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

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INTRODUCTION

This case was tried under the now-repudiated approach to products-liability law from *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), rather than the approach the Supreme Court mandated last year in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). The trial court gave the standard *Azzarello* instruction, telling the jury that Honda was liable if the 1999 Integra lacked "every element necessary to make it safe." The court did *not* charge the jury under *Tincher*, which "*requires proof* … either of the ordinary consumer's expectations or of the risk-utility of a product." *Id.* at 401 (emphasis added). It did *not* instruct the jury on the risk-utility factors outlined in *Tincher*. Nor did Plaintiffs offer *any* evidence of what the "average or ordinary consumer" would expect under the consumer-expectations test. *Id.* at 387. Not surprisingly, neither party mentioned the risk-utility or consumer-expectation tests to the jury at closing.

Plaintiffs nonetheless dispute that a new trial is necessary, arguing they somehow *prevailed* on both risk-utility *and* consumer-expectations at trial. They did not—the jury was never asked to find for Plaintiffs under either test. Plaintiffs point to crashworthiness requiring proof of "an alternative, safer, practicable design." But that goes at most to *one* risk-utility factor, and it ignores that Honda was denied a risk-utility jury charge and prevented from fully defending itself with

evidence that the utility of the Integra's seatbelt design outweighed any alleged risks, as *Tincher* required.

These errors were highly prejudicial. Plaintiffs did not claim any malfunction of the Integra's seatbelt, but rather that its vehicle-mounted design (found in 98% of all vehicles) is defective. Only after being erroneously instructed that Honda was a "guarantor" of safety could a jury find Honda liable for this state-of-the-art product design. At minimum, these errors require a new trial.

Plaintiffs' arguments confirm that their design-defect claim also fails on other grounds. They do not dispute the jury charge's omission of the second crashworthiness element—what injuries Mr. Martinez would have received with an alternative seatbelt design—nor do they address recent precedent confirming the three crashworthiness elements, including *Parr v. Ford Motor Co.*, 109 A.3d 682 (Pa. Super. 2014) (en banc), *allocatur denied*, 123 A.3d 331 (Pa. 2015). Moreover, Plaintiffs' alternative design was illegal under federal law because it utilized 5.5 pounds of pretension. They respond that the owner's manual instructed passengers to pull their belts "snug." But that advice does not override the regulation and permit a seatbelt *designed* with unlawful pretension. Because Plaintiffs' alternative design could not be lawfully sold, their design-defect claim fails as a matter of law.

Plaintiffs' warning-defect claim likewise fails. Plaintiffs could not have proved causation if the trial court had not erroneously charged the jury with an irrebuttable "heeding presumption." This improper instruction entitles Honda to a new trial; Plaintiffs' failure to establish causation entitles Honda to judgment n.o.v.

The jury's record-breaking damages award is excessive and punitive in any event, and the new trial to which Honda is entitled should be held in York County.[1]

ARGUMENT

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

A. The Charge Omitted Essential Elements—"Unreasonably Dangerous" Defect And The Entire Risk-Utility Test.

Because this case proceeded under the repudiated *Azzarello* framework, the trial court never asked the jury whether the Integra was "unreasonably dangerous"—whether its product-design risks outweighed its benefits such that Honda could be strictly liable for any resulting harm. Under *Tincher*, this was error and requires a new trial, because Plaintiffs were relieved of their burden of proving critical elements of their claims. Each of Plaintiffs' arguments why they

[1] Treating each *Tincher*-related error in isolation, Plaintiffs insinuate that Honda appeals too many issues. Appellees' Brief ("AB") at 13. This case bears no resemblance to the pro se *Commonwealth v. Ellis*, 626 A.2d 1137 (Pa. 1993), decision. *Nigro v. Remington Arms Co.*, is more apposite—a product liability case finding "meritorious claims in each of [appellant's eleven] allegations of error." 637 A.2d 983, 988 (Pa. Super. 1993).

did not have or somehow carried that burden, notwithstanding the lack of a jury charge, fails.

First, Plaintiffs are wrong that *Tincher* "did not affect crashworthiness cases." AB18. *Tincher* reiterated that strict liability applies to "any product":

> No product is expressly exempt [from §402A] and, as a result, the presumption is that strict liability may be available with respect to any product, provided that the evidence is sufficient to prove a defect. *See* [*Id.* comment b] (cause of action in strict liability "cover[s] the sale of ***any product*** which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property").

104 A.3d at 382 (emphasis original). Indeed, *Tincher* relied more heavily on a crashworthiness case, *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994), than on any other precedent. 104 A.3d at 391-93. This Court has rejected a crashworthiness exception to strict liability in any event. *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 534 (Pa. Super. 2009).

