any new trial occur in Plaintiffs' county of residence.

Trial Court's Answer: No.

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

"[W]hen reviewing the denial of a motion for a new trial," this Court "must determine if the trial court committed an abuse of discretion, or error of law that

controlled the outcome of the case." *Nelson v. Airco Welders Supply*, 107 A.3d 146, 155 (Pa. Super. 2014) (en banc) (citation omitted). Judgment n.o.v. may be entered upon "two bases": "one, the movant is entitled to judgment as a matter of law; and/or two, the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered in favor of the movant." *Id.* (citation omitted). The full "record" is considered. *Id.*

The Court reviews a jury charge "to determine whether the trial court abused its discretion or offered an inaccurate statement of law controlling the outcome of the case." *Tincher*, 104 A.3d at 351. Although this Court reviews evidentiary decisions for an abuse of discretion, *Zieber v. Bogert*, 773 A.2d 758, 760 n.3 (Pa. 2001), "an abuse of discretion occurs where the court reaches a conclusion that overrides or misapplies the law." *Commonwealth v. Wright*, 78 A.3d 1070, 1080 (Pa. 2013). Finally, when an erroneous evidentiary ruling "may have affected a verdict, the only correct remedy is the grant of a new trial." *Deeds v. Univ. of Pa. Med. Ctr.*, 110 A.3d 1009, 1012 (Pa. Super. 2015).

STATEMENT OF THE CASE

I. The Accident And Subsequent Lawsuit

This action concerns a single vehicle accident that occurred in Maryland on May 1, 2010. Plaintiff Carlos Martinez was driving his 1999 Acura Integra when his right rear tire suffered a blowout, causing the vehicle to swerve right (*see* R.

194-96a). Mr. Martinez steered left, causing the Integra to fishtail, leave the roadway and eventually roll over twice (R. 197-99a, 215-16a, 219a). The accident broke Mr. Martinez's neck (*see* R. 407-08a).

Mr. Martinez and his wife, Rosita de Los Santos de Martinez, commenced this action against Honda on December 30, 2011 in the Philadelphia County Court of Common Pleas (R. 1a). Plaintiffs' complaint asserted crashworthiness claims against Honda and other defendants (Complaint, *see* R. 7a (docket)). Mrs. Martinez alleged loss of consortium.

Because neither Plaintiffs nor the accident had any connection to Philadelphia, and all fact witnesses resided elsewhere, Honda moved to transfer venue to York County, where Plaintiffs lived (*see* R. 1047-1197a). On December 30, 2013, the court denied that motion (Addendum D).

Before trial, Plaintiffs dismissed all defendants except Honda and abandoned their negligence claims. The action proceeded to trial solely on strict liability crashworthiness theories of design and warning defect.

II. Trial Proceedings

A jury trial before the Honorable Shelley Robins-New began on June 16, 2014. Plaintiffs presented testimony from, among others, Larry Sicher, an expert in seat belt design; Brian Benda, a biomechanist; and Atsushi Katsuki, a Honda engineer who participated in developing the occupant restraint system for the 1999

Integra. In defense, Honda presented testimony from, among others, Eddie Cooper, a restraint expert; Roger Nightingale and Catherine Corrigan, biomechanical experts, and Katsuki.

At the close of Plaintiffs' case, Honda moved for compulsory nonsuit on Plaintiffs' warning and design-defect claims, and the court denied the motion (R. 575-82a (motion), 586a (ruling)). Honda also moved for a directed verdict on Plaintiffs' design and warning-defect claims at the close of evidence, and the court denied that motion (*see* R. 780-81a (motion), 781a (ruling)).

III. The Design Of The 1999 Integra's Driver Restraint System

Consistent with federal regulations, *see* 49 C.F.R. §571.210 S4.3.1 (1999), the 1999 Acura Integra was equipped with a "vehicle mounted" seat belt, its shoulder belt anchored to the vehicle's B-pillar (R. 253-54a).[1] The seat belt had a "free sliding latch plate," allowing the belt webbing to move (R. 270a), and a retractor that locks during crashes, stopping more belt webbing from being pulled from the spool (R. 270a).

Plaintiffs asserted that the Integra's seat belt system was defectively designed (R. 278-79a, 302-03a), even though it was undisputed that 98% of 1999 model cars used the same vehicle-mounted design (R. 307a, 596-97a). Plaintiffs'

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[1] The "B-pillar" is next to the driver's seat, behind the driver's door, and extends to the vehicle roof (R. 254a).

expert Mr. Sicher conceded that the seat belt locked properly and timely when the rollover occurred (R. 273a, 310a, 312-13a). He nevertheless opined that the Integra's seat belt system was defective because it allowed Mr. Martinez's head to contact the vehicle's roof during the accident (R. 296a).

Honda engineer Mr. Katsuki testified that Honda had considered using an All-Belts-To-Seat ("ABTS") restraint system instead of the vehicle-mounted restraint system (Katsuki Dep., 20:15-21, 28:17-29:2, 34:24-35:17 (Ex. R to Honda's post-trial motion)). Honda chose the vehicle-mounted system because its engineers judged that this system would perform better overall and provide seated occupants with a better fit (*id.* at 38:5-9). Mr. Katsuki testified that crash safety considerations were paramount in Honda's decision, and that an ABTS system is not safer than a vehicle-mounted system overall (*id.* at 36:9-11, 36:20-37:3).

During vehicle development, Honda simulated rollover accidents dynamically and tested the seat belt components installed in the 1999 Integra (*id.* at 25:8-27:1). Plaintiffs' expert Mr. Sicher criticized the results of one rollover test because the test-dummy's head contacted the roof of the vehicle (R. 263a).

Mr. Katsuki explained that no lawful seat belt design can prevent head-to-roof contact in all rollovers. Specifically, he did not believe that an ABTS design would have prevented the dummy's head from contacting the roof in Honda's rollover test (Katsuki Dep., 80:19-21, 82:25-83:2, 84:2-4). Mr. Katsuki also

testified that the Integra's restraint system had to perform safely not just in rollovers but in "all modes of a crash" and that a certain amount of belt "stretch" is necessary to prevent or mitigate chest injuries in non-rollover accidents (*id.* at 74:22-76:02). The requirement that the Integra's restraint system must be designed to optimize occupant safety in *all* crash modes was unrebutted by *any* of Plaintiffs' witnesses.

IV. Plaintiffs' Illegal Alternative Design Theory

Mr. Sicher advanced an alternative design for the 1999 Integra (the "Sicher Design")—which consisted of an ABTS system from a Chrysler Sebring convertible, modified to include a total of 5.5 pounds of tension on the lap belt prior to any crash simulation. Mr. Sicher testified that this design "provides better restraint, particularly in the rollover environment," compared to a vehicle-mounted system used by Honda (R. 278-79a; *see also* R. 347a). But he never tested that design under the regulatory constraints that Honda faced or in an actual production vehicle (R. 321-22a, 348a, 352-53a).

Manufacturers must comply with Federal Motor Vehicle Safety Standards ("FMVSS"). *See* 49 U.S.C. §§30112, 30115. In 1999 (and today), FMVSS 209 specifically limited the amount of pretension that can be added to any lap belt to "not more than 7 N[ewtons]," or approximately 1.57 pounds. *See* 49 C.F.R.

§571.209 S4.3(j)(6) (1999). FMVSS 209 restricts belt pretensioning to avoid user discomfort that could deter seat belt use (R. 351-52a).

Unburdened by this requirement, the Sicher Design included manual addition of belt pretension to a total of 5.5 pounds to every test subject's lap belt before being turned upside down in "inversion" testing (R. 321-22a, 347a, 348a). Mr. Sicher developed the Sicher Design while working for the U.S. Army (R. 238a, 275-76a, 277a). Military vehicles, however, are exempt from FMVSS 209 and other federal regulations applicable to civilian passenger vehicles like the 1999 Integra. *See* 49 C.F.R. §571.7(c). Mr. Sicher admitted that a civilian car using 5.5 pounds of pretension—as the Sicher Design does—could not have been legally sold because the car would have violated FMVSS 209 (*see* R. 348a).

Mr. Sicher conceded that the 5.5 pounds of belt pretension affected *all* his test measurements by reducing the "vertical excursion" (up-and-down movement) of the passenger (R. 290a, 343a). When asked whether the Sicher Design could have prevented head-to-roof contact *without* the excessive belt pretensioning, Mr. Sicher answered "*probably*" not:

> Q. ... If you take the Sebring seat belt system, you put it into the Acura Integra, you have Gus wearing the belt, you turn the vehicle upside down *without you adding the extra belt tension*, there's no doubt in your mind, is there, Mr. Sicher, that that two-inch gap would be closed and in the all-belts-to-seat system Gus's head *is on the roof*, right?
>
> A. In an upright position like that for Gus's head, *probably*, yes.

(R. 343a (emphases added)). Without illegal pretension, Mr. Sicher's test subject "Gus" would have hit his head on the roof (R. 339-43a).

Mr. Sicher never tested his design without pretension or in an actual civilian vehicle such as the 1999 Integra (R. 320-21a, 324-35a, 345a; *infra*, Figure 1). He testified solely about tests conducted for the Army in the 1990s using other types of vehicles ((R. 275-77a) (Sebring inversion tests), 238-39a (Humvee dolly rollover tests)).[2]

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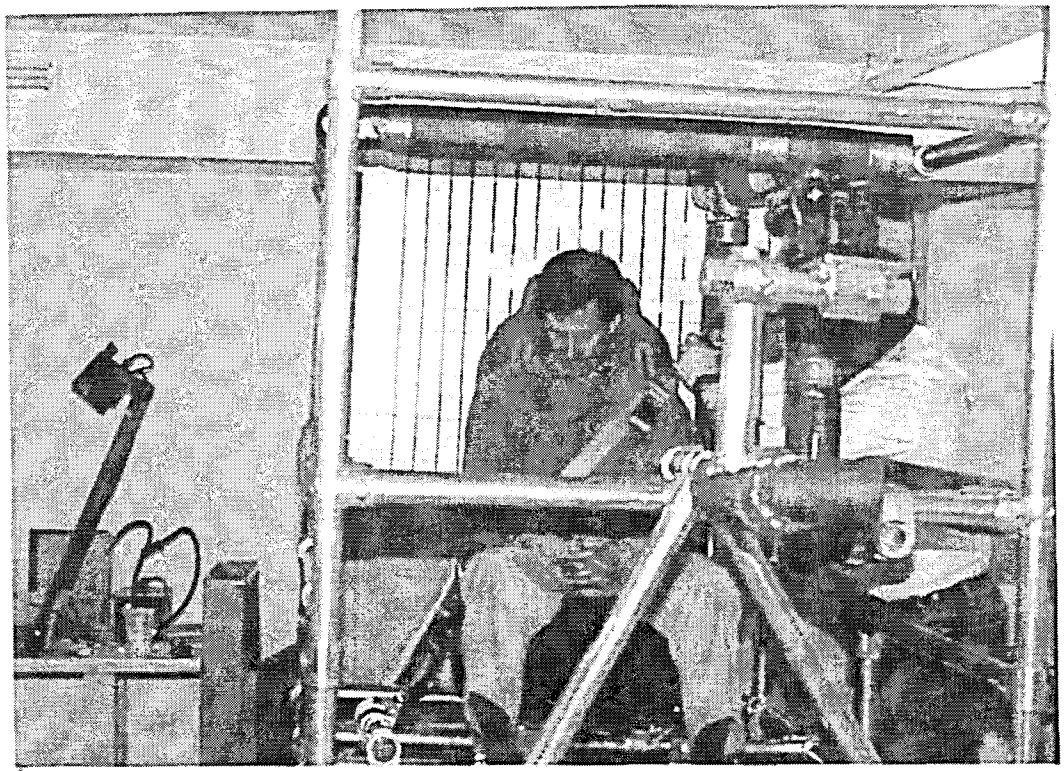
[2] Mr. Sicher likewise pretensioned Humvee seat belts to 5.5 pounds, and sometimes added a second shoulder belt to create a "crisscross" effect (R. 238-39a, 244-45a). As with his lap-belt pre-tensioning, Mr. Sicher's crisscross design could not be sold legally to the civilian public (R. 245a). Mr. Sicher admitted that, despite these added design features, in every Humvee test, the test dummies' heads struck the roof (R. 244a, 245a).

Figure 1: Mr. Sicher's testing contraption[3]



Unlike Mr. Sicher, Honda's expert Eddie Cooper actually tested an ABTS restraint in the Integra—the vehicle at issue—and without the pretensioning prohibited by FMVSS 209. That testing confirmed that even with a legally permissible ABTS restraint, an occupant's head would still strike the roof during a rollover accident (R. 593a, 625-27a, 634-35a).

V. Plaintiffs' Warning Defect Claim

Testimony established that Plaintiffs bought the 1999 Integra as a used car in 2010 (R. 561-62a). The record contains no evidence that Mr. Martinez ever had or

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[3] (R. 1048a; *see also* R. 348a, 778a, 780a).

read the Integra's owner's manual. After Mr. Martinez testified, Plaintiffs' counsel admitted that Mr. Martinez never possessed the owner's manual (R. 743a). When new, the 1999 Integra would have had an owner's manual containing extensive information about the seat belt system's functions (R. 294-95a, 561-62a). In the manual, Honda warned that "[s]eat belts cannot completely protect you in every crash," among other warnings (R. 1047a).

Plaintiffs' experts did not offer any alternative rollover warning for the 1999 Integra. The jury heard no evidence what an alternative warning might have stated, where it should have appeared, or how it might have reduced any particular risk. Nonetheless, Mr. Martinez testified (over Honda's objection) that he would not have bought the 1999 Integra had he received some warning to the effect of "this car not being able to protect you in a rollover" (R.562-65a).

