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445 EDA 2015

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 445 EDA 2015
ORAL ARGUMENT NO. J-A21015-16

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

APPELLANT AMERICAN HONDA MOTOR CO., INC.'S APPLICATION TO FILE POST-ARGUMENT SUBMISSION ADDRESSING UNBRIEFED MATTERS RAISED AT ORAL ARGUMENT

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APPLICATION

At the August 9, 2016 oral argument of this appeal, the Martinez Appellees raised several matters not mentioned in either side's briefing. Pursuant to Pennsylvania Rule of Appellate Procedure 2501(a), Appellant American Honda Motor Co., Inc. ("Honda") respectfully applies for permission to file the attached five-page post-argument submission limited to those previously unbriefed matters.

Honda believes that this short post-argument submission will clarify these new issues and correct misstatements about them made at oral argument, and thus ultimately aid the Court in resolving this appeal.

Dated: August 12, 2016

Respectfully submitted,

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POST-ARGUMENT SUBMISSION OF APPELLANT AMERICAN HONDA MOTOR CO., INC. ADDRESSING UNBRIEFED MATTERS RAISED AT ORAL ARGUMENT

Appellant American Honda Motor Co., Inc. ("Honda") respectfully offers this post-argument submission limited to three previously unbriefed issues raised by the Martinez Appellees at oral argument.

A. UNPUBLISHED AND UNCITABLE *CANCELLERI* OPINION

At oral argument Appellees' counsel persistently alluded to this Court's unpublished, and therefore uncitable, opinion in *Cancelleri v. Ford Motor Co.*, No. 267 MDA 2015, 2016 WL 82449 (Pa. Super. Jan. 7, 2016), until finally inducing the Panel to inquire about this decision. Counsel thereby deliberately violated Pa. Super. I.O.P. 65.37A − and a prior order of this Court in this appeal entered on March 1, 2016 that struck all references to *Cancelleri* from Appellant's Advance Form Brief.[1] Counsel was fully aware of *Cancelleri*'s non-citable status but nonetheless violated both I.O.P. 65.37A and the Court's Order in this case because he disagrees with them.[2] The Court should follow its own rules and disregard *Cancelleri*.

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[1] *See* Order, No. 445 EDA 2015, filed March 1, 2016 ("unpublished memorandum opinions of Superior Court cannot be considered precedent and cannot be cited by parties to action for any purpose") (quoting *Commonwealth v. Dennis*, 618 A.2d 972 (Pa. Super. 1992)).

[2] A day prior to oral argument counsel published an article acknowledging that he was "prohibited" from citing *Cancelleri* in "a pending appeal," but at oral

Cancelleri is rightfully unpublished because it had no independent significance. On the need for *Tincher* instructions, *Cancelleri* "agree[d] with the trial court's decision" (attached to the memorandum opinion) that the defect charge given in that case was sufficient. 2016 WL 82449, at *3. As Honda established, the defect instructions that the *Cancelleri* trial court opinion discussed included precisely the multi-factored risk-utility language that was refused here. Appellant's Reply Br. ("ARB") at 7-8. Also unlike this case, the *Cancelleri* jury received a full, three-element crashworthiness instruction under *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532 (Pa. Super. 2009). *See Cancelleri v. Ford Motor Co.*, 2015 WL 263476, at *5 (C.P. Lack. Co. Jan. 9, 2015), *aff'd mem.*, 267 MDA 2015, 2016 WL 82449 (Pa. Super. Jan. 7, 2016).

B. TRIAL COURT OPINION ON REMAND IN *TINCHER*

A week before oral argument, Appellees submitted two recent trial court opinions in *Tincher v. Omegaflex* under Pa. R.A.P. 2501(b), which allows no argument.[3] At argument, counsel mischaracterized the *Tincher* trial court's denial of a new trial as based on jury instructions that sufficiently satisfied the Supreme

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argument he did it anyway. Howard J. Bashman, "Superior Court Should Lift Ban on Citing Its Unpublished Opinions," *Legal Intelligencer* (Aug. 8, 2016).

[3] Honda thereafter submitted this Court's July 11, 2016 Order in *Tincher* (No. 1285 EDA 2016), denying a motion to quash for untimeliness.

Court's risk/utility factors. That is inaccurate. The *Tincher* trial court's opinion did not even mention a risk/utility instruction, let alone as the basis for denying a new trial. Rather, the *Tincher* trial court avoided the issue altogether by holding – *sua sponte* and retroactively – that any error was harmless because the *Tincher* plaintiffs were entitled to a directed verdict on risk/utility. *See Tincher v. Omegaflex, Inc.*, No. 2008-00974-CA, at pp. 6-7 (C.P. Ches. Co. March 22, 2016) (in light of "voluminous evidence" on risk-utility, "reasonable minds could not differ on the point") (Exh. A to Appellees' Aug. 3, 2016 Notice).

Appellees here neither moved for a directed verdict on defect at trial nor claim such entitlement on this appeal. As discussed in Honda's papers (AOB at 8-13, 20-22, 29-34; ARB 5-7), and further urged at oral argument, the relative risks and benefits of the 1999 Integra's vehicle-mounted three-point seatbelt design compared to plaintiffs' all-belts-to-seat alternative were hotly contested. The complex engineering evidence presented to the jury thus required proper jury instructions. While precise wording may vary under *Tincher*, Honda was entitled to *some* jury instruction about both "unreasonably dangerous" defects and risk-utility. Here, the jury received *no* charge on either point, and "the jury must be afforded an opportunity to make a finding." *Nelson v. Airco Welders Supply*, 107 A.3d 146, 160 (Pa. Super. 2014) (en banc).

C. POST-*TINCHER* SUGGESTED JURY INSTRUCTIONS

Finally, Appellees' counsel argued that the jury instructions here were supported by new Suggested Standard Civil Jury Instructions released in May, 2016 by the Pennsylvania Bar Institute. Honda has already established (AOB at 33-34; ARB at 25-26) that such "suggested" instructions are "not binding." *Butler v. Kiwi, S.A.*, 604 A.2d 270, 273 (Pa. Super. 1992).

In any event, the jury instructions given below (R. 872a) are flatly *inconsistent* with the new suggested instructions, which correctly eliminate the "guarantor" language disapproved in *Tincher* (*see* SSCJI §16.10) – and emphasized by Appellees in the closing argument here − and add a risk-utility

instruction (*see* SSCJI §16.20) that is substantially similar to what the trial court refused to give (R. 932a).[4]

Dated: August 12, 2016

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[4] Other aspects of the new suggested instructions are plainly inconsistent with *Tincher*, including: (1) SSCJI §16.10's instruction that a product is defective if it lacks "any element to make it safe" (*see Tincher*, 104 A.3d at 365 ("any element" defect test originated in the "one-justice lead opinion" and "was quoted subsequently out of context by the majority in *Azzarello* as the standard of proof in a strict liability action")); and (2) the suggested instructions' failure to include any language regarding an "unreasonably dangerous" inquiry (*see Tincher*, 104 A.3d at 380 ("in a jurisdiction following the [§ 402A] formulation of strict liability in tort, *the critical inquiry* in affixing liability is whether a product is 'defective'; in the context of a strict liability claim, whether a product is defective *depends upon whether that product is 'unreasonably dangerous*.'") (emphasis added)).

PROOF OF SERVICE

I hereby certify that on August 12, 2016, the foregoing Appellant American Honda Motor Co., Inc.'s Application To File Post-Argument Submission Addressing Unbriefed Matters Raised At Oral Argument and accompanying submission was e-served on counsel of record, those being:

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