Second, Plaintiffs contend the jury found the Integra "unreasonably dangerous" under the new *Tincher* framework because it decided the Integra was "defective." AB16 (arguing that "unreasonably dangerous" is "equivalent" to "defective"). That is incorrect; otherwise there would have been no need to overrule *Azzarello*. *Tincher* carefully analyzed and highlighted the material differences between the *Azzarello* "defect" inquiry and the comprehensive "unreasonably dangerous" inquiry Pennsylvania law now requires. 104 A.2d at 386-408. Before *Tincher*, juries decided merely whether a product was defective

because it lacked "every element necessary to make it safe." *Id.* at 406 ("The jury would … simply resolve any 'dispute as to the condition of a product'"). After *Tincher*, however, juries must "balance … interests respecting what is socially or economically desirable" for a product. *Id.* at 386. Accordingly, juries must consider not only the consumer's "interest in the safe continued use of a product," but also "the sales price of the product" and the manufacturer's "economic interests … in providing new or innovative products." *Id.* at 385-86. The "unreasonably dangerous" inquiry is thus a "normative" one that imposes a critical "limitation[]" on a manufacturer's liability. *Id.* at 400, 405.

Illustrating the broad scope of the jury's inquiry, *Tincher* pointed to the seven-factor risk-utility test used in "multiple jurisdictions":

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of

> the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 389-90.[2]

Plaintiffs claim they effectively prevailed under this risk-utility framework by offering evidence at trial "permit[ting] the jury to consider the total use and utility of [their] proposed alternative design to make the 1999 Integra's seatbelt safe." AB20-21. But evidence cannot cure an erroneous charge. The trial court *never instructed* the jury on any risk-utility framework. Honda's multi-factor risk-utility instruction (R. 932a) was *rejected*. Even assuming Plaintiffs offered "sufficient" risk-utility evidence, the jury was not told how to evaluate it properly. "[T]he jury must be afforded an opportunity to make a finding, and we will not presume which facts will be accepted by the jury." *Nelson v. Airco Welders Supply*, 107 A.3d 146, 160 (Pa. Super. 2014) (en banc).

Plaintiffs argue otherwise based on a single phrase from the jury charge—"was there an alternative, safer, practicable design available[?]" AB17 (quoting R. 871a). At most that language addresses one of seven risk-utility factors. No case

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[2] Pennsylvania courts instructed juries on these seven risk-utility considerations before being prohibited under *Azzarello*. *See Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134, 136-37 (Pa. Super. 1987).

has held that the crashworthiness inquiry into "practical" alternative designs satisfies even part of a risk-utility analysis.[3]

Plaintiffs also argue that, because *Tincher* established no "rigid" jury charge, the trial court did not need to use the words "unreasonably dangerous." 104 A.3d at 408. The wording may be flexible, but *Tincher* leaves no doubt that the jury must be charged on the unreasonably dangerous *inquiry* as the benchmark for design defect. *Id.* at 406-08. "[W]hen 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 of the product." *Id.* at 407. Because the trial court failed "to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict," it relieved Plaintiffs of the burden of proving an unreasonably dangerous product. *Id.* at 408.

Third, Plaintiffs argue that the trial court in *Cancelleri v. Ford Motor Co.*, 2015 WL 263476 (Pa. C.P. Lackawanna Co. Jan. 9, 2015), *aff'd mem.*, No. 267 MDA 2015 (Pa. Super. Jan. 7, 2016), approved "the same sort of crashworthiness

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[3] Plaintiffs similarly argue that they prevailed on a crashworthiness claim that is "more stringent than a mere … design defect claim." AB19. This argument is a red herring. A jury does not reach the "more stringent" crashworthiness elements unless first finding that the product is defective. *See Parr*, 109 A.3d at 689 (stating crashworthiness elements, beginning with "pro[of] that the design of the vehicle was defective"). *Tincher* radically altered that initial defect inquiry.

charge that the trial court delivered here." AB18. Nothing could be further from the truth. The *Cancelleri* charge included *precisely the multi-factorial risk-utility analysis that is absent here*:

> With regard to alternative designs, keep in mind that the total use and utility that such designs would have on the project. In considering whether the alternative design or designs proposed by the Cancelleris are necessary ... you must consider whether those alternative designs would have increased or decreased the usefulness of the product, increased or decreased the overall safety of the product, and increased or decreased any other benefit provided by the product, including such benefits such as production, price of costs, product longevity and durability, ease and costs of maintenance and repair, esthetics and convenience and ease of use.

Cancelleri Reproduced Record, 267 MDA 2015, at 1651a.[4]

Fourth, Plaintiffs urge the Court to ignore the risk-utility test because they supposedly satisfied the alternative "consumer expectations" test. AB21-24. That test is inapplicable because "the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards." *Tincher*, 104 A.3d at 388 (quoting *Soule*, 882 P.2d at 308). Since Honda's initial brief, another California appellate court reached the same result. *Kim v. Toyota Motor Corp.*, 197 Cal. Rptr. 3d 647, 670-71 (Cal. App. 2016) ("consumer expectations test was inapplicable" to "complex" automotive component). In any event, the trial court *never instructed the jury on a*

[4] This Court may judicially notice items in its own or other courts' dockets. *E.g.*, *Commonwealth v. Bond*, 532 A.2d 339, 343 (Pa. 1987).

consumer expectations test. Honda had no reason to proffer evidence whether the alleged danger was "unknowable and unacceptable to the average or ordinary consumer." 104 A.3d at 387. Neither did Plaintiffs, who (at most) introduced the subjective expectations of a *single* consumer. AB21. Plaintiffs clearly could not have prevailed on a strict-liability theory never even posed to the jury.