VI. The Jury Charge

On June 24, 2014, the court held a charge conference. Both in requested points for charge and at the conference, Honda argued for charging the jury on the three elements of crashworthiness that Pennsylvania law required Plaintiffs to prove (*see, e.g.*, R. 732a, 737-38a, 930a). Honda also sought a verdict sheet including the three crashworthiness elements (R. 749a, 750-51a).

The court rejected Honda's repeated requests to charge on the three-prong crashworthiness burden of proof, and instead used Pa. SSCJI §16.20 to instruct the

jury on the elements of a Section 402A strict products liability claim without the crashworthiness standard. *See* Restatement (Second) of Torts §402A (1965). Specifically, the court instructed the jury that Honda "is liable for all harm caused by the defect" (R. 871-72a).

Regarding the warning-defect claim, over Honda's repeated objection, the court erroneously gave a "heeding presumption," instructing the jury that they: (1) "*must presume*" that Mr. Martinez would have followed any "adequate" warning, and (2) "*may not* find for the defendant" on the ground that he "would not have read or heeded" such an adequate warning (R. 873-74a (emphasis added), 741-42a, 775-76a, 744a (ruling on Honda's objection)).

VII. Jury Verdict

The jury found for Plaintiffs on both design and warning defect and awarded Plaintiffs $55,325,714 (R. 920-22a). The $55,325,714 damages award consisted of $25,000,000 in past and future non-economic damages, $15,000,000 in loss of consortium damages for Mrs. Martinez, $14,605,393 in future medical expenses, and $720,321 in past and future lost earnings and earnings capacity (R. 922a; *see also* R. 909-10a).

VIII. Post-Trial Briefing

Honda timely moved for post-trial relief. While Honda's motion was pending, the Supreme Court decided *Tincher*, overruling *Azzarello*. Both sides thoroughly briefed *Tincher* as supplemental authority.[4]

SUMMARY OF ARGUMENT

First, the Supreme Court's intervening decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), applies retroactively to this case and requires a new trial for at least four reasons. The trial court failed to instruct the jury that Plaintiffs must prove that the 1999 Integra was unreasonably dangerous, as *Tincher* requires. Contrary to *Tincher*, the trial court erroneously instructed the jury that Honda was the "guarantor" of the Integra's safety and was liable if the Integra lacked "every element necessary to make it safe." Under *Tincher*'s risk-utility framework, the trial court erred by excluding evidence that Honda complied with federal safety standards and industry practice, and by failing to instruct the jury that it could consider such evidence in determining whether the Integra was defective. Furthermore, the trial court erroneously concluded that *Tincher* "did not

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[4] In violation of Pa. R. Civ. P. 205.2, the trial court refused to allow record filing of any post-trial briefing (*see* R. 38a), and threatened Honda with contempt of court for attempting such filings (R. 1040-43a). Honda filed an unopposed motion in this Court under Pa. R.A.P. 1926(b)(1) to add this briefing to the record, but that motion was denied. Honda does not expect any dispute over the contents of the post-trial briefing, but should there be, Honda will renew its application.

concern [Plaintiffs'] failure to warn" claim, and wrongly determined that its failure to apply *Tincher* "would be harmless."

Second, Honda is entitled to a new trial or judgment n.o.v. on Plaintiffs' design-defect claim. The trial court erroneously refused to instruct the jury that Plaintiffs bore the burden of proving the three crashworthiness elements of that claim. This error requires a new trial. Because Plaintiffs failed to proffer any evidence of a feasible/legal alternative design, Honda was entitled to judgment n.o.v. on Plaintiffs' design-defect claim. Federal safety standards would preempt Plaintiffs' design-defect claim in any event.

Third, Honda is also entitled to a new trial or judgment n.o.v. on Plaintiffs' warning-defect claim. Contrary to Pennsylvania law, the trial court charged the jury that it "must presume" that Mr. Martinez would have heeded any "adequate" warning, and that the jury "may not find for" Honda on the ground that Mr. Martinez "would not have read or heeded" such a warning. Absent such an improper presumption, Plaintiffs could not have established causation. Moreover, Plaintiffs' warning-defect claim must fail, because Honda's warning regarding the risk of injuries was adequate as a matter of law.

Fourth, the jury's verdict was excessive under Pennsylvania law, and improperly attempted to punish Honda in violation of due process. The trial court nonetheless erroneously denied Honda's request for remittitur.

Finally, any new trial should be held in York County—not Philadelphia County.

ARGUMENT

I. The Supreme Court's Intervening *Tincher* Decision Requires A New Trial Before A Properly Instructed Jury.

This matter was tried to verdict in June 2014, before the Pennsylvania Supreme Court decided *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), and before this Court applied *Tincher* in *Amato v. Bell & Gossett*, 116 A.3d 607 (Pa. Super. 2015). Both these decisions were extensively briefed to the trial court. The court nonetheless dismissed *Tincher* in a single paragraph, as not making "any change in any legal or evidentiary ruling." (Op. at 11-12 (Addendum B)). The court ignored *Amato*'s holding that *Tincher* applies to both design-defect and warning-defect claims. *Id.* at 12. Because *Tincher* applies retroactively to this case, a new trial is warranted.

A. *Tincher* Applies Retroactively To This Case.

Plaintiffs have conceded that *Tincher* applies retroactively to this case. In *Tincher*, the Supreme Court held that defendants, like Honda, that "preserved and presented" the overruling of *Azzarello* are "entitled to the benefit." 104 A.3d at 410. In *Amato*, this Court applied *Tincher* as "the law in effect at the time of [the] appellate decision." 116 A.3d at 617. The *Amato* defendant preserved "reasonableness" issues under *Tincher* by raising the Third Restatement of Torts.

Id. at 617-19. Honda did precisely the same thing in this case, moving *in limine* to admit industry standards evidence, and proposing jury instructions indistinguishable from those in *Amato*.[5] Thus, *Tincher* "is applicable to the case *sub judice*." *Id.* at 620.

B. The Trial Court Failed To Instruct The Jury That It Was Plaintiffs' Burden To Prove That The Integra Was Unreasonably Dangerous.

In *Tincher*, the Supreme Court held that, "in the context of a strict liability claim, whether a product is defective depends upon whether that product is 'unreasonably dangerous.'" *Tincher*, 104 A.3d at 380. Thirty years earlier, *Azzarello* had established that the "unreasonably dangerous" determination was an "issue[] of law and policy entrusted solely for decision to the trial court." *Id.* at 367 (quoting *Azzarello*, 391 A.2d at 1027). *Tincher* returned the "unreasonably dangerous" determination to the jury because judicial determination was "impractical" and "undesirable." 104 A.3d at 380-81. Moreover, *Tincher* upended *Azzarello*'s burden of proof, which had required trial courts to "read[] the record in the light most favorable to [the plaintiff]" in determining whether asserted defects were "unreasonably dangerous." *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823,

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[5] (*See* R. 1606-29a (Honda's Motion in Limine to Apply The Restatement Third of Torts and Admit Evidence of Industry Customs and Standards); R. 932a, 934a (Honda's Proposed Jury Instructions, Nos. 8, 10); R. 623a, 624-25a, 643-44a (precluding Honda's expert from giving state-of-the-art industry standard and compliance testimony); R. 703-04a (same)).

834 (Pa. 2012). As *Tincher* explained, "Pennsylvania does not presume a product to be defective until proven otherwise" and "assign[s] the burden of proof in a strict liability case to the plaintiff." 104 A.3d at 409. Honda is entitled to a new trial because the trial court did exactly what *Tincher* condemned—it allowed Plaintiffs to escape their burden of proving an "unreasonably dangerous" defect.

Under *Tincher*, a plaintiff must prove that a product is unreasonably dangerous under a two-part "composite" test, which "requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." 104 A.3d at 401. Under the consumer expectation prong, the plaintiff must prove that "the danger is unknowable and unacceptable to the average or ordinary consumer." *Id.* at 335. Under the risk-utility prong, the plaintiff must prove that "a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Id.*; *see also id.* at 407 ("when a plaintiff proceeds on a theory that implicates a risk-utility calculus, proof of risks and utilities are part of the burden to prove that the harm suffered was due to the defective condition").

Plaintiffs tried what *Tincher* considers a risk-utility case, offering an alternative seat-belt design and claiming that Honda already knew about the

alleged defect.[6] Honda requested instructions on a risk-utility analysis as well as other instructions that comport with the standard the Supreme Court laid out in *Tincher* (*see* R. 929a, 931a, 932a, 934a); R. 733-34a, 735-37a, 739-40a). "Where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted." *Tincher*, 104 A.3d at 408.

Applying *Azzarello*, the court rejected Honda's proposed instruction and never instructed the jury on either risk-utility or consumer expectations standards. It would be entirely improper to presume that the jury somehow conducted a risk-utility or consumer-expectations analysis in the absence of any instruction to do so. Under *Azzarello*, "[t]he jury [was] not to be presented with the [risk-utility] factors"—and it certainly was not presented with those factors here. *Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134, 138 (Pa. Super. 1987). Although Plaintiffs offered the jury an "alternative design" as part of their crashworthiness claim (*infra* p. 36), that evidence relates to only *one* of several factors in the risk-utility analysis. *See Tincher*, 104 A.3d at 389-90 (identifying seven risk-utility

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[6] Although not necessary to this appeal, the "consumer expectations" test is inapplicable. First, Plaintiffs did not assert an "unknowable" defect. *Tincher*, 104 A.3d at 387. Instead, they mischaracterized a 1992 crash test to argue that Honda "knew" of the alleged defect (*e.g.*, R. 794a). Second, the consumer expectation test is incompatible with the elements of crashworthiness. "[T]he ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations." *Tincher*, 104 A.3d at 388 (quoting *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994)).

factors). The jury was never asked to determine whether Plaintiffs had proved that the Integra's seat belt was unreasonably dangerous based on a consideration of its risks and utility. For this reason alone, a new trial is warranted.

C. The Trial Court Improperly Instructed The Jury On *Azzarello*'s "Every Element"/"Guarantor" Standard.

The trial court also erred in instructing the jury that Honda was the "guarantor" of the Integra's safety and was liable if the Integra lacked "every element necessary to make it safe" (R. 872a). *Azzarello* held that "the seller is the 'guarantor' of the product, and a jury could find a defect 'where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.'" *Tincher*, 104 A.3d at 367 (quoting *Azzarello*, 391 A.2d at 1027). *Tincher* rejected this "standard *Azzarello* charge" (*id.* at 346), which Plaintiffs' counsel repeated several times to the jury in closing argument (R. 791a) ("the first thing you have to decide, ladies and gentlemen, did Honda design this seat belt system with every element to make it safe?").[7] A new trial is also warranted for this reason.

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[7] (*See* R. 792a ("Her Honor is going to ... tell you that under the law a manufacturer like Honda has an obligation to design its products and include every element to make it safe. Every element to make it safe."); R. 792a ("The manufacturer ... is a guarantor of its safety."); R. 842a ("This Acura Integra did not have every element to make it safe.")).

Tincher held that *Azzarello* erroneously "fill[ed] the legal void" caused by taking the "unreasonably dangerous" inquiry from the jury by pronouncing that a manufacturer "is a guarantor" of its product. 104 A.3d at 379. That "guarantor" language was a "term[] of art," offered to the jury "with no further explanation of [its] practical import" and resulting in an "impractical" standard. *Id.* The Supreme Court also rejected the "every element" jury instruction, which had been taken "out of context" from an earlier case and wrongly turned into a "standard of proof in a strict liability action." *Id.* at 365 (discussing *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975)).

The trial court erroneously instructed the jury on both the "guarantor" and "every element" standard, and Plaintiffs' counsel accentuated the error by making the now-discredited charge a central theme in closing argument. Given the court's improper instruction and the emphasis it received in Plaintiffs' closing, this error "may have affected" the verdict, *Deeds*, 110 A.3d at 1012, by focusing the jury on whether Honda could have made the Integra marginally safer—even though Honda is not liable "for failing to make an already safe product somewhat safer [o]r for failing to utilize the safest of all possible designs." *Pascale v. Hechinger Co.*, 627 A.2d 750, 752-53 (Pa. Super. 1993). A new trial is required.[8]

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[8] Plaintiffs have not disputed, nor did the trial court, Honda's preservation of any *Tincher* issue.

D. The Trial Court Erroneously Precluded Honda From Defending Itself On The Basis That The Integra Complied With Industry Standards And Customs.

The trial court also excluded evidence critical to Honda's defense, including Honda's compliance with federal safety standards and industry practice, and the court failed to instruct the jury that it could consider that evidence in determining whether the Integra was defective. Under the risk-utility framework that *Tincher* adopted (*supra* p. 20), that was reversible error.

Tincher did not explicitly resolve the admissibility of regulatory and industry standards, because the parties had not briefed the issue. 104 A.3d at 409; *see also id.* at 345 n.4. However, the Supreme Court acknowledged the obvious "impact" of its ruling on "subsidiary issues ... such as the availability of negligence-derived defenses." *Id.* at 409. In *Amato*, 116 A.3d 607, the first appellate decision involving post-*Tincher* issues, this Court indicated that the defendant would have been entitled to defend itself on the basis that its product was "state-of-the-art" had it preserved that defense. *Id.* at 622 ("Where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted.").