The instructions here erased the pivotal "unreasonably dangerous" limitation that *Tincher* restored to the heart of §402A. The instructions omitted the equally critical risk-utility calculus that carries that limitation into effect. Those same instructions cannot now be retroactively repurposed to include what they left out. The verdict must be reversed for this reason alone.

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

Apart from its failure to discuss the controlling composite tests, the jury charge also included the "formulaic" *Azzarello* instructions rejected by *Tincher* (R. 872a (manufacturer is a "guarantor" of the product and liable if it lacks "every element necessary to make it safe")). Plaintiffs, joined by *amicus* Pennsylvania Association for Justice ("PAJ"), seize on *Tincher*'s remanding, rather than reversing, a jury charge using this language to argue "harmless" error. AB25; PAJ Brief ("PAJB") at 16-17. But if the *Azzarello* "guarantor"/"any element" instruction were proper, *Tincher* would not have required any remand. And even if

an *Azzarello* instruction "tailored to the facts of the case" might avoid a new trial (PAJB17), the instruction given here was not "tailored."

In this case, "guarantor" was not defined, any more than in *Azzarello*. (*Compare* 391 A.2d at 1027 n.12, *with* R. 871a). Nor was the "any element" test given any more "context." The only substantive difference between *Azzarello*'s overruled language and what this jury heard is eight additional words—"and there was an alternative, safer, practicable design" (R. 872a). Those eight words address none of the infirmities *Tincher* identified. Nor did Plaintiffs' counsel stress that language in closing argument. Instead, they repeatedly exploited the *Azzarello* charge:

- "[T]he first thing you have to decide" is "did Honda design this [product] with every element to make it safe?"
- "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."
- "The manufacturer … is a guarantor of its safety."
- "This Acura Integra did not have every element to make it safe."

(R. 791a, 792a, 842a).

The prejudice to Honda was manifest. The "every element" test falls far short of the more demanding, comprehensive risk-utility standard mandated by *Tincher*. Where a closing argument "exploits an erroneous instruction, we cannot

minimize the underlying error"—rather, "counsel's argument effectively magnified the error," and "we cannot deem the court's error harmless." *Passarello v. Grumbine*, 87 A.3d 285, 306-07 (Pa. 2014) (adopting Superior Court analysis).

C. Exclusion Of Compliance With Federal And Industry Standards Requires A New Trial.

Tincher's risk-utility test "analyze[s] *post hoc* whether a manufacturer's conduct in manufacturing or designing a product was reasonable." 104 A.3d at 389. *Tincher* expressly recognized "conduct of the manufacturer," "reasonableness," and other "indicia of negligence" as "inseparable" under §402A. *Id.* at 405. This focus on conduct, in turn, makes evidence of regulatory compliance admissible. "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).[5]

Indeed, *amicus* PLAC provides the Court with precedent from 17 states holding industry standards and/or regulatory compliance admissible in strict liability cases following legal standards similar to *Tincher*. PLAC Brief at 27-30.

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[5] *Barker v. Lull Engineering Co.*, heavily relied on in *Tincher*, is pertinent: "[M]ost of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the 'risk-benefit' standard … are similar to issues typically presented in a negligent design case." 573 P.2d 443, 455 (Cal. 1978).

Plaintiffs cite *no* contrary law, and PAJ cites a 1982 New Jersey decision no longer reflecting that state's law.[6] An annually updated treatise—Morton F. Daller, *Product Liability Desk Reference* (Wolters Kluwer 2015)—lists only Montana (and pre-*Tincher* Pennsylvania) as generally excluding compliance with governmental and industry standards from strict liability actions.

Adhering to this national legal consensus would permit Honda to present evidence to the jury establishing that the Integra complied with every applicable Federal Motor Vehicle Safety Standard, and that, for 25 years, all other manufacturers have used the same vehicle-mounted seatbelt design in nearly every vehicle sold. Excluding this evidence was highly prejudicial. Plaintiffs' core trial theme was that Honda *knew* its design was unsafe. *See, e.g.*, AB5, 21. Yet Plaintiffs' alternative design was itself illegal. Appellant's Opening Brief ("AOB") at 10-13. Honda should have been permitted to respond that: (1) the Integra's vehicle-mounted seatbelt design was *not* unsafe, given its compliance with every applicable regulatory and industry standard, and (2) its design, unlike Plaintiffs' alternative, complied with federal regulations.

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[6] *See Feldman v. Lederle Labs.*, 479 A.2d 374, 387-88 (N.J. 1984) (limiting *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982), "to the circumstances giving rise to its holding"); N.J.S.A. §2A:58C-3a(1) (statutory state-of-the-art defense); *Kendall v. Hoffman-La Roche, Inc.*, 36 A.3d 541, 554 (N.J. 2012) (regulatory compliance is "compelling, although not absolute, evidence").