Compliance with regulatory and industry standards is necessarily one of the "negligence-derived defenses" that *Tincher* contemplated. 104 A.3d at 409. *Tincher*'s risk-utility test "analyze[s] *post hoc* whether a manufacturer's *conduct* in

manufacturing or designing a product was reasonable." *Id.* at 389 (emphasis added). Compliance with applicable regulatory and industry standards is relevant and admissible when jurors evaluate a manufacturer's conduct. "Pennsylvania courts permit[] defendants to adduce evidence of compliance with governmental regulation in their efforts to demonstrate due care (when conduct is in issue)." *Lance v. Wyeth*, 85 A.3d 434, 456 (Pa. 2014).[9]

If a product complies with government standards, it is more likely that the product's utility outweighs its risks—a consideration at the core of the jury's analysis after *Tincher*. 104 A.3d at 409. "Whether a product comports with industry standards is particularly relevant to [risk/utility] factor (2) . . . 'The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.'" *Sliker v. Nat'l Feeding Sys., Inc.*, 2015 WL 6735548, at *7 (Pa. Ct. Com. Pl. Clarion Cty. Oct. 19, 2015).[10] Thus, one of the key

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[9] The same decisions that barred state-of-the-art evidence under *Azzarello* recognized its relevance to conduct. *Lewis v. Coffing Hoist Div.*, 528 A.2d 590, 594 (Pa. 1987) ("industry standards relating to the design" of products "go to the reasonableness of the [defendant's] conduct"); *Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 966 (Pa. Super. 2009) (en banc) (recognizing "the well-settled principle that proof of a violation of a statute can be used as evidence of negligence").

[10] Government standards are also relevant to reasonable consumers' expectations. *See, e.g., Soproni v. Polygon Apartment Partners*, 971 P.2d 500, 505 (Wash. 1999) ("it may be unreasonable for a consumer to expect product design to depart from legislative or administrative regulatory standards").

authorities the Supreme Court relied upon in *Tincher* makes clear that industry safety standards are admissible in determining whether a product is defective. *See Welch v. Outboard Marine Corp.*, 481 F.2d 252, 257 (5th Cir. 1973) (affirming judgment for manufacturer in part because of evidence that the product "met all industry safety standards").

Under *Tincher*, Honda should be allowed to introduce evidence and argue to the jury that the Integra complied with all applicable Federal Motor Vehicle Safety Standards and with automotive industry standards. Compliance was particularly critical here, since Plaintiffs' alternative Sicher Design violated FMVSS 209. *See supra* pp. 10-12. The trial court should not have denied Honda's *in limine* motion to present this evidence and refused Honda's proposed jury instruction, *see supra* note 5, on the role of industry standards and customs.

These errors prejudiced Honda. A centerpiece of Plaintiffs' case was a 1992 rollover test that they asserted meant Honda had notice of a seat-belt defect. *See supra* p. 9. Exclusion precluded Honda from rebutting this argument with evidence that its restraint system complied with federal regulations and industry standards. Plaintiffs even introduced post-manufacture evidence of another Honda design to imply that the Acura was not state of the art, but still Honda could not

show compliance.[11] Honda managed to establish on cross-examination that its seatbelt system was the design of choice in 98% of all automobiles in 1999 (R. 307a, 596-97a) but could not argue this fact as evidence disproving a defect, nor was the jury so instructed. Honda requested an appropriate instruction regarding industry standards and customs, and "refusal to give a requested jury instruction containing a correct statement of law relating to the issues raised by the evidence is grounds for a new trial." *Santarlas v. Leaseway Motorcar Transp. Co.*, 689 A.2d 311, 312 (Pa. Super. 1997).[12]

E. *Tincher* Applies Equally To Plaintiffs' Warning Claim; Thus The Trial Court Wrongly Asserted Harmless Error.

The trial court reasoned that "if *Tincher* changed the law of the case concerning defective design, it did not concern the failure to warn," and, because "the jury found an independent basis of liability based upon failure to warn," any error by court in applying *Tincher* "would be harmless." (Op. at 12 (Addendum

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[11] (*See* R. 157-59a, 160-61a (2007 Honda Element had ABTS design)). This evidence was admitted despite Honda conceding that such an alternative design was feasible in 1999 (R. 158-59a, 161a, 163a). That concession was "conclusive," *Rizzo v. Haines*, 555 A.2d 58, 69 (Pa. 1989), and should have had "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Durkin v. Equine Clinics, Inc.*, 546 A.2d 665, 670 (Pa. Super. 1988). The trial court ignored that concession (Op. at 5-6 (Addendum B)).

[12] Preclusion of industry standards also impaired Honda's defense of Plaintiffs' warning claim, as the credibility of Mr. Martinez's testimony that he would have bought a different car, if warned (R. 562-65a), would have been undermined by evidence that very few such cars existed.

B)). That reasoning is erroneous under this Court's decision in *Amato v. Bell & Gossett.*

In *Amato*, the plaintiffs (like the trial court here) contended that "*Tincher* was a design defect case and that the [Supreme] Court's holding was specifically limited to such claims." 116 A.3d at 619. This Court disagreed. Although *Tincher* involved a design-defect claim, "the *Tincher* Court nevertheless provided something of a road map for navigating the broader world of post-*Azzarello* strict liability law." *Id.* at 620. That "broader world" includes strict-liability warning-defect claims, which (like design-defect claims) now require the jury to consider whether the manufacturer's conduct was reasonable. *Id.* In other words, after *Tincher*, plaintiffs have the burden of persuading the jury that a product is unreasonably dangerous absent a particular warning. *See id.*; *see also Weiner v. Am. Honda Motor Co.*, 718 A.2d 305, 309 (Pa. Super. 1998) ("*The claim of 'failure to warn' is a subset of defective design* ... [and] [t]o succeed on a claim of inadequate or lack of warning, a plaintiff must prove that the lack of warning rendered the product unreasonably dangerous....") (emphasis added).

Like *Tincher*, *Amato* was submitted as supplemental authority and thoroughly briefed in the trial court. Like *Tincher*, the trial court ignored this controlling authority. The same errors that infected Plaintiffs' design-defect claim also require a new trial on their warning-defect claim. The jury heard the same

Azzarello-based "every element"/"guarantor" instruction; it was not instructed on Plaintiffs' burden of proving that the Integra was unreasonably dangerous; and it never heard Honda's evidence that, with or without a warning, the vehicle was not defective because it complied with all applicable regulatory and industry standards. Plaintiff's warning claim is likewise infected with error under *Tincher*, and *Tincher* likewise requires reversal of that aspect of the verdict.

II. Honda Is Entitled To A New Trial Or Judgment N.O.V. On Plaintiffs' Design-Defect Claim.

A. The Court's Crashworthiness Charge Relieved Plaintiffs Of Proving The Elements Of Their Claim And Requires A New Trial.

Plaintiffs pursued a "crashworthiness" design-defect claim; yet, the trial court refused to instruct the jury that Plaintiffs bore the burden of proving the three crashworthiness elements, overruling Honda's repeated objections. This Court, sitting en banc, confirmed the three elements in *Parr*, 109 A.3d 682, and during post-trial proceedings, Plaintiffs conceded they had to prove all three elements. The trial court, however, ignored *Parr* and Plaintiffs' concession, and affirmed its erroneous jury charge with the thinnest of explanations. That error was prejudicial and requires a new trial.

Plaintiffs' defect theory was not that the Integra's seat-belt system caused Mr. Martinez's accident. They contended only that the seat-belt design *enhanced* the injuries he suffered in the accident. In other words, they asserted a defect in

the vehicle's "crashworthiness"—"the protection that a motor vehicle affords its passenger against personal injury or death as a result of a motor vehicle accident." *Parr*, 109 A.3d at 689 (quoting *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. 1994)).

> "[A] crashworthiness claim requires proof of three elements":
>
> > *First*, the plaintiff must prove that the design of the vehicle was defective, and that at the time of design an alternative, safer, and practicable design existed that could have been incorporated instead. *Second*, the plaintiff must identify those injuries he or she would have received if the alternative design had instead been used. *Third*, the plaintiff must demonstrate what injuries were attributable to the defective design.

Id. (emphasis added) (quoting *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532 (Pa. Super. 2009)); *see also Schroeder v. Commonwealth, Dep't of Transp.*, 710 A.2d 23, 28 n.8 (Pa. 1998). Plaintiffs have *conceded* that "*[t]hose are three things we have to prove. There's no doubt about it.*" (R. 1000-01a (emphasis added)).

All three elements are critical. The crashworthiness doctrine expands liability beyond a traditional §402A products liability claim to include "situation[s] in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the design defect." *Colville*, 809 A.2d at 922. Thus, "the crashworthiness doctrine permits a plaintiff to recover for enhanced injuries, *i.e.*, *only* for those injuries he can prove he would not have sustained if he had been riding in a crashworthy vehicle." *Oddi*

v. Ford Motor Co., 234 F.3d 136, 142 (3d Cir. 2000) (applying Pennsylvania law) (emphasis added). To take advantage of this expansion of liability, Plaintiffs must meet "more rigorous" standards than in ordinary §402A cases where a design defect allegedly causes an accident. *Colville*, 809 A.2d at 922. Thus, courts are "required" to charge the jury on crashworthiness. *Id.* at 922-23; *Raskin v. Ford Motor Co.*, 837 A.2d 518, 524-25 (Pa. Super. 2003).

Nonetheless, over Honda's objections,[13] the trial court instructed the jury using general Suggested Standard Civil Jury Instructions ("SSCJI") "design defect" and "factual cause" instructions applicable to all product-liability claims—suggested instructions which erroneously omit the concept of enhancement:

> If you find that the product at the time it left the defendant'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 there was an alternative, safer, practicable design, then the product was defective, and the defendant is liable for *all harm* caused by the defect.

(R. 872a (emphasis added)). This instruction adequately charged on crashworthiness element one, but did not charge at all on element two, and incorrectly charged on element three.

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[13] Honda submitted proposed jury instructions that included the crashworthiness defect claim elements (R. 930a). Honda repeatedly argued during trial that a jury charge on the crashworthiness tripartite burden of proof was mandatory under the controlling *Colville* decision (R. 732a, 737-38a, 744a, 749a, 750-51a, 770-71a, 772-73a, 773-74a, 891-96a).

In *Colville*, this Court held that failure to instruct on element two required reversal of the verdict and a new trial, because the jury was *required* to evaluate whether "the plaintiff ... demonstrate[d] 'what injuries, *if any*, [he] would have received had the alternative safer design been used." 809 A.2d at 924 (citation omitted). The trial court here relieved Plaintiffs of their burden by omitting this critical element, with severe prejudice to Honda. Plaintiffs proffered no evidence on the second element, and their expert conceded that without illegal pretension, his test surrogate "*probably*" would have suffered head-to-roof contact with the alternative design (R. 325a, 343a (emphasis added)). A correctly instructed jury could have found a defect, but also that Mr. Martinez would have received the same injuries with any legal ABTS restraint.

Regarding element three, the trial court did not instruct the jury that Plaintiffs had to prove "what injuries were attributable to the defective design." *Parr*, 109 A.3d at 689. Instead, the trial court charged on injury-causation using the outdated SSCJI §16.70 (2008 revision),[14] and compounded that error by omitting SSCJI §16.70's language that injury enhancement must be proven. *See*

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[14] SSCJI §16.70 purports to reverse the burden of proof in crashworthiness cases based on a vacated decision. *See* Subcommittee Note to SSCJI §16.70 (citing *Stecher v. Ford Motor Co.*, 779 A.2d 491 (Pa. 2001), *vacated*, 812 A.2d 553 (Pa. 2002)). The Supreme Court in *Stecher* informed the lower courts that the Superior Court crashworthiness analysis "should be regarded as mere *dicta*." 812 A.2d at 558 n.5. *Gaudio* thus properly ignored *Stecher* and followed the "correct" jury charge established by *Colville*. 976 A.2d at 532, 551.

SSCJI §16.70 (defect must be "factual cause of damages beyond those that were probably caused by the original impact"). The trial court's instruction that "[t]he plaintiff is required to prove only that the defective condition was a factual cause of those damages that occurred when the roof of the car hit the ground" reduced element three to a mere concurrent cause issue relating to when the roof "hit the ground" (R. 874-75a). This is error on any reading of crashworthiness.

The trial court's order sought to defend its jury charge on three grounds, each both legally and factually incorrect.

First, the trial court stated that its charge was not "inconsistent with the limited holding of [*Colville*]" (Op. at 10 (Addendum B)). As just explained, however, *Colville* squarely held that failure to instruct on the second crashworthiness element is, without more, reversible error. *Supra* p. 32.

Second, the trial court stated that "[*Colville*] was decided before the current standard instructions were adopted" (Op. at 10). That is beside the point, because the same three-element crashworthiness instruction continues to be the law. *See, e.g.*, *Parr*, 109 A.3d at 689; *Gaudio*, 976 A.2d at 532 (both using identical language). Irrespective of the SSCJI's vintage, such "suggested" instructions do not change the law, and where, as here, they deviate from controlling precedent it is error to follow them. *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992) ("the suggested standard jury instructions ... are not binding"); *Carpinet v.*

Mitchell, 853 A.2d 366, 374 (Pa. Super. 2004) (reversing for a new trial where trial court charged with an erroneous suggested instruction), *superseded on other grounds by* Pa. R.C.P. No. 223.3.

Third, the trial court elliptically suggested that any instructional error was harmless because *Colville* "did not involve a failure to warn claim" (Op. at 10 (Addendum B)). As Honda explains below (*infra* pp. 42-47), the trial court's errors cannot be harmless because its warning instructions were also erroneous.

The erroneous crashworthiness instruction prejudiced Honda by relieving Plaintiffs of their burden of proving essential elements of their claim. *See Slavin v. Slavin*, 84 A.2d 313, 318 (Pa. 1951) (new trial where plaintiff relieved of burden of proof); *Tudor Ins. Co. v. Twp. of Stowe*, 697 A.2d 1010, 1017 (Pa. Super. 1997) (same). Necessary crashworthiness elements were also omitted from the factual causation instruction, the issues in the case instruction, and the verdict form (R. 871-72a, 874-75a, 893-94a, 910-11a). As in *Colville*, the failure to instruct the jury on the three elements of a crashworthiness defect claim requires a new trial.

B. Honda Was Entitled To Judgment N.O.V. On The Design Defect Claim Because Plaintiffs Proffered No Evidence Of A Feasible, Alternative Design.

The trial court erroneously denied Honda's motion for judgment n.o.v. on Plaintiffs' crashworthiness-based design-defect claim. The first element of a crashworthiness claim required Plaintiffs to prove "that the design of the vehicle

was defective, and that at the time of design an alternative, safer, and practicable design existed that could have been incorporated instead." *Parr*, 109 A.3d at 689. Plaintiffs failed to show a feasible alternative to the 1999 Integra's vehicle-mounted seat belt system—a system utilized in virtually every car manufactured in the United States, that passed every legally mandated safety test mandated, and that functioned properly in the crash at issue (R. 273a, 307a, 310a, 312-13a, 596-97a).

Plaintiffs failed to advance a *feasible*, alternative seat-belt design because the "Sicher Design" alternative offered by their expert incorporates as an integral component 5.5 pounds of lap-belt pretension added in every test he ever conducted. In two decades, Mr. Sicher has never tested his proposed design without the illegal extra lap belt pretension (R. 321-22a, 325a, 347a).

This pretension was illegal because in 1999 (and today), FMVSS 209 specifically limited the amount of pretension that can be added to any lap belt to "not more than 7 N[ewtons]," or approximately *1.57 pounds*. *See* 49 C.F.R. §571.209 S4.3(j)(6) (1999). Mr. Sicher conceded that "you couldn't sell it [the Integra], legally" had its seat belts been designed to exert more than 1.5 pounds of tension against the passenger's body (R. 348a, 351-52a). Passenger safety motivated this federal restriction: "if the seat belt is designed too tightly, people won't wear them" (R. 351-52a; *see* 59 Fed. Reg. 39472, 39473 (DOT Aug. 3,

1994) ("NHTSA believes that some occupants who find their safety belts to be uncomfortable react to their discomfort either by wearing their safety belts incorrectly or by not wearing them at all.")).

Notwithstanding these clear federal requirements, the Sicher Design depended on pretension more than three times FMVSS 209's limits (R. 321-22a, 325a, 347a, 352-53a (Q: "The idea, though, of ... taking the [tested] system and just running it without adjusting the tension, did you even try to do that? A: I don't believe I tried it at all, no.")). The 5.5 pounds of pretension was so critical to his design that without it Mr. Sicher conceded his test dummy "probably" would have suffered head-to-roof contact, even with the rest of his design (R. 343a). Moreover, Honda presented unrebutted evidence that an unmodified ABTS design—without illegal pretensioning—would not have prevented Mr. Martinez's head from contacting the roof in the accident (R. 593a).

A design like Mr. Sicher's, dependent on a feature that is illegal to sell, cannot logically or legally be a feasible alternative design. Applying Pennsylvania law, the court in *Wolfe v. McNeil-PPC, Inc.*, 773 F. Supp. 2d 561 (E.D. Pa. 2011), rejected a similar design-defect claim as a matter of law because, when "[t]here exists no [government]-approved alternative form of [the product]," "there is no available alternative design." *Id.* at 572. Analogously, this Court recently approved a jury instruction in a warning case that "[a]s a matter of law, [the jury]

cannot find the defendant is liable for failure to give warnings or instructions that the [government] has considered and rejected." *Maya v. Johnson & Johnson McNeil-PPC, Inc.*, 97 A.3d 1203, 1222 (Pa. Super. 2014).[15]

This case requires the same result. The Sicher Design incorporated an element that would have been illegal for Honda to design and sell. An illegal alternative design is no alternative at all. Despite extensive briefing, the trial court never even acknowledged that Plaintiffs' alternative design was illegal and therefore failed as a matter of law. That error cannot stand, and Honda is entitled to judgment notwithstanding the verdict on Plaintiffs' crashworthiness-based design-defect claim.

C. Plaintiffs' Illegal Design Defect Claim Is Preempted By Federal Law

Plaintiffs' crashworthiness design-defect claim also fails as a matter of law because it is preempted by federal safety standards. State tort claims that conflict with federal law or its purposes are preempted. *Cipollone v. Liggett Grp., Inc.*, 505

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[15] Other states agree. *See Lewis v. Am. Cyanamid Co.*, 715 A.2d 967, 981 (N.J. 1998) ("A plaintiff may not succeed on an alternative design theory that would have required the defendant manufacturer to violate the law."); *White v. Wyeth Labs., Inc.*, 533 N.E.2d 748, 753-54 (Ohio 1988) (alternative design was not feasible where "it was not possible for [defendant] to have legally marketed a [product] design using [the alternative design] at the time [plaintiff] was inoculated"); *Ackley v. Wyeth Labs., Inc.*, 919 F.2d 397, 401 (6th Cir. 1990) (following *White*; alternative designs did not "exist[]" where it was "indisputable" that "[w]ithout an FDA license to produce another design, [defendant] was legally prohibited from distributing" those designs).

U.S. 504, 516, 521 (1992); *Cellucci v. Gen. Motors Corp.*, 706 A.2d 806, 809 (Pa. 1998). Such "conflict preemption" occurs either "where it is impossible for a private party to comply with both state and federal law" or where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

Plaintiffs' design-defect claim was preempted for two, independent reasons. First, since Plaintiffs' alternative design violates federal law, *supra* pp. 35-36, were Pennsylvania law to permit recovery, federal preemption would nonetheless bar it. Design claims where the "alternative" is illegal under federal law are preempted because such claims, if successful, would frustrate federal objectives and place private parties in the impossible position of trying to comply with inconsistent standards. *E.g.*, *Eckhardt v. Qualitest Pharm., Inc.*, 751 F.3d 674, 679 (5th Cir. 2014) (plaintiff's alternative design is "prohibited by federal law," so "the state law claim against [the defendant] is preempted because the state law claim is in direct conflict with the federal law"); *McCracken v. Ford Motor Co.*, 588 F. Supp. 2d 635, 641 (E.D. Pa. 2008) (claim preempted if plaintiff's alternative windshield design is not approved under FMVSS 205). State law cannot require, as an "alternative," a design forbidden by federal law.

Second, Plaintiffs' claim frustrates a comprehensive federal regulatory scheme intended to ensure that manufacturers have a choice among a variety of designs for passenger restraint systems. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *see Williamson v. Mazda Motor, Inc.*, 562 U.S. 323, 330 (2011) (state tort claims are preempted where they restrict manufacturer choice and where choice is a "*significant objective* of the federal regulation") (emphasis original).

Federal law provides automobile manufacturers the option of using *either* a vehicle-mounted *or* an ABTS seat belt system (provided neither system incorporates illegal pretension and satisfies other federal standards). FMVSS 210 establishes requirements for seat belts anchored in different locations, based on the options available to the manufacturer. *See* 49 C.F.R. §571.210 S4.3 (1999). These options include a "seat belt [that] does not bear upon the seat frame" (the equivalent of a vehicle-mounted seat belt) or a "seat belt [that] attaches to the seat structure" (the equivalent of an ABTS seat belt). *Id.* §571.210 S4.3.1 (1999); *see also id.* §571.210, Fig. 1 (illustrating how manufacturers may attach seat belt anchors to areas other than the seat itself) (1999). Likewise, FMVSS 208 provides different anchoring requirements for each design. *Id.* §571.208 S7.1.2 (1999).

These regulations provide manufacturers with flexibility to use a "variety and mix of devices" in order to encourage greater seat belt use by passengers. *Soliman v. Daimler AG*, 2011 WL 4594313, at *4 (E.D.N.Y. Sept. 30, 2011)

(quoting *Geier*, 529 U.S. at 881). In 1994, DOT expressly described the purpose of FMVSS 208 as:

> *afford[ing] manufacturers broad flexibility in designing means of compliance.* Manufacturers may comply by providing for the adjustability of the anchorage and have a broad choice regarding the means for doing so... . [T]he requirement allows them to *choose* other means of compliance. In lieu of anchorage adjustability, manufacturers may either integrate the belts with the seat or provide a means of automatically moving the webbing in relation to the anchorage.

59 Fed. Reg. at 39473 (emphasis added). DOT determined that manufacturer choice and innovation increased safety because "some occupants who find their safety belts to be uncomfortable react to their discomfort either by wearing their safety belts incorrectly or by not wearing them at all [and] improving safety belt fit will encourage the correct use of safety belts and could *increase the overall safety belt usage rate.*" *Id.* (emphasis added). Thus, enhancing safety through manufacturer choice was a "*significant objective*" of this federal regulation. *Williamson*, 562 U.S. at 330 (emphasis original).

Plaintiffs' claim is the mirror image of the seat-belt liability theory preempted in *Soliman*, 2011 WL 4594313. *Soliman* involved an ABTS seatbelt system, and the plaintiff claimed a vehicle-mounted seatbelt as a safer alternative. *Id.* at *4. That claim was preempted because manufacturer choice was a "significant objective" of federal regulations, intended to enhance safety by increasing the overall seat belt usage rate. *Id.* at *5 (quoting *Williamson*, 562 U.S.

at 330); *see also Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169, 176-77 (M.D. Pa. 2001) (seat belt design-defect claim preempted because "no matter how ... plaintiffs characterize their claim," they would impose liability on the manufacturer for choosing one of "several restraint system options" under FMVSS 208).

The trial court rejected Honda's preemption arguments because *Williamson* "held that although the federal regulations provided manufacturers with choices between seat belt designs, victims may still raise state court claims of defective design based upon a manufacturer's decision to install an allegedly less safe design" (Op. at 8 (Addendum B)). That deeply flawed, superficial reasoning ignores the first basis for preemption: an alternative design *illegal* under federal law cannot be required by state law. *Williamson* has nothing to do with illegal design alternatives, and, as discussed, the cases that do address illegal design alternatives recognize preemption. The trial court's reasoning is also wrong as to the second basis for preemption, because the federal regulations here went beyond mere "choices" and explicitly based those choices on significant safety-related objectives. As explained above, and as *Soliman* held, a significant objective of the federal regulations was to ensure that manufacturers could utilize either a vehicle-mounted or an ABTS restraint. Under *Williamson*, tort claims (like this one) that frustrate a "significant objective" are preempted.

III. Honda Is Entitled To A New Trial Or Judgment N.O.V. On Plaintiffs' Warning Defect Claim.

A. The Trial Court's Improper "Heeding Presumption" Requires A New Trial.

The trial court erroneously charged the jury that they "must presume" that Mr. Martinez would have followed any "adequate" warning, and "may not find for the defendant" on the ground that he "would not have read or heeded" such an adequate warning. The complete jury charge regarding warnings stated:

> Even a perfectly made and designed product may be defective if not accompanied by proper warnings and instructions concerning its use. A manufacturer must give the user or consumer any warnings and instructions of the possible risks of using the product that may be required or that are created by the inherent limitations in the safety of such use.
>
> If you find that such warnings or instructions were not given, the defendant is liable for all harm caused to the plaintiff by the failure to warn.
>
> If you find instead that there were warnings or instructions required to make this product non-defective which were not adequately provided by the defendant, then *you may not find for the defendant based on a determination that, even if there had been adequate warnings or instructions, the plaintiff would not have read or heeded them.*
>
> Instead, *the law presumes, and you must presume, that if there had been adequate warnings or instructions, the plaintiff would have followed them.*

(R. 873-74a (emphases added); *see also* R. 888-89a, 897a; R. 744a (ruling on Honda's objection to charge on duty to warn)). This charge misstated Pennsylvania law in at least two ways and requires a new trial.

First, Plaintiffs bore the burden of proving each element of their warning-defect claim, including that the inadequate warnings caused their injuries. *See Beard*, 41 A.3d at 829 n.8; *Tooey v. AK Steel Corp.*, 81 A.3d 851, 865 (Pa. 2013). As a practical matter, this burden requires a plaintiff to show that "had [the] defendant issued a proper warning," the plaintiff "would have altered his behavior and the injury would have been avoided." *Demmler v. SmithKline Beecham Corp.*, 671 A.2d 1151, 1155 (Pa. Super. 1996) (citation omitted). Causation is "*not* presumed." *Id.* (emphasis added).

The trial court nonetheless "instructed the jury pursuant to SSJI (Civ) §16.50 ... that they must presume that if there were adequate warnings plaintiff would have followed them" (Op. at 10 (Addendum B)). This was error.

This Court has repeatedly held that no "heeding presumption" exists outside of workplace-related warnings. *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005) (per curiam), rejected expansion of such a presumption to consumer products, explaining that "where the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful." *Id.*; *accord Goldstein v. Phillip Morris*, 854 A.2d 585, 587 (Pa. Super. 2004) ("[T]he heeding presumption ... does not apply in the context of this case, which involves the voluntary choice of a smoker to begin and continue smoking

tobacco."). In *Moroney v. General Motors Corp.*, 850 A.2d 629 (Pa. Super. 2004), this Court reiterated that a heeding presumption exists "*only*" in cases "where plaintiffs faced exposure during their employment"—not to cases, like this one, involving personal automobiles. *Id.* at 634 n.3 (emphasis added); *see also Sliker*, 2015 WL 6735548, at *1 ("this is not a case involving workplace exposure to asbestos, [so] the heeding presumption does not apply").

The trial court ignored this Court's controlling precedent and instead relied upon the suggested jury instructions (Op. at 10 (Addendum B)). Once again, "suggested" jury instructions cannot override appellate precedent. "[T]he suggested standard jury instructions have not been adopted by our supreme court and therefore are not binding." *Butler*, 604 A.2d at 273. They "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Commonwealth v. Smith*, 694 A.2d 1086, 1094 n.11 (Pa. 1997). "[A]s their title suggests, the instructions are guides only." *Commonwealth v. Simpson*, 66 A.3d 253, 274 n.24 (Pa. 2013).