Plaintiffs and PAJ claim that exclusion is required under *Lewis v. Coffing Hoist*, 528 A.2d 590 (Pa. 1987). AB28-29; PAJB23-26. They are incorrect for several reasons. First, *Tincher* expressly left open how evidentiary issues, like admissibility of regulatory compliance and industry standards, should be decided under its new strict liability standard. 104 A.3d at 410. Second, *Lewis* was firmly rooted in *Azzarello*, which *Tincher* overruled. *See Lewis*, 529 A.2d at 594 (holding that "'industry standards' go to the negligence concept of reasonable care," and "under our decision in *Azzarello* such a concept has no place").[7] Third, since the liability standards have now shifted, evidentiary rulings should shift with them.[8] Admission of this evidence is in keeping with *Tincher*.

As in *Tincher*, the "interests of justice," 104 A.3d at 376, were not served by preventing Honda from defending itself with evidence of compliance with applicable standards, and reversal and retrial are warranted.

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[7] Plaintiffs contend that *Lewis* "comes not from *Azzarello* but from the express language of 402A." AB26. This is false. California and Illinois, cited in *Tincher*, 104 A.3d at 390, for their similar "composite" defect tests, both admit compliance evidence. *Barker*, 573 P.2d at 457-58; *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 335 (Ill. 2008). *See also, e.g.*, *Adams v. Genie Industries, Inc.*, 929 N.E.2d 380, 385 (N.Y. 2010); *Doyle v. Volkswagenwerk Aktiengesellschaft*, 481 S.E.2d 518, 521 (Ga. 1997); *Wagner v. Clark Equipment Co.*, 700 A.2d 38, 50 (Conn. 1997).

[8] Before *Lewis*, this evidence was routinely admitted in strict liability trials. *E.g.*, *Jackson v. Spagnola*, 503 A.2d 944, 948-49 (Pa. Super. 1986); *Brogley v. Chambersburg Engineering Co.*, 452 A.2d 743, 745-46 (Pa. Super. 1982).

D. *Tincher*-Related Errors Also Require Reversal Of The Warning-Defect Verdict.

As Honda explained, the trial court's *Azzarello*-based instructions infected both Plaintiffs' design-defect and warning-defect claims. AOB27-29. Honda knows of no precedent anywhere applying §402A's "unreasonably dangerous" requirement to design-defect but not warning-defect claims, and Plaintiffs cite none. Nonetheless, the issue will be decided by the Pennsylvania Supreme Court, which has granted an appeal on whether *Tincher*'s "unreasonably dangerous" ruling applies in warning-defect cases. *Amato/Vinciguerra v. Bell & Gossett, Clark-Reliance Corp.*, Nos. 4-5 EAP 2016 (Pa. Feb. 1, 2016).

Plaintiffs' waiver argument (AB31-32) is meritless. First, Honda moved against Plaintiffs' "claims" generally in preserving "unreasonably dangerous" issues *in limine*, and neither Plaintiffs' opposition nor the trial court's order excluded warning claims.[9] Second, since Plaintiffs never raised and the trial court did not find waiver, their waiver argument is waived. By "respond[ing] … on the merits and fail[ing] to argue waiver," Plaintiffs "waived any waiver argument on [their] own behalf." *Hart v. Arnold*, 884 A.2d 316, 336 n.5 (Pa. Super. 2005);

[9] (*See* R. 1606-29a (Honda's Motion *in Limine* to Apply Restatement (Third) of Torts: Products Liability to Plaintiffs' Claims and to Admit Evidence of Industry Customs and Standards); R. 630-38 (Pls.' Opposition to Honda's MIL); AOB Addendum C (Order denying Honda's MIL)).

accord In re Price, 573 A.2d 263, 265 (Pa. Commw. 1990) ("Appellee waived the issue of Appellant's failure to raise … the issue").

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.

Honda is entitled to a new trial because the jury was never asked to decide "what injuries, if any, [Mr. Martinez] would have received had the alternative safer design been used"—an essential crashworthiness element. *Colville v. Crown Equipment Corp.*, 809 A.2d 916, 923 (Pa. Super. 2002); AOB29-34. Indeed, twice Plaintiffs conceded below that they had "to prove what injuries [Mr. Martinez] would have suffered with the alternative feasible design…. *There's no doubt about it*" (R. 1000-01a (emphasis added); *see also* R.894-96a). Yet the jury charge was silent on this element. The court instructed the jury that Plaintiffs had to prove a safer, alternative design, but not what injuries would have resulted from their alternative design, as *Colville* requires.

Plaintiffs ask the Court to ignore this element of crashworthiness because *Colville* was a "forklift case decided more than a decade [ago]." AB33. Over and over, since *Colville*, courts have required plaintiffs bringing crashworthiness claims to prove what injuries they would have sustained with their alternative designs. *See, e.g., Pa. Dept. of Gen. Servs. v. U.S. Mineral Prods. Co.*, 898 A.2d

590, 602 (Pa. 2006); *Parr*, 109 A.3d at 689; *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532 (Pa. Super. 2009); *Raskin v. Ford Motor Co.*, 837 A.2d 518, 524-25 (Pa. Super. 2003).

Plaintiffs ignore this controlling precedent and instead distinguish between "first" and "second" collisions. AB34-36. *Colville* rejected this very argument—*regardless* of there being one or two collisions, a plaintiff must prove all three crashworthiness elements. 809 A.2d at 924. That the trial court told the jury to "focus solely on the second collision" (AB34) is irrelevant, because the instructions and verdict form omitted what injuries Mr. Martinez would have suffered with the alternative design.

Colville also rejected Plaintiffs' argument that the three crashworthiness elements do not apply because this was an "all or nothing" case. AB35-36 (arguing that "if Martinez did not strike his head on the roof, he would not have received his injuries"). Even under a theory that a plaintiff "would not have received any injuries in the absence of a defect," plaintiff remains "required" to prove "what injuries, *if any*, the plaintiff would have received had the alternative safer design been used." *Colville*, 809 A.2d at 924 (emphasis original).

Plaintiffs incorrectly assert that the trial court "gave the Suggested Standard Civil Jury Instruction crashworthiness charge (16.70)." AB34. First, no SSCJI accurately states the elements of crashworthiness; the proper "three elements" are

specified in *Colville*, and in *Gaudio* and *Parr*—cases that post-date the drafting of 16.70. Second, 16.70 was edited at Plaintiffs' request. The trial court "revised our standard charges 13.00 and 16.70" (R.785a). It deleted some of 16.70's language (including that Plaintiffs must prove damages "beyond those that were probably caused by the original impact") and added case-specific facts (R. 874-75a). Nowhere did the court charge on the critical crashworthiness elements mandated by *Colville*, *Gaudio*, and *Parr*.

Plaintiffs do not argue that this instructional error was harmless. Nor could they. Rather, they contend that "[t]he jury ultimately believed plaintiffs' experts that the alternative design would have kept Martinez's head off the roof, thereby resulting in the elimination of his injuries." AB36. But since the jury was *never asked* that question, *post hoc* speculation about what "the jury ultimately believed" is improper. *Nelson*, 107 A.3d at 160. Plaintiffs' expert conceded that, without illegal pretension, the alternative design "probably" would *not* have prevented Mr. Martinez's head-to-roof contact. AOB11, 32. Plaintiffs were erroneously relieved of this element of their claim, and such error is *per se* prejudicial and warrants a new trial. AOB34.

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

Plaintiffs did not establish that their alternative design (the "Sicher Design") was feasible. An illegal design, by definition, is not feasible (AOB35-37)—a point Plaintiffs do not dispute. Plaintiffs further do not dispute that a Federal Motor Vehicle Safety Standard prohibits seatbelts with more than 1.5 pounds of retractive force. 49 C.F.R. §571.209 S4.3(j)(6) (1999). Because the Sicher Design included more than 1.5 pounds of pretension, it could not have been lawfully sold, and Plaintiffs' design defect claim fails as a matter of law.

Unable to rely on the design Mr. Sicher actually tested and presented to the jury, Plaintiffs now argue an unmodified Chrysler Sebring seat as their alternative design. AB37. But Mr. Sicher never tested an unmodified Sebring seat. He tested a "prototype system" that was only loosely "based on" the Sebring restraint system.[10]

Mr. Sicher undisputedly added an unlawful amount of pretension to his "prototype" restraint system (R. 348a). Plaintiffs misstate the record in arguing that he "repeatedly testified that he did not alter any tension existing on the Sebring seatbelt system." AB38. Mr. Sicher unambiguously admitted that he "pulled on

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[10] Sicher cut two Sebring seats in half, "cobbled them together," and "changed the seat bottom … to be reflective of a slightly different design" (R. 279a, 343a).

the shoulder belt with five and a half pounds" and never conducted a test without the illegal extra lap belt pretension (R. 347a; *see also* R. 321-22a, 325a). Documents recording Mr. Sicher's seatbelt tests likewise confirm "5.5 lbs tension" (R. 642a).

Plaintiffs respond that the Sicher Design was not unlawful because Mr. Sicher did not modify the physical design, but merely "tested" the seatbelt with 5.5 pounds of pretension. AB37-38. That is a distinction without a difference. However Mr. Sicher added illegal pretension, the restraint system he actually tested could not lawfully be sold.

Nor can Plaintiffs avoid the Sicher Design's clear violation of FMVSS 209 by arguing that Mr. Sicher followed the Integra owner's manual's recommendation that passengers pull the belt "snug." AB38. An owner's manual obviously cannot override a federal standard.[11] Moreover, voluntary "snugging" to individual comfort levels is allowed by FMVSS 209, whereas uniformly compelling passengers to wear belts with 5.5 pounds of pretension is prohibited, for reasons of passenger comfort. 59 Fed. Reg. at 39472.

Plaintiffs misleadingly suggest that Mr. Sicher's test subjects manually snugged their own belts as the owner's manual recommended. AB38. In fact,

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[11] Plaintiffs also rely on the wrong owner's manual. Mr. Sicher used Chrysler Sebring parts and seatbelts but could not recall Chrysler's instructions (R. 342a).

Mr. Sicher used a mechanical device to increase (and then hold) the belt tension (R. 349-51a). As Plaintiffs' biomechanist conceded, this is *not* how actual passengers put on and adjust a seatbelt (R. 445-47a).