Here, the suggested "heeding presumption" instructions are incomplete and obsolete. SSCJI §§16.40–.60 were last revised in January 2003—before this Court made clear in *Viguers*, *Goldstein*, and *Moroney* that a heeding presumption is appropriate only in limited employment-related circumstances. That error alone

requires a new trial. *E.g.*, *Carpinet*, 853 A.2d at 374 (granting new trial where suggested instruction was erroneous).

Second, the trial court compounded its error by further charging the jury that the heeding presumption was *irrebuttable.* The trial court's defense of an irrebuttable presumption—that Honda "presented no evidence to rebut the presumption," and "[t]he only evidence on this issue was Mr. Martinez's testimony that had a warning been given he would have heeded it by not buying the car"—ignores that no presumption existed *ab initio* (Op. at 10 (Addendum B) (citing SSCJI §16.60)).

Further, due process mandates that a defendant have an opportunity "to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)); *accord Harmar Ice Assocs. v. Lignelli*, 686 A.2d 819, 820-21 (Pa. 1996). Rebuttal of a presumption is an essential component of that right. *See Vlandis v. Kline*, 412 U.S. 441, 446 (1973) ("irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments"). Even an ostensibly rebuttable presumption violates due process if, in practice, it "operates to deny a fair opportunity to rebut it." *Id.*; *see also City of Pittsburgh v. WCAB (Robinson)*, 67 A.3d 1194, 1205 (Pa. 2013) (due process requires that a presumption have "some rational connection between the fact proved and the

ultimate fact presumed" so that "the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate"); *Rich Hill Coal Co. v. Bashore*, 7 A.2d 302, 314 (Pa. 1939); *Volk v. UCBR*, 49 A.3d 38, 46-47 (Pa. Commw. 2012) (procedure that "effectively transforms" a "presumption ... into an irrebuttable presumption" violates due process).

Here, the instruction that the jury "*may not* find for the defendant" *even* if it "determin[es] that ... the plaintiff would not have read or heeded [the warnings]" (R. 873-74a (emphases added)), compelled a verdict in Plaintiffs' favor on their warning-defect claim despite the total lack of evidence that they ever possessed the owner's manual in question. Therefore, it precluded Honda from defending itself against this claim and effectively directed a verdict in Plaintiffs' favor in violation of due process.[16]

These errors prejudiced Honda by relieving Plaintiffs from having to prove an essential element of their warning claim. Pennsylvania courts "refuse[] to ignore an incorrect, misleading, or incomplete charge on a matter as fundamental as the burden of proof." *Commonwealth v. Lewis*, 598 A.2d 975, 981 (Pa. 1991) (citation and quotation marks omitted). An "instructional error [that] consists of a misdescription of the burden of proof," is reversible error "which vitiates all the

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[16] *See also* Subcommittee Note to SSCJI §16.50 (4th ed. 2015 Supplement) ("The defendant *must* have an opportunity to [rebut the heeding presumption], because the plaintiff still bears the burden of persuasion as to causation").

jury's findings." *Commonwealth v. Miskovitch*, 64 A.3d 672, 684 (Pa. Super. 2013). In particular, "[a] charge on a weaker burden of proof than that required by law constitutes an error of law that may well control the outcome of the case; therefore, [the Court is] required to reverse and remand for a new trial." *Tudor Ins.*, 697 A.2d at 1017.[17]

It was *Plaintiffs'* burden to establish that Mr. Martinez would have heeded a warning. Had the jury been properly instructed on that burden, it could have found that Plaintiffs failed to meet that burden. As described more fully below (*infra* p. 51), Plaintiffs introduced no evidence that Mr. Martinez ever received, let alone read, the owner's manual when he purchased the used 1999 Integra.

B. Honda Is Entitled Judgment N.O.V. On Plaintiffs' Warning Defect Claim.

Alternatively, Honda is entitled to judgment notwithstanding the verdict on Plaintiffs' warning-defect claim.[18]

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[17] *Accord, e.g., Slavin*, 84 A.2d at 318 (new trial where plaintiff relieved of burden); *Heasley v. Carter Lumber*, 843 A.2d 1274, 1277 (Pa. Super. 2004) (new trial where burden set too high); *Jeter v. Owens-Corning Fiberglas Corp.*, 716 A.2d 633, 638 (Pa. Super. 1998) (same).

[18] At appropriate times, Honda moved for compulsory nonsuit and then directed verdict on Plaintiffs' warning-defect claim, which the trial court denied (R. 575-82a, 586a, 780-81a).

1. Plaintiffs Could Not Have Established Causation Without The Trial Court's Erroneous Heeding Presumption.

Assuming *arguendo* that Honda had a duty to warn about the open and obvious risk of injury from rollover accidents and did not satisfy it, Plaintiffs failed utterly to prove that any inadequate warning caused Mr. Martinez's injury: Absent imposition of a non-existent presumption, no reasonable jury could have found for Plaintiffs on this essential element.

The burden of establishing causation in a warning defect case always rests with the plaintiff, who "must further establish proximate causation by showing that had defendant issued a proper warning to the [actor], he would have altered his behavior and the injury would have been avoided." *Cochran v. Wyeth, Inc.*, 3 A.3d 673, 676 (Pa. Super. 2010) (citation and quotation marks omitted); *see also Staymates v. ITT Holub Indus.*, 527 A.2d 140, 147 (Pa. Super. 1987). "In the event that a warning is inadequate, proximate cause is not presumed." *Demmler*, 671 A.2d at 1155.

"To prove *possibility* [of causation] or to leave the issue to surmise or conjecture is never sufficient to sustain a verdict." *Farnese v. SEPTA*, 487 A.2d 887, 889 (Pa. Super. 1985) (emphasis added). Rather, the plaintiff must "demonstrate[] that the user of the product would have avoided the risk had he or she been warned of it by the seller/manufacturer." *Weiner*, 718 A.2d at 310 (citation omitted). In other words, "where the theory of liability is failure to warn

adequately, the evidence must be such as to support *a reasonable inference, rather than a guess*, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury." *Staymates*, 527 A.2d at 147 (emphasis added).

In automotive cases, courts regularly enter defense verdicts when plaintiffs fail to establish that inadequate warnings caused their injuries. In *Moroney*, for example, the Court affirmed judgment against a warning claim where the plaintiff offered no evidence that she paid attention to the automotive locks at issue or that warnings about them would have reduced her risk of injury. 850 A.2d at 634. Summary judgment was likewise affirmed in *Weiner*, in part because the plaintiff "admittedly never read or consulted" his owner's manual. 718 A.2d at 310.[19] In a factually indistinguishable case, a warning claim arising out of a car accident was dismissed because the plaintiff did not read the "owner's manual [that] came with the vehicle," and therefore "any purported absence of a warning in the owner's manual was not a substantial factor in bringing about the injury." *Reis v. Volvo Cars of N. Am., Inc.*, 901 N.Y.S.2d 10, 13 (N.Y. App. Div. 2010), *rev'd in part on*

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[19] *See also Conti v. Ford Motor Co.*, 743 F.2d 195, 198-99 (3d Cir. 1984) (entering judgment notwithstanding the verdict under Pennsylvania law for defendant because plaintiff introduced no evidence that a "reminder" sticker "may have made a difference"); *Lynn v. Yamaha Golf-Car Co.*, 894 F. Supp. 2d 606, 640 (W.D. Pa. 2012) (granting summary judgment where plaintiffs produced no competent evidence that more or different information would have prevented injuries sustained while riding in golf cart).

other grounds, 18 N.E.3d 383 (N.Y. 2014). Any argument regarding placement of a warning label was "speculation" in light of the fact that plaintiff's expert never "even explain[ed] where such a warning label should have been." *Id.*[20]

These authorities are fatal to Plaintiffs' claim. Here, Plaintiffs offered no evidence to support "a reasonable inference, rather than a guess," that any alleged inadequate warning caused Mr. Martinez's injuries. *Staymates*, 527 A.2d at 147. Mr. Martinez briefly testified, over Honda's objection, about what he might have done differently in response to a hypothetical warning of an unspecified nature:

> Q. Mr. Martinez, had there been warnings about this car not being able to protect you in a rollover, would you have bought this car?
>
> MR. CONROY: Same objection, Your Honor.
>
> THE COURT: That objection is overruled. He may answer the question.
>
> THE WITNESS: No.

(R. 564-65a; *see generally* R. 562-65a (colloquy concerning speculative nature of questioning)). This testimony was: (1) speculative and lacking foundation; (2) the product of counsel's leading question; (3) self-serving; and (4) unsupported by the location, content, or placement of any hypothetical "rollover" warning. Allowing such a question was error. *Commonwealth v. A.D.B.*, 752 A.2d 438, 444 (Pa.

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[20] *See also Hankins v. Ford Motor Co.*, 2011 WL 6291947, at *5 (S.D. Miss. Dec. 15, 2011) ("a manufacturer is not liable for allegedly inadequate warnings in an owner's manual when the plaintiff has not read the manual" because causation is not proven).

Commw. 2000) (overruling objection reversible error where question "put words improperly into the mouth of [counsel's] own witness" and was thus leading and lacked foundation).

Even crediting this inadmissible testimony, Plaintiffs failed to establish causation. Plaintiffs nowhere introduced any evidence that Mr. Martinez even received an owner's manual with the vehicle, let alone that he ever made any effort to review it. In 2010, Plaintiffs purchased a used 1999 Integra from somebody named Hernandez—without mention of any owner's manual (R. 561-62a). Out of the jury's hearing, Plaintiffs' counsel later admitted that "Mr. Martinez was never given an owner's manual" (R. 743a).[21] *A fortiori*, there was no basis for the jury to conclude that Mr. Martinez ever saw, read, or disregarded the specific warning that Honda did give about the limitations of his car's seat belt system.

If the trial court had not erroneously instructed the jury to presume causation irrebuttably, *see supra* pp. 42-47, the jury could not have made a reasonable, evidence-based judgment that Mr. Martinez's injury was caused by the owner's manual lacking a hypothetical warning of an unspecified nature. At best, any

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[21] Counsel's argument that "if somebody else had read the owner's manual, [then a warning] could have come from them" (R. 743a), is precisely the sort of "guess" and speculation insufficient to establish causation under Pennsylvania law. *Staymates*, 527 A.2d at 147. "[I]t is well settled in the law that attorneys' statements or questions at trial are not evidence." *Commonwealth v. LaCava*, 666 A.2d 221, 231 (Pa. 1995).

verdict by a properly instructed jury would have been an impermissible "guess[]." Judgment in favor of Honda on Plaintiffs' warning-defect claim was required.

2. Honda's Warning Was Adequate As A Matter of Law.

Furthermore, Honda's warnings in the owner's manual were adequate as a matter of law, particularly the warning that "seat belts cannot completely protect you in every crash" (R. 1047a (1999 Acura Integra Owner's Manual, at 8)). Several other warnings in the manual likewise remind readers that seat belts do not eliminate the risk of serious injury. It states that "in *most* cases, seat belts can *reduce* your risk of serious injury," indicating that seat belts do not eliminate risk in all cases. The manual also provides that seat belts "help[]" protect occupants from being "thrown in the inside of the vehicle," reflecting that risks persist even with proper seat belt use (R. 295-96a).

Where, as here, the manufacturer has provided a sufficient warning, a warning-defect claim must "fail[] as a matter of law." *Mackowick v. Westinghouse Elec. Corp.*, 575 A.2d 100, 103 (Pa. 1990); *see also Robinson v. Delta Int'l Mach. Corp.*, 274 F.R.D. 518, 523 (E.D. Pa. 2011) (warning-defect claim failed as a matter of law because manufacturer included a warning in owner's manual).

Plaintiffs bore the burden of proving that Honda's warnings were inadequate. No witness for Plaintiffs even discussed Honda's warning that "seat belts cannot completely protect you in every crash," let alone opined that it was

insufficient. On this record, judgment must be entered for Honda. *See Lynn*, 894 F. Supp. 2d at 639-41 (granting summary judgment against warning claim where defendant warned that "death or severe personal injury can result from failure to follow [safe-use] instructions"; none of plaintiff's experts "testified about the adequacy of the ... warnings"; and plaintiff "ma[d]e no demonstration beyond the pleadings that the ... warnings were either inadequate or altogether lacking").

IV. The Excessive Damages Award Violates Pennsylvania Law And Due Process.

A. The "Compensatory" Damages Award Was Excessive Under Pennsylvania Law.

The record-breaking $55 million verdict here is grossly excessive in light of the evidence.[22] A new trial is appropriate "[w]here the jury's verdict is so contrary to the evidence as to shock one's sense of justice." *Kiser v. Schulte*, 648 A.2d 1, 4 (Pa. 1994) (internal citation omitted); *see also Foley v. Clark Equip. Co.*, 523 A.2d 379, 394-95 (Pa. Super. 1987) ($15 million verdict excessive in double amputation case), *disapproved on other grounds by Majdic v. Cincinnati Mach. Co.*, 537 A.2d 334, 339 (Pa. Super. 1988) (en banc); *Tuski v. Ivyland Café, Ltd.*, 2004 WL 4962363, at *24 (Pa. Ct. Com. Pl. Phila. Cty. Dec. 22, 2004) ($50 million

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[22] *See* June 27, 2014 Press Release, "Jury Awards $55.3 Million for a Defective Seatbelt in a Honda Vehicle," *available at* http://www.marketwatch.com/story/jury-awards-553-million-for-a-defective-seatbelt-in-a-honda-vehicle-2014-06-27?reflink=MW_news_stmp.

compensatory damages award excessive in auto accident that rendered plaintiff quadriplegic).