Without any legal, and therefore feasible, design, Plaintiffs again raise the invalid argument (*Nelson*, 107 A.3d at 160), that this uninstructed jury "had a sufficient basis in the evidence to find … that Sicher's proposed alternate seatbelt design complied with federal law." AB38. As discussed above, FMVSS compliance was improperly kept from the jury. Moreover, "the meaning of federal regulations is not a question of fact, to be resolved by the jury … [but] a question of law, to be resolved by the court." *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 900-01 (7th Cir. 1994) (verdict reversed; "the district court either should have excluded the testimony or instructed the jury that as a matter of law [the] seat belt assembly complied with the federal requirements").

Here, the seatbelt design Mr. Sicher tested with 5.5 pounds of pretension violated FMVSS 209's 1.5 pound pretension limit. An illegal alternative design is no alternative at all, therefore Honda is entitled to judgment n.o.v. for Plaintiffs' failure to establish an essential element of crashworthiness.

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

Alternatively, if Pennsylvania common law were to permit defect findings predicated on illegal alternative designs, it would be preempted for two dispositive

reasons. First, Plaintiffs' illegal alternative would place Honda in the impossible position of complying with inconsistent standards. AOB37-38. Second, Plaintiffs' claim frustrates a comprehensive federal scheme intended to ensure that manufacturers can select either vehicle-mounted or all-belts-to-seat ("ABTS") restraint systems. AOB39-41.

Regarding the first basis for preemption, Plaintiffs only reprise their invalid argument (AB38) that an uninstructed jury could decide federal compliance—which as just discussed is a question of law, not fact. Illegal alternative design claims are preempted (AOB37-38); *Verna v. U.S. Suzuki Motor Corp.*, 713 F. Supp. 823, 826-27 (E.D. Pa. 1989).

Regarding the second basis, Plaintiffs argue that a "federal agency's deliberate decision to offer manufacturers a choice … is, in and of itself, insufficient to establish federal preemption." AB39-40 (citing *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323 (2011)). While *Williamson* found no preemption on its facts, it reaffirmed preemption where regulatory purpose and history establish that manufacturer choice furthers "significant regulatory objectives." 562 U.S. at 336. Courts following *Williamson* recognize preemption where, as here, this standard is satisfied.[12] Tellingly, Plaintiffs do not even address

[12] *See, e.g., Priester v. Cromer*, 736 S.E.2d 249 (S.C. 2012) (auto-manufacturer choice of window glass was a significant regulatory objective, requiring

the purpose and history of the relevant federal safety standards. *Soliman v. Daimler AG*, 2011 WL 4594313 (E.D.N.Y. Sept. 30, 2011), did, and it correctly found that tort claims (like Plaintiffs' here) that remove a manufacturer's choice between an ABTS and vehicle-mounted restraint frustrate a "significant regulatory objective" and are preempted. *Id.* at *4.

Plaintiffs' extended attack on *Soliman* is unavailing. While *Soliman* is a federal decision, it "should be treated as *persuasive*," particularly where, as here, the same federal regulations and constitutional principles are at issue. *Stone Crushed P'ship v. Jackson*, 908 A.2d 875, 884 n.10 (Pa. 2006) (emphasis added). Likewise, *Soliman*'s detailed analysis alone belies Plaintiffs' assertion that preemption was not "fully litigated." AB41. The district court "performed a de novo review of the [magistrate's] Report," which thoroughly analyzed *Williamson*, applicable FMVSS, and relevant legislative history before ultimately agreeing that the claims were preempted. *Soliman*, 2011 WL 4594313, at *1.

Nor is the preemption ruling in *Soliman dicta*. AB41. *Soliman* found two bases for dismissal, one of which was preemption. *Soliman*, 2011 WL 4594313, at *4 ("this claim is also preempted by federal law"). "[W]here a decision rests on

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preemption); *McDaniel v. Wells Fargo Inv., LLC*, 717 F.3d 668 (9th Cir. 2013) (recognizing preemption because a "significant objective" of the relevant federal regulation was to provide companies flexibility in preventing insider trading).

two or more grounds equally valid, none may be relegated to the inferior status of *obiter dictum*." *Commonwealth v. Reed*, 971 A.2d 1216, 1220 (Pa. 2009).[13]

Finally, Plaintiffs' argument that "under either possible scenario, a seatbelt would be provided with the automobile" (AB42) is specious. The purpose of FMVSS 209 is not merely to ensure that "a seatbelt would be provided with the automobile," but that passengers would actually use them. That is precisely what both *Soliman* and this case are all about. Under FMVSS 209, manufacturer choice promotes seatbelt comfort, and comfort, in turn, is indispensable to the goal of fostering seatbelt comfort and usage. AOB40.[14]

This case focused on Honda's *decision* to use a vehicle-mounted three-point system versus an ABTS system. Plaintiffs argued to the jury that "[i]t was a choice between this system and that system" (R. 797a). They claimed that ABTS systems generally "reduce[]" the "movement of an occupant" better than vehicle-mounted systems (R. 678-80a). Their expert testified that ABTS systems "provide[] better

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[13] Plaintiffs' contention that "[n]o court has found the court's preemption ruling in *Soliman* persuasive" (AB42) shows only the unprecedented nature of their claims. *Soliman* has never been overruled or distinguished, and remains good law.

[14] *Soliman* is thus directly on point—unlike *King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir. 2000) (cited at AB43), a knee-bolster case that preceded both *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *Williamson*. *Geier* established, contrary to Plaintiffs argument (AB44), that the statutory saving clause Plaintiffs raise "does not bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869.

restraint, particularly in the rollover environment," compared to a vehicle-mounted system (R. 278-80a). Plaintiffs chose a frontal attack on Honda's decision to use a vehicle-mounted instead of an ABTS system, and because manufacturer choice is a "significant objective" of the federal safety standards, Plaintiffs' claim is preempted. *Soliman*, 2011 WL 4594313, at *5.[15]

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.

Controlling law—three decisions by this Court, one affirmed by the Supreme Court, and another specifically involving automobiles—establishes that a "heeding presumption" applies *only* in the workplace context. AOB43-44.[16] Plaintiffs fail to cite these cases, let alone distinguish them. They have no valid argument that the trial court's charge is not reversible error. That charge ordered the jury that, if it found Honda's warnings defective, it "may not find for the

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[15] Plaintiffs also cite a few inapposite cases that admittedly "involve no discussion of preemption," and therefore cannot possibly support their preemption arguments. AB46. Moreover, these cases involve completely different defect theories and federal safety standards. *See, e.g.*, *Goodner v. Hyundai Motor Co.*, 650 F.3d 1034 (5th Cir. 2011) (non-preemption evidentiary issues in seat-back case), *Long v. TRW Vehicle Safety Sys.*, 2011 U.S. Dist. Lexis 121766 (D. Ariz. Oct. 20, 2011) (deciding admissibility of expert testimony).

[16] *Citing Goldstein v. Phillip Morris*, 854 A.2d 585, 587 (Pa. Super. 2004); *Moroney v. General Motors Corp.*, 850 A.2d 629, 634 n.3 (Pa. Super. 2004); *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005) (per curiam).

defendant" and "must presume" that an adequate warning would have been heeded (R. 873-74a).

Ignoring this Court's precedent, Plaintiffs cite three federal decisions relying on *Pavlik v. Lane Ltd./Tobacco Exporters International*, 135 F.3d 876, 883 (3d Cir. 1998), which incorrectly "predict[ed] that Pennsylvania would adopt a rebuttable heeding presumption" generally. AB50. Since *Pavlik*, however, "Pennsylvania courts have consistently declined to apply any heeding presumption in … product liability cases, strictly limiting the application of any such presumption to claims arising from *involuntary* workplace exposure to asbestos." *Leffler v. Am. Home Prods.*, 2005 WL 2999712, at *5 (Pa. C.P. Phila. Co. Oct. 20, 2005) (emphasis original). Indeed, only nine pages earlier, Plaintiffs argue that a federal decision like *Pavlik* "is not precedential because it is not a Pennsylvania appellate decision." AB41. They were right the first time. This Court's precedent is controlling, and it plainly precludes a heeding presumption here.[17]

Plaintiffs' reliance on the SSCJI is similarly misplaced. AB47-49. As Honda explained and Plaintiffs cannot dispute, those instructions are non-binding, obsolete, and incomplete. AOB44; *see* AB47-49. These "suggested" instructions

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[17] *Maya v. Johnson & Johnson & McNeil-PPC, Inc.*, 97 A.3d 1203 (Pa. Super. 2014), is inapposite. The jury in *Maya* did not receive any heeding presumption at all—indeed, this Court rejected an argument that "the trial court erred *by failing* to give a heeding presumption." *Id.* at 1218 (emphasis added). *Maya* is the opposite of this case.

were last revised before this Court's controlling precedent was handed down beginning in 2003. As such, the SSCJI do not accurately reflect current Pennsylvania law, and relying on them was error. *Carpinet v. Mitchell*, 853 A.2d 366, 374 (Pa. Super. 2004).

Nonetheless, Plaintiffs argue the heeding presumption was justified because Honda did not "introduce any evidence" that Mr. Martinez would not have heeded a warning. AB51. Nothing so powerfully demonstrates the correctness of this Court's limitation of the heeding presumption as the evidence in this case. The *only* evidence Plaintiffs introduced to establish causation was Mr. Martinez's answer to an objected-to, leading question that he would "not have bought the car" had he received some warning about rollover injuries (R. 562-65a). They offered no evidence that Mr. Martinez ever possessed, let alone read, the Acura owner's manual—indeed, they conceded outside the jury's hearing that he had not. AOB14.

This paltry showing did not require "rebuttal"; it required the jury to perform its most basic function—determining the credibility of Mr. Martinez's statement. But the irrebuttable heeding presumption charge forbade the jury to disbelieve Mr. Martinez. The jury was told that it "must presume" Mr. Martinez's heeding of any "adequate" warning, and that it "may not find for the defendant" on the ground that he "would not have read or heeded" such a warning (R. 873-74, 897a).

Plaintiffs' use of a heeding presumption to nullify the jury's essential role in this case demonstrates that this Court's precedents limiting the heeding presumption to workplace injuries not only are the law, but *should be* the law. Because courts must order a new trial where a party is improperly relieved of its burden of proof (AOB46-47), Honda should receive a new trial here.