Here, the jury's award of $55,325,714 in "compensatory" damages included approximately $15 million in economic damages and $40 million in non-economic damages.[23] This award bears no relation to Plaintiffs' actual harm, and far exceeds other awards in similar Pennsylvania cases. Because it is "out of line with experience" and "offensive to our sense of justice," a new trial is warranted. *See Haines v. Raven Arms*, 26 Pa. D. & C.4th 268, 272 (Pa. Ct. Com. Pl. Phila. Cty. 1994).

B. The Jury's Verdict Amounted To An Improper Award Of Punitive Damages In Violation Of Honda's Due Process Rights.

Honda is also entitled to a new trial because the jury's verdict is an improper attempt to punish Honda in violation of due process.

Plaintiffs' counsel repeatedly invited the jury to penalize Honda (R. 844a ("Is that what we want to tell our corporations ...?")). Counsel also asked the jury to send a message to Honda and tarred it with misconduct by other car manufacturers (R. 844-45a, 794-95a).

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[23] The $40 million noneconomic damages award included $25 million in noneconomic damages for Mr. Martinez and $15 million in loss of consortium damages for Mrs. Martinez (R. 911-12a). Loss of consortium is considered "non-economic detriment." *Pirches v. Gen. Acc. Ins. Co.*, 511 A.2d 1349, 1355 (Pa. Super. 1986).

Such requests to "punish[] or warn[] ... the defendant" "appeal[] to the prejudices of the jury and invit[e] [it] to find a verdict upon false grounds." *Brown v. Cent. Pa. Traction Co.*, 85 A. 362, 363 (Pa. 1912). Apparently it worked here: When the court asked the foreman whether the jurors had "agreed on the verdict," the foreman pronounced Honda "*guilty*" (R. 910a (emphasis added)). The excessive overall award and "disproportionate" noneconomic component is another "clear indication that the jury was punitive in its award of compensatory damages." *Tuski*, 2004 WL 4962363, at *24.

Such an award "may violate the Due Process Clause even if it is not labeled 'punitive.'" *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004); *see also Commonwealth v. Kline*, 695 A.2d 872, 874-75 (Pa. Super. 1997) "labels ... are not of paramount importance"); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

C. Honda Is Entitled To Remittitur.

The trial court ignored all of the foregoing constitutional violations. Instead, in two paragraphs, the court simply denied Honda's request for remittitur, because the evidence purportedly was "compelling" that Plaintiffs' "lives were changed drastically and irrevocably" by the accident, and "both plaintiffs will suffer extensive damages" (Op. at 11 (Addendum B)). This too was error. The verdict was a product of passion, prejudice, and sympathy, and amounted to an award of

punitive damages in violation of Pennsylvania law and due process. At minimum, this Court should grant remittitur and substantially reduce the excessive verdict that pronounced Honda "guilty" (R. 910-12a).

Remittitur is proper when it is apparent that "the jury has returned a verdict excessive in amount and clearly beyond what the evidence warrants." *Murray v. Phila. Asbestos Corp.*, 640 A.2d 446, 450 (Pa. Super. 1994) (citation and quotation marks omitted).

Honda is entitled to remittitur for each of the reasons set forth above. No larger personal injury verdict in the history of Pennsylvania has withstood excessiveness arguments in any reported case. The verdict of $55,325,714 is not reasonable compensation for Plaintiffs' injuries, and the evidence during trial fails to support this excessive verdict. The noneconomic component—$40 million, or more than 70 percent of the total—"was disproportionate in comparison to the economic damages sought, a clear indication that the jury was punitive in its award of compensatory damages." *Tuski*, 2004 WL 4962363, at *24.

In *Foley*, 523 A.2d 379, this Court offered a formula against which excessiveness claims should be judged:

> Were [we not reversing on other grounds], we would find that the $15,000,000 verdict was excessive. *If invested at the legal rate, the amount of the verdict would produce an annual income of $900,000. This exceeded by far the plaintiff's earning capacity*, and although appellant sustained serious and incapacitating injuries, the record does not support this grossly excessive verdict.

Id. at 394-95 (emphasis added).

The "legal rate" is 6%. 42 Pa.C.S.A. §8101; 41 Pa. Stat. §202. Putting aside special damages, interest at the "legal rate" on just the $40 million non-economic component of this verdict is $2.4 million per year. As in *Foley*, just the annual interest on the noneconomic damages dwarfs Mr. Martinez's total *lifetime* earning capacity, which the jury found to be $720,321 (R. 912a). The lack of evidentiary support for—and punitive nature of—this plainly excessive verdict requires its reduction. *See Mancini v. Morrow*, 458 A.2d 192, 586 (Pa. Super. 1983); *Tuski*, 2004 WL 4962363, at *24.

V. Any New Trial Should Be Transferred to York County.

The trial court also erroneously denied Honda's motion to transfer venue from Philadelphia County (where Plaintiffs filed suit) to York County (where Plaintiffs reside) (Addendum D).

A transfer of venue is warranted when the plaintiff's chosen forum is "oppressive or vexatious." *Zappala v. Brandolini Prop. Mgmt.*, 909 A.2d, 1272, 1283 (Pa. 2006). A defendant may show that the plaintiff's chosen forum is "oppressive by establishing that a trial in another county would provide easier access to witnesses, to other evidence, or to the ability to view the site of the automobile accident." *Mateu v. Stout*, 819 A.2d 563, 565 (Pa. Super. 2003). Transfer of venue is thus appropriate when trial in another county would be more

convenient to the witnesses and the parties, and where adjudication in plaintiff's chosen forum would be onerous and impose undue hardship. *Id.* at 567; *Hartman v. Corp. Jet., Inc.*, 60 Pa. D.&C. 4th 431, 438 (Pa. Ct. Com. Pl. Phila. Cty. 2001); Pa. R. Civ. P. 1006(d)(1).

Philadelphia was not a proper forum. Plaintiffs reside in York County, less than one mile from the York County Courthouse (R. 1098a). The accident's sole eyewitness also lives in York. Plaintiffs purchased the vehicle and had it serviced in York. The accident occurred in Howard County, Maryland, at least 125 miles from Philadelphia, but 60 miles or less from York. Except for physicians in Baltimore (approximately 52 miles from York and 100 miles from Philadelphia), all damages witnesses are located in York. *See Stoner v. Penn Kleen, Inc.*, 59 A.3d 612, 615 (Pa. Super. 2012) (inconvenience justified transfer where Philadelphia was "200 roundtrip miles" with tolls, while the alternative forum "would involve only 31 to 75 miles' travel" without tolls); *Dulaney v. Consol. Rail Corp.*, 715 A.2d 1217, 1218-19 (Pa. Super. 1998) (trial in Philadelphia County concerning an out-of-state accident held oppressive where no witnesses or medical providers were Philadelphia residents).

The trial court nonetheless concluded that "Honda failed 'to establish on the record that trial in the chosen forum [would be] oppressive,'" because "Honda merely established the inconvenience of Plaintiffs' chosen forum" (Op. at 3

(Addendum B) (quoting *Cheeseman v. Lethal Exterminator*, 701 A.2d 156, 162 (Pa. 1997))).[24] As the Supreme Court later explained in *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014), while "[m]ere inconvenience [is] insufficient, ... there is no burden to show near-draconian consequences." *Id.* at 10. "As between Philadelphia and adjoining Bucks County, the situation in *Cheeseman*, we speak of mere inconvenience; as between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror and we near oppressiveness with every milepost of the turnpike and Schuylkill Expressway." *Id.* The trial court's search for such "near-draconian consequences" was error under the newer *Bratic* standard; thus, its order denying Honda's motion to transfer venue was in error. Any new trial of this case should therefore occur in York County.

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[24] The trial court also found that "Honda failed to demonstrate that Plaintiffs' chosen forum was designed to harass or inconvenience it and thereby failed to satisfy the burden to demonstrate vexation" (Op. at 3 (Addendum B)). But vexation is merely an *alternative* ground justifying transfer, *Zappala*, 909 A.2d at 1283—not a "burden" every movant must carry.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be reversed.

Dated: March 28, 2016

Respectfully submitted,

s/William J. Conroy

Theodore J. Boutros, Jr. (PHV)
Theane Evangelis (PHV)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel: (213) 229-7000
Fax: (213) 229-7520

William J. Conroy (36433)
Katherine A: Wang (204158)
CAMPBELL, CAMPBELL, EDWARDS & CONROY, P.C.
1205 Westlakes Drive
Suite 330
Berwyn, PA 19312
Tel: (610) 964-1900
Fax: (610) 964-1981

James M. Beck (#37137)
David J. Bird (#92424)
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103-2762
Tel: (215) 851-8100
Fax: (215) 851-1420

Counsel for Appellant American Honda Motor Co., Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant American Honda Motor Co., Inc. contains 13,702 words, excluding the supplementary matter excluded by Pennsylvania Rule of Appellate Procedure 2135(b).

s/William J. Conroy
William J. Conroy

PROOF OF SERVICE

I hereby certify that on March 28, 2016, two copies of the foregoing Definitive Brief Pursuant To Pa. R.A.P. 2154(b) for Appellant American Honda Motor Co, Inc. were delivered by first-class, United States mail, postage prepaid, with a copy served via electronic mail, to:

STEWART J. EISENBERG
DANIEL J. SHERRY, JR.
EISENBERG ROTHWEILER WINKLER
EISENBERG & JECK, P.C.
1624 SPRUCE STREET
PHILADELPHIA, PA 19103

Attorneys for Plaintiffs-Appellees

HOWARD J. BASHMAN
LAW OFFICES OF HOWARD
J. BASHMAN
2300 COMPUTER AVENUE,
SUITE G-22
WILLOW GROVE, PA 19090

CLIFFORD A. RIEDERS
PAMELA L. SHIPMAN
RIEDERS, TRAVIS, HUMPHREY, WATERS &
DOHRMANN
161 WEST THIRD STREET
WILLIAMSPORT, PA 17701

Attorneys for Amicus Curiae
Pennsylvania Association for Justice

Christopher Scott D'Angelo
Patrick T. Ryan
Montgomery, McCracken,
Walker & Rhoads, LLP
123 S. Broad Street
Philadelphia, PA 19109

Counsel for Amicus Curiae
Product Liability Advisory Counsel

s/William J. Conroy
William J. Conroy

ADDENDUM A

CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.
William J. Conroy, Esquire
Tiffany M. Alexander, Esquire
Katherine A. Wang, Esquire
Emily J. Rogers, Esquire
Identification Nos.: 36433/88681/204158/309033
1205 Westlakes Drive
Suite 330
Berwyn PA 19312
(610) 964-1900

REED SMITH LLP
James M. Beck, Esquire
David J. Bird, Esquire
Identification Nos.: 37137/92424
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
(215) 851-8100

GIBSON, DUNN & CRUTHCHER LLP
Theodore J Boutrous, Jr. (*Pro Hac Vice*)
Theane Evangelis (*Pro Hac Vice*)
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Counsel for Defendant, American Honda Motor Co., Inc.

CARLOS MARTINEZ AND ROSITA DE LOS SANTOS DE MARTINEZ, H/W Plaintiffs v. AMERICAN HONDA MOTOR CO., INC., Defendant	COURT OF COMMON PLEAS PHILADELPHIA COUNTY DECEMBER TERM, 2011 NO.: 03763

DEFENDANT/APPELLANT AMERICAN HONDA MOTOR CO., INC.'S CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL PURSUANT TO PA. R.A.P. 1925(B)

Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) and this Court's Order of February 6, 2015, Defendant/Appellant American Honda Motor Co., Inc. ("Honda") submits this Concise Statement of Errors Complained Of On Appeal. Because the Court's Order entered on January 21, 2015 contained no reasoning or explanation, Honda cannot readily discern the basis for the Court's denial of Honda's post-trial motions. Accordingly, pursuant to Pa. R.A.P. 1925(b)(4)(vi), this Statement identifies the errors only in general terms.

I. ERRORS RESULTING IN DENIAL OF JUDGMENT N.O.V.

1. **Design**: Judgment n.o.v. was erroneously denied because Plaintiffs failed to introduce any evidence, as Pennsylvania law requires, that the vehicle-mounted seat-belt design Honda used in the 1999 Acura Integra was defectively designed when taking into account all circumstances of its foreseeable use.

2. **Design**: Judgment n.o.v. was erroneously denied because Plaintiffs failed to introduce any evidence, as Pennsylvania law requires, that their proposed "Sicher Design" alternative all-belts-to-seat ("ABTS") seat-belt system was safer, considering all the product's foreseeable uses, than the seat-belt design actually incorporated into the 1999 Acura Integra.

3. **Design**: Judgment n.o.v. was erroneously denied because Plaintiffs' proposed "Sicher Design" alternative could not have been lawfully sold and was based on assumptions contrary to the facts in evidence, having been tested solely with lap belts pre-tensioned to over three times the maximum allowed by the applicable Federal Motor Vehicle Safety Standard ("FMVSS").

4. **Design**: Judgment n.o.v. was erroneously denied because Plaintiffs failed to introduce any evidence, as Pennsylvania law requires, that the failure to use a legal alternative design enhanced the injuries suffered by Plaintiff Carlos Martinez.

5. **Design**: Judgment n.o.v. was erroneously denied because Plaintiffs' design claims were preempted, both by the choice of seat-belt design options established in Federal Motor Vehicle Safety Standard ("FMVSS") 208, and by the illegality of Plaintiffs' alternative design under FMVSS 209.

6. **Warning**: Judgment n.o.v. was erroneously denied because Plaintiffs failed to introduce any evidence, as Pennsylvania law requires, that Plaintiff Carlos Martinez ever saw or possessed the owner's manual that would have contained any warning, and therefore Plaintiffs had no evidence that any alleged failure to warn caused Mr. Martinez's injuries.

7. **Warning**: Judgment n.o.v. was erroneously denied because the risk of serious injury from rollover accidents was open and obvious so that Honda had no duty to warn under Pennsylvania law, Honda adequately warned that "[s]eat belts cannot completely protect you in every crash," and Plaintiffs offered no evidence that Honda's warning was inadequate, nor what an alternative warning should have been.

8. **Consortium**: Judgment n.o.v. was erroneously denied because the loss of consortium claim asserted by Plaintiff Rosita de los Santos de Martinez is derivative, and all of Plaintiff Carlos Martinez's claims failed as a matter of law.

II. ERRORS RESULTING IN DENIAL OF A NEW TRIAL

9. **Warning**: A new trial was erroneously denied because the jury was improperly charged on an irrebuttable heeding presumption with respect to warning claims pertaining to a personal automobile.

10. **Warning**: A new trial was erroneously denied because the heeding presumption jury instruction, as applied in this case, was illogical, arbitrary, irrebuttable, and therefore an unconstitutional infringement of due process.

11. **Design**: A new trial was erroneously denied because the jury was not charged at all on the second element of the crashworthiness cause of action and was improperly charged on the third element.

12. **Design**: A new trial was erroneously denied because it was improper to admit evidence of an ABTS design in a different Honda model from 2007 when the product in question was manufactured in 1999, and Honda had conceded feasibility.

13. **Design**: A new trial was erroneously denied because it was improper to admit testimony concerning the dissimilar inversion testing performed by Plaintiff's design expert, Larry Sicher.

14. **Design**: A new trial was erroneously denied because it was improper to limit the testimony of Honda's design expert, Eddie Cooper, about Honda's compliance, and Mr. Sicher's non-compliance, with FMVSS and industry standards.

15. **All Claims**: A new trial was erroneously denied because it was improper to admit insufficiently certain opinion and demonstrative testimony from two treating physicians who never submitted expert reports, and their opinions were not expressed contemporaneously with their treatment.

16. **All Claims**: A new trial was erroneously denied because the $55 million verdict in this case was excessive under Pennsylvania state law standards.

17. **All Claims**: A new trial was erroneously denied because the $55 million verdict in this case was excessive as a matter of due process under the United States Constitution, both because the verdict was punitive and Honda lacked fair notice.

18. **All Claims**: A new trial was erroneously denied because the $55 million verdict in this case was excessive under the Commerce Clause of the United States Constitution.

19. **Consortium**: A new trial was erroneously denied because the loss of consortium claim asserted by Plaintiff Rosita de los Santos de Martinez is derivative, and all of Plaintiff Carlos Martinez's claims require a new trial.

III. ERRORS RESULTING FROM SUBSEQUENTLY-DECIDED AUTHORITY

20. **All Claims**: A new trial was erroneously denied because the jury was improperly charged with the now-overruled Azzarello "any element" and "guarantor" defect instruction, the defect instruction as given did not include the concept of "unreasonably dangerous," and Plaintiffs emphasized that instruction in their closing. See Azzarello v. Black Brothers Co., 391 A.2d 1020 (Pa. 1978), overruled, Tincher v. Omega Flex, Inc., 104 A.3d 328, 365, 371-72, 376, 379-80 (Pa. 2014).

21. **Design**: A new trial was erroneously denied because this crashworthiness case, involving a proposed alternative design and allegedly knowable risks, is a "typical" product liability claim concerning Honda's "conduct," which bears the "indicia of negligence." Tincher v. Omega Flex, Inc., 104 A.3d 328, 405 (Pa. 2014). Therefore, it was error to exclude evidence and argument concerning Honda's compliance with FMVSS.

22. **Design**: A new trial was erroneously denied because this crashworthiness case, involving a proposed alternative design and allegedly knowable risks, is a "typical" product liability claim concerning Honda's "conduct," which bears the "indicia of negligence." Therefore, it was error to exclude evidence and argument concerning Honda's compliance with industry standards.

23. **Warning**: A new trial was erroneously denied because this crashworthiness case, involving a proposed alternative design and allegedly knowable risks, is a "typical" product

liability claim concerning Honda's "conduct," which bears the "indicia of negligence." Therefore no heeding presumption is appropriate.[1]

24. **All Claims**: Venue should have been transferred to York County, and the erroneous denial of Honda's venue motion employed unduly strict standards since overruled by the Pennsylvania Supreme Court. See Bratic v. Rubendall, 99 A.3d 1, 7-10 (Pa. 2014).

IV. MISCELLANEOUS ERRORS

25. The court erred in denying Honda any remittitur of the excessive $55 million verdict.

Respectfully submitted,

Campbell Campbell Edwards & Conroy, P.C.

By: /s/ William J. Conroy
William J. Conroy, Esquire
Tiffany M. Alexander, Esquire
Emily J. Rogers, Esquire
Katherine A. Wang, Esquire

Attorneys for Defendant/Appellant,
American Honda Motor Co., Inc.

Date: February 24, 2015

[1] The heeding presumption has never been adopted by the Pennsylvania Supreme Court. Pursuant to Schmidt v. Boardman Co., 11 A.3d 924, 941-42 (Pa. 2011), Honda again gives notice that should this appeal reach that court, it will also argue that no such presumption should ever exist.

CERTIFICATE OF SERVICE

I, William J. Conroy, Esquire, hereby certify that I caused a true and correct copy of the foregoing, Defendant/Appellant American Honda Motor Co., Inc.'s Concise Statement of Errors Complained of on Appeal Pursuant to Pa. R.A.P. 1925(B) to be filed this date via Electronic Filing through the First Judicial District of Pennsylvania, Court of Common Pleas, Philadelphia County, and served on all counsel through electronic filing via Philadelphia's Electronic Filing website and hand delivery:

Plaintiffs' Counsel
Stewart J. Eisenberg, Esquire
Daniel J. Sherry, Jr., Esquire
Eisenberg Rothweiler Winkler Eisenberg & Jeck, P.C.
1634 Spruce Street
Philadelphia PA 19103

Howard J. Bashman, Esquire
Law Offices of Howard J. Bashman
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090

I further certify that I caused a true and correct copy of the foregoing, Defendant/Appellant American Honda Motor Co., Inc.'s Concise Statement of Errors Complained of on Appeal Pursuant to Pa. R.A.P. 1925(B) to be hand delivered to the trial judge:

The Honorable Shelley Robins New
City Hall, Room 673
Philadelphia, PA. , 19107

/s/ William J. Conroy
William J. Conroy, Esquire
Attorney for Defendant/Appellant,
American Honda Motor Co., Inc.

Dated: February 24, 2015

ADDENDUM B

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CARLOS MARTINEZ AND ROSITA DE LOS SANTOS de MARTINEZ, h/w v. AMERICAN HONDA MOTOR CO., INC	DECEMBER TERM, 2011 No. 03763

OPINION

Defendant, Honda Motor Co., Ltd. (hereafter Honda), appeals from this Court's judgment following a jury trial in this crashworthiness and defective design matter. For the reasons set forth below, the order entering judgment for the Plaintiffs, Carlos Martinez and Rosita De Los Santos de Martinez (hereafter Plaintiffs), should be affirmed.

PROCEDURAL HISTORY

On May 1, 2010, Carlos Martinez was driving a 1999 Acura Integra, manufactured by Honda, when he lost control of the vehicle. His car left the roadway and rolled over twice. He sustained serious injuries from the accident that rendered him a quadriplegic. Plaintiffs timely brought suit against Honda for damages as a result of the accident. In their claim against Honda, Plaintiffs alleged the seatbelt in Carlos Martinez's vehicle was defectively designed.

The matter was tried before a jury from June 17, 2014 to June 26, 2014. The jury returned a verdict against Honda, finding Honda negligent under two independent theories. First, the jury found that the design of the seatbelt in Carlos Martinez's car was defective and there was an alternative, safer, practicable design. The jury also determined the subject vehicle was defective because of Honda's failure to warn. The jury also found both the

defective design and Honda's failure to warn were factual causes of Carlos Martinez's injuries. As a result, the jury awarded Plaintiffs $14,605,393.00 in future medical expenses, $720,321.00 in past and future lost earnings and earnings capacity, $25 million in past and future non-economic damages, and $15 million in loss of consortium, totaling an award of $55,325,714.00. Following the jury's verdict and denial of post-verdict motions, this Court entered judgment in favor of Plaintiffs in accordance with the jury's allocation of damages.

LEGAL ANALYSIS

In its Statement pursuant to Pa.R.A.P. 1925(b), Honda raises twenty five (25) claims, broken down into four categories: (1) Claims concerning the denial of the Judgment N.O.V; (2) General claims of trial error; (3) Claims concerning alleged subsequently decided authority and; (4) A claim concerning the denial of its request for remittitur. As some of the legal issues raised by Honda are raised multiple times in more than one of its four categories, and under alternative theories, we will not follow Honda's categorization of the issues. Instead, we will address the issues in a chronological order as they occurred during the course of the litigation.

In a challenge to a pretrial ruling, Honda claims that venue in Philadelphia County was inappropriate. Alternatively, Honda argued that Philadelphia was an inconvenient forum and venue should be transferred from Philadelphia County to York County. We note that when Honda filed its Motion on May 30, 2014, the case had been in suit for two years and was ready for trial. The motion was denied.

Upon review of that decision, which was made prior to the assignment of the case to this Court for trial, we take note of Pa. R.C.P. 1006 and 2179, which set forth the relevant

rules concerning venue in this case. As Honda maintains a registered office and regularly conducts business in Philadelphia, venue in Philadelphia was proper.

Honda sought transfer from Philadelphia County to York County, contending that venue in Philadelphia would be oppressive or vexatious. However, Honda failed to demonstrate that Plaintiffs' chosen forum was designed to harass or inconvenience it and thereby failed to satisfy the burden to demonstrate vexation. Similarly, Honda failed "to establish on the record that trial in the chosen forum [would be] oppressive" and thereby failed to show that Plaintiffs' chosen venue was oppressive. *Cheeseman v. Lethal Exterminator*, 701 A.2d 156, 162 (Pa. 1997). Ultimately, Honda merely established the inconvenience of Plaintiffs' chosen forum. Inconvenience alone, however, is not enough to warrant a transfer of venue. *Id.*

In light of Honda's failure to demonstrate more than mere inconvenience of venue in Philadelphia the Court properly denied Hondas Motion to Transfer Venue and gave appropriate deference to "Plaintiff[s'] choice of forum, [which] is entitled to weighty consideration and should not be disturbed lightly." *Zappala v. Brandolini Prop. Mgmt.*, 909 A.2d 1272, 1281 (Pa. 2006), *accord*, *Bratic v. Rubendall*, 99 A.3d 1, 6 (Pa. 2014).

An appellate court reviews the trial court's ruling on a motion to transfer purely to ensure that an abuse of discretion did not occur. *Bratic*, 99 A.3d at 7.

> In this regard, the trial court's ruling must be reasonable in light of the peculiar facts. If there exists any proper basis for the trial court's decision to [or not to] transfer venue, the decision must stand. An abuse of discretion is not merely an error of judgment, but occurs only where the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence o[f] the record.

Id.

Finding no reason that the case could not be tried fairly and impartially in Philadelphia County, giving necessary deference to the Plaintiffs chosen forum, and weighing the considerations of both Honda and the Plaintiffs, the court exercised its discretion reasonably and retained the case. Accordingly, no relief is due concerning this claim.

Next, Honda under a number of alternative theories, challenging both the Court's decision to deny the JNOV and claiming certain trial errors, alleges that Plaintiffs failed to sustain its burden of proving with relevant and admissible evidence that the seat belts were defectively designed and that there was an alternative, safer, practicable design. Contrary to Honda's claim, the evidence presented at trial was properly introduced and was sufficient to prove each of these elements and no errors occurred in the presentation of that evidence.

In summary, plaintiffs' theory of the case was that the seat belt utilized in Mr. Martinez's vehicle was designed to allow his head to move an unreasonable distance which caused his head to strike the roof of the car during a low speed rollover type crash, causing his injuries. Plaintiff also alleged that an all-belts-to seat ("ABTS") seatbelt system, if utilized in this car, would have prevented Mr. Martinez's injuries.

In challenging the admissibility of the ABTS evidence, Honda claimed the proposed seat belt was designed after the manufacture of the subject vehicle, but prior to the date of the accident should have been precluded from trial. Hondas' claim rests on the assertion that such evidence demonstrated subsequent remedial measures that unduly prejudiced the jury.

First, the evidence demonstrated this all-belts to seat (ABST) design was not

technology originated subsequent to 1999, but had been used from at least 1992. However, to the extent that this technology postdated the design of the instant vehicle, it still was admissible.

As with the Honda's Motion to Transfer Venue, it is within the discretion of this Court to determine the admission or exclusion of evidence. *Blumer v. Ford Motor Co.*, 20 A.3d 1222, 1226 (Pa. Super. 2011). "The admissibility of evidence is a matter addressed to the sound discretion of the trial court and should not be overturned absent and abuse of discretion." *Educ. Res. Inst., Inc. v. Cole*, 827 A.2d 493, 499 (Pa. Super. 2003).

Examination of Pennsylvania's Rules of Evidence sheds a clarifying light onto this Court's decision to admit the evidence at issue. All relevant evidence is admissible. Pa.R.E. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequent in determining the action." Pa.R.E. 401.

> A crashworthiness claim requires proof of three elements. First, the plaintiff must prove that the design of the vehicle was defective, and that at the time of design an alternative, safer, and practicable design existed that could have been incorporated instead. Id. Second, the plaintiff must identify those injuries he or she would have received if the alternative design had instead been used. Id. Third, the plaintiff must demonstrate what injuries were attributable to the defective design.

Gaudio v. Ford Motor Co., 976 A.2d 524, 532 (Pa. Super. 2009).