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

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

But for the improper "heeding presumption," no reasonable jury could have concluded that any additional warning would have prevented Mr. Martinez's injuries. Plaintiffs offer only Mr. Martinez's speculative and self-serving "would not have bought" testimony. AB48. Even with this testimony, Plaintiffs cannot establish proximate cause because (as discussed above) they presented no evidence that Mr. Martinez ever saw, read, or relied on any instructions or warnings in the owner's manual.[18] This is fatal to Plaintiffs' claim. *See Hartsock v. Wal-Mart Stores E., Inc.*, 2009 WL 4268453, at *2 (E.D. Pa. Nov. 23, 2009).

[18] Plaintiffs also failed to introduce any evidence regarding how Honda was supposed to convey Plaintiffs' hypothetical warnings. Plaintiffs now argue that there are "multiple obvious ways that a motor vehicle manufacturer can deliver adequate warnings." AB55. Perhaps, but none of them appear in the record.

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

Assuming any warning was necessary, Honda provided one in the owner's manual—that Mr. Martinez admittedly never read (AOB14, 51)—stating that "[o]f course, seat belts cannot completely protect you in every crash" (R.1047a (Sicher Slide 22)). Plaintiffs' response, yet again, is to attempt, yet again, to shift the burden of proof. Whether any Honda witnesses testified "that this language constituted a warning" is immaterial. AB55. The warning was admitted into evidence and presented to the jury. Plaintiffs had the burden of establishing what warning was inadequate and why (AOB44); "merely stat[ing] that the warnings are inadequate" is insufficient. *Hoffman v. Paper Converting Mach. Co.*, 694 F. Supp. 2d 359, 367 (E.D. Pa. 2010). Rather, "the plaintiff[s] must show, 'through experts or otherwise *why* the warnings are allegedly inadequate or *how* the existing warnings could be improved.'" *Lynn v. Yamaha Golf-Car Co.*, 894 F. Supp. 2d 606, 639-40 (W.D. Pa. 2012) (quoting *Hoffman*, 694 F. Supp. 2d at 367).

Plaintiffs failed to do either. "[N]either [Mr. Sicher] (a design expert) nor any other expert (*e.g.*, a warnings expert) testified about the adequacy of the [Integra's] warnings," let alone about "*how* the existing warnings could be improved." *Lynn*, 894 F. Supp. 2d at 640 (emphasis original).[19]

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[19] *Von Der Stuck v. Apco Concrete, Inc.*, 779 A.2d 570 (Pa. Super. 2001), cited by Plaintiffs (AB53-54), is inapposite. That decision dealt with expert

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

Plaintiffs cannot dispute that more than 70% of the jury's record-breaking $55 million award comprises noneconomic damages. *See* AB60-61. Whatever the extent of Plaintiffs' actual injuries, that award is excessive and warrants a new trial. AOB53-56. The award's noneconomic component "was disproportionate in comparison to the economic damages sought." *Tuski v. Ivyland Café, Ltd.*, 2004 WL 4962363, at *24 (Pa. C.P. Phila. Co. Dec. 22, 2004). This is "a clear indication that the jury was punitive in its award of compensatory damages," *id.*, and accepted Plaintiffs' counsel's repeated invitations to punish Honda. AOB54-55. This violates due process. *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004). Honda is therefore entitled to remittitur. AOB55-57.

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

Finally, the new trial to which Honda is entitled should occur in York County—where Plaintiffs and the accident's sole eyewitness reside, and Plaintiffs purchased the Integra and had it serviced. AOB57-59. Plaintiffs argue Honda had no "convenience affidavits" (AB66-67), but none was required. "[O]ne needs no detailed affidavit to understand the difference in logistics necessitated by a

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qualifications. *Id.* at 574. Regardless of Mr. Sicher's qualifications as a warning expert, his conclusory testimony that "the head strike … is a hazard" and Honda "made no attempt to warn that I've seen" (R. 306a), cannot establish the elements of a failure-to-warn claim.

separation of 100 miles." *Bratic v. Rubendall*, 99 A.3d 1, 9 (Pa. 2014). Several witnesses whom Honda determined were too difficult to bring to Philadelphia for trial testified to this forum's inconvenience in their depositions.[20] *See Stoner v. Penn Kleen, Inc.*, 59 A.3d 612, 615 (Pa. Super. 2012). The trial court never applied the correct *Bratic* standard. This Court must, and any new trial should be held in York County.

[20] (R. 1147-48a (Barrow Dep); R. 1140-41a, 1144a (Appiah Dep.); R. 1162 (Perdue Dep.); R. 1166a (Burns Dep.)).

CONCLUSION

For the reasons stated in Honda's opening brief and herein, the trial court's judgment should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief for Appellant American Honda Motor Co., Inc. contains 6,991 words, excluding the supplementary matter excluded by Pennsylvania Rule of Appellate Procedure 2135(b).

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PROOF OF SERVICE

I hereby certify that on March 28, 2016, two copies of the foregoing Advance Text Reply 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:

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