Hence, in order to demonstrate their claim, Plaintiffs were required to put forth evidence such as that which Honda contests. The evidence at issue, seat belt(s) designed after the manufacture of the 1999 Acura Integra driven by Carlos Martinez but before the date of the accident from which this case arises, was submitted by Plaintiffs to demonstrate that an alternative, practicable seat belt design existed.

However, Honda claimed that such evidence was inadmissible because it was demonstrative of subsequent remedial measure(s) which would cause unfair prejudice or mislead the jury, in violation of Pa.R.E. 403. *See, Commonwealth v. Walker*, 92 A.3d 766, 791 (Pa. 2014). Importantly though, the Court may admit evidence of subsequent remedial measures for the purpose of proving "ownership, control, or the feasibility of precautionary measures," if disputed. Pa.R.E. 407.

In *Blumer*, a case involving an alleged design defect in a truck's parking brake, the Superior Court of Pennsylvania affirmed the admission of evidence of design changes made to the parking brake.

> If the evidence of other accidents is *substantially similar* to the accident at issue in a particular case, then that evidence will assist the trier of fact by making the existence of a fact in dispute more or less probable, and the greater the degree of similarity the more relevant the evidence

Blumer v. Ford Motor Co., 20 A.3d at 1229. (emphasis added)

This Court properly determined the evidence at issue was admissible due to its relevancy. This case centered around a crashworthiness and design defect claim; evidence of alternative, practicable seat belts are obviously relevant. Additionally, this Court recognized that such evidence was not demonstrative of subsequent remedial measures because,

> [c]hanges in design that are devised prior to the accident at issue are not barred as subsequent remedial measures . . . [m]easures that are predetermined before a particular accident occurs are not 'remedial measures' under Pa.R.E. 407 because the measures are not intended to address the particular accident that gave rise to the harm.

Id. at 1228.

Even if Honda could circumvent the definitional barrier that prevented Plaintiff's' evidence from being classified as "subsequent remedial measures," such evidence would

still be admissible under Pa.R.E. 407 in order to prove the "feasibility of precautionary measures," as it was in *Blumer v. Ford Motor Co.*

Finally, a recently decided case in the Superior Court of Pennsylvania supports this Court's decision to admit Plaintiff's evidence in the instant issue. In *Parr v. Ford Motor Co.*, 109 A.3d 682 (Pa. Super. Ct. 2014) the plaintiff alleged "the vehicle's roof and restraint system were defectively designed." The court granted defendant's motion to preclude evidence of a post-manufacture regulatory standard that was irrelevant to the plaintiff's claim regarding the roof defect and based on a lack of substantial similarity.

Unlike in *Parr*, the theory of injury was not disputed in this case. Rather, the existence of a defect was the focus of dispute. Plaintiffs sufficiently demonstrated to this Court that evidence of seat belts designed after the manufacture of the subject vehicle but prior to the accident was substantially similar to the case at hand, thus admissible.

For the preceding reasons, this Court did not err in admitting evidence of post-manufacture design and design changes at trial. No relief is warranted.

Next, Honda claims the evidence was insufficient to support the verdict. Reviewing the evidence in the light most favorable to Plaintiffs as verdict winners, we note Plaintiff's primary expert on the issue of the defectively designed seat belt was Larry Sicher. In summary the witness testified the three point seat belt utilized in the instant Integra provided no meaningful protection in a rollover crash, as it allowed the head to rise more than eight inches. Moreover, Honda was aware of this fact as early as 1992. The ATBS system, if utilized would have allowed the head to move less than four inches. Dr. Brian Benda, a biomechanical engineer testified that had the ATBS system been in this car, Mr. Martinez would not have sustained the spinal cord injuries that resulted in his paralysis.

Plaintiff also presented evidence, primarily through Mr. Sicher and Mr. Martinez concerning Honda's failure to warn Plaintiffs about the seat belt's lack of protection in a rollover crash. Additional evidence was introduced on the issue of damages, both economic and non-economic.

Honda denied each of these relevant facts and presented expert witnesses in support of its theory of the case. It was for the fact finder to resolve these disputed issues and Honda has presented no reason to disturb those findings.

Honda also raises specific challenges to many of this Court's evidentiary rulings. First, Honda claimed that Federal Vehicle Safety Standards 207 and 208 concerning seat belt design preempted plaintiffs' claims. In denying Honda's claim we followed the decision of the United States Supreme Court in *Williamson v. Mazda Motor of America, Inc.* 131 S.Ct. (2011), which held that although the federal regulations provided manufacturers with choices between seat belt designs, victims may still raise state court claims of defective design based upon a manufacturer's decision to install an allegedly less safe design.

Next, Honda raises challenges to the Court's rulings concerning the admissibility of portions of the testimony of Mr. Martinez's treating physicians, Dr. Sansur and Dr. Boscak. We note that prior to trial, this Court considered extensive *motions in limine* filed by both sides. Among those motions were challenges to the testimony of both doctors. The issues were extensively briefed and argued. The Court reviewed the deposition transcripts of both doctors line by line. Certain portions of each deposition were admissible and certain portions were inadmissible. We have again reviewed our rulings and find nothing improper with them and our decisions. Each Doctor's testimony was limited to

issues within their scope of expertise and to issues concerning their treatment of Mr. Martinez. We expressed our reasoning on the record. See N.T. 6/18/14, 4-5. Our rulings were legally correct and were a proper exercise of our discretion.

Honda also claims this court improperly limited the testimony of its design expert Eddie Cooper. We have reviewed Mr. Cooper's testimony and find no improper limitation of his testimony. He rebutted Mr. Sicher's claims and provided his explanations for his conclusions. He demonstrated through the use of photographs of other cars his opinion that the ABTS system also would have permitted the head to come in contact with the roof. The fact that the jury chose to give greater weight to the opinions of plaintiffs' expert raises no appellate issue.

Next, Honda raises challenges to the jury instructions in this case. Specifically Honda challenges this Court's instructions on the "second collision/enhanced injury" as well as the "heeding presumption." We have reviewed the jury instructions and find no error in those instructions.

This case involved two collisions. The first occurred when the car left the road and turned over. Mr. Martinez sustained some injuries during that collision. However, the catastrophic injuries occurred during the second collision, when Mr. Martinez's head came in contact with the roof and the roof came in contact with the ground. It was for those enhanced injuries during the second collision that plaintiff sought redress. Both our charge to the jury and the verdict sheet instructed the jury that they could find liability against Honda only if (1) the seatbelt system was defective and (2) the defect caused injuries solely when the roof of the vehicle struck the ground. The instructions were in accordance with the facts of the case, the standard instructions and the law. Honda's reliance upon *Colville*

v. Crown Equipment Corp, 809 A.2d. 916 (Pa. Superior 2002) is misplaced. First, we do not believe our charge is inconsistent with the limited holding of that case. Second, that case was decided before the current standard instructions were adopted. Third, that case did not involve a failure to warn claim.

Next, Honda claims error in our "heeding presumption" instruction on the issue of failure to warn. Specifically, the issue concerns whether plaintiff would have heeded warnings, if they were given. Based upon the evidence introduced in this case, this Court instructed the jury pursuant to Pa.SSJI (Civ) §16.50, which instructed the jury that they must presume that if there were adequate warnings plaintiff would have followed them. Honda claims error because the Court did not charge pursuant to Pa.SSJI (Civ) §16.60. That instruction, as the subcommittee noted, is appropriate when the defendant has presented evidence rebutting the heading presumption. The Court did not give the requested instruction because Honda presented no evidence to rebut the presumption. The only evidence on this issue was Mr. Martinez's testimony that had a warning been given he would have heeded it by not buying the car. See N.T. 6/20/14, 47-48. Our decision was proper and accordingly, no relief is due.

Next, Honda challenges this Court's decision to deny its request for remittitur. It has been held repeatedly that the decision to grant or deny remittitur is within the trial court's discretion and should only be granted when the award so shocks one's sense of justice, such that the jury must have been influenced by partiality, prejudice, mistake or corruption. See e.g. *Renna v. Schadt*, 64 A.2d. 658, 671 (Pa. Superior 2013). Large verdicts are not inherently excessive. In deciding whether the verdict is excessive the court should consider, *inter alia*, (1) the severity of the injury; (2) whether the plaintiff's injury

is manifested by objective physical evidence or whether it is only revealed by the subjective testimony of the plaintiff (... where the injury is manifested by broken bones, disfigurement, loss of consciousness, or other objective evidence, the courts have counted this in favor of sustaining a verdict); (3) whether the injury will affect the plaintiff permanently; (4) whether the plaintiff can continue with his or her employment; (5) the size of the plaintiff's out-of-pocket expenses; and (6) the amount plaintiff demanded in the original complaint. *Gbur v. Golio,* 932 A.2d 203, 212 (Pa.Superior.2007), *affirmed,* 600 Pa. 57, 963 A.2d 443 (2009).

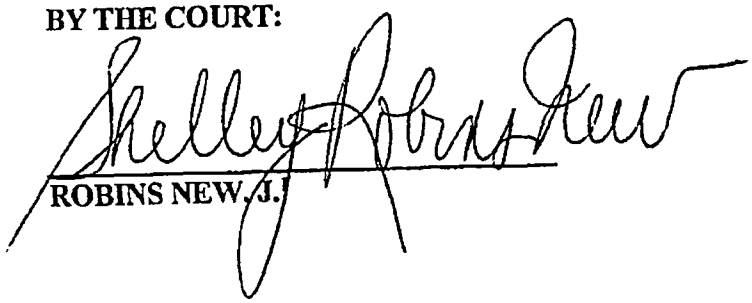
Instantly, Mr. Martinez was rendered a paraplegic. The jury credited plaintiffs' evidence that his future care would cost $14,605,393 and his lost earnings amounted to the sum of $720,321. The verdict for non-economic damages and loss of consortium was consistent with the facts and testimony presented in court. We did not believe it appropriate for us to disturb the jury's finding. The evidence, from the family in this case was compelling how the accident turned Mr. Martinez from a family wage earner and head of the household into a helpless person dependent upon others for every aspect of his daily survival. Every part of both plaintiff's lives were changed drastically and irrevocably. As Mr. Martinez had a life expectancy of an additional twenty-eight (28) years, both plaintiffs will suffer extensive damages. Accordingly, in the exercise of our discretion, based upon the evidence we did not believe the verdict should have been disturbed.

Finally, Honda believes that our Supreme Court's November 19, 2014 decision in *Tincher v. Omega Flex, Inc*, 104 A.3d. 328 (Pa. 2014) rendered four (4) months after the instant trial compels a new trial. When Tincher was decided, this Court read every word of the one hundred thirty-seven (137) page slip opinion. We did not believe then and do

not believe now that Tincher requires a new trial in the instant case. The Supreme Court's primary holding was its rejection of the Restatement (Third) of Torts in products cases. We do not believe that Tincher mandated any change in any legal or evidentiary ruling made by this Court in the instant matter. Moreover, even if Tincher changed the law of the case concerning defective design, it did not concern the failure to warn. As the jury found an independent basis of liability based upon failure to warn, if this Court erred, such error would be harmless.

WHEREFORE, for the reasons stated above, the Order entering judgment should be affirmed.

BY THE COURT:



ROBINS NEW, J.

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[1] The Court wishes to acknowledge the assistance of our intern, Amanda Capaldi, a law student at Temple University, Beasley School of Law, with the research and writing of this opinion.

IN THE COURT OF COMMON PLEAS OF PHILADLEPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

CARLOS MARTINEZ AND ROSITA DE LOS SANTOS DE MARTINEZ, H/W Plaintiffs V. AMERICAN HONDA MOTOR CO., INC. Defendant	:	DECEMBER TERM, 2011 NO: 03763

ORDER

AND NOW this 21 day of January, 2015, after consideration of the pleadings and oral argument, and after review of the record and the law it is hereby **ORDERED** and **DECREED** that the post verdict motions are **DENIED**. Judgment is entered in favor of Plaintiffs and against Defendant in the amount of $57,391,716. This sum represents the jury verdict of $55, 325, 714 plus delay damages in the amount of $2,066, 002. As a matter of law, the jury's award of damages for loss of consortium is not subject to delay damages. See Anchorstar v. Mack Trucks, Inc., 620 A.2d. 1120 (Pa. 1993). As the instant Order encompasses delay damages, Plaintiff's separate Motion for Delay Damages (Control No. 14070364 is **DENIED** as moot.

BY THE COURT:

ROBINS NEW, J.

DOCKETED

JAN 21 2015

R. POSTELL
DAY FORWARD

Case ID: 111203763
Control No: 14071113

ADDENDUM C

Carlos Martinez and Rosita De Los Santos de Martinez, h/w Plaintiffs Honda Motor Co., Ltd. Defendant	COURT OF COMMON PLEAS PHILADELPHIA COUNTY DECEMBER TERM, 2011 No: 3763 **CONTROL NO. 14060098**

ORDER

AND NOW, this 13 day of June, 2014, upon consideration of Defendant's Motion in Limine to "Apply the Restatement (Third) of Torts: Products Liability to Plaintiffs' Claims and to Admit Evidence of Industry Standards", and Plaintiffs' Response thereto, it is hereby ORDERED and DECREED that Defendant's Motion is DENIED.

BY THE COURT:

J.

Martinez Etal Vs Honda -ORDER

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ADDENDUM D

Carlos Martinez and Rosita De Los Santos de Martinez, h/w Plaintiffs v. Honda Motor Co., Ltd., et al Defendants	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY DECEMBER TERM, 2011 No: 3763 **CONTROL NO. 13112672**

ORDER

AND NOW, this 30th day of December, 2013, upon consideration of Defendant Honda Motor Co., Ltd.'s Motion to Transfer Pursuant to *Forum Non Conveniens*, and Plaintiffs' Response in Opposition thereto, it is hereby ORDERED and DECREED that Defendant's Motion is DENIED.

BY THE COURT:

Lisa M. Rau, J.