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In the Superior Court of Pennsylvania

No. 445 EDA 2015

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

v.

AMERICAN HONDA MOTOR CO., INC.,

Defendant/Appellant.

BRIEF FOR PLAINTIFFS/APPELLEES

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

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I. COUNTERSTATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

Judgment Notwithstanding the Verdict: As the Supreme Court of Pennsylvania explained in *Birth Center* v. *St. Paul Cos.*, 787 A.2d 376, 383 (Pa. 2001), when conducting appellate review of a trial court's ruling on a motion for j.n.o.v., "[w]e view the evidence in the light most favorable to the verdict winner and give him or her the benefit of every reasonable inference arising there from while rejecting all unfavorable testimony and inferences."

Earlier, in *Moure* v. *Raeuchle*, 604 A.2d 1003 (Pa. 1992), the Supreme Court explained:

> [T]he evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.

Id. at 1007 (citations and internal quotations omitted).

New Trial: This Court has held that it will overturn a trial court's denial of a motion for a new trial only where the trial court grossly abused

its discretion or committed an error of law that controlled the outcome of the case. *See Gianni* v. *William G. Phillips, Inc.*, 933 A.2d 114, 116 (Pa. Super. Ct. 2007). While "viewing the evidence in the light most favorable to the verdict winner"— here the plaintiffs — this Court turns its focus to "whether a new trial would produce a different verdict." *Gunn* v. *Grossman*, 748 A.2d 1235, 1239 (Pa. Super. Ct. 2000). "Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed." *Id.*

Admission of Evidence: This Court has explained:

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

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

Remittitur: In *Rettger* v. *UPMC Shadyside*, 991 A.2d 915 (Pa. Super. Ct. 2010), this Court explained:

> Judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant. The question is

> whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption.

Id. at 932. Furthermore, this Court recognized that whether to grant or deny remittitur is within the trial court's sole discretion and will be overturned only upon a showing of abuse of discretion or error of law. *Id.* This Court will view the record with consideration of the evidence accepted by the jury and will not substitute its judgment for that of the fact-finder. *See Smalls* v. *Pittsburgh-Corning Corp.*, 843 A.2d 410, 414 (Pa. Super. Ct. 2004).

Forum *Non Conveniens*: This Court reviews for abuse of discretion, recognizing that "trial courts are vested with considerable discretion . . . to balance the arguments of the parties, consider the level of prior court involvement, and consider whether the forum was designed to harass the defendant." *Lee* v. *Thrower*, 102 A.3d 1018, 1021 (Pa. Super. Ct. 2014) (internal quotations omitted). Accordingly, "If there exists any proper basis for the trial court's decision" not to transfer venue, "the decision must stand." *Id.*

II. COUNTERSTATEMENT OF THE CASE

A. Relevant Factual History

1. Liability

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

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

The evidence at trial showed that Honda knew that the seatbelt was designed in a way that was inadequate to protect the driver of a 1999 Integra from suffering such a devastating head-strike. Some 18 years before Martinez's rollover, Honda conducted a 30-mph rollover test for the Integra which conclusively demonstrated that a seatbelted driver would strike his head on the roof, as evidenced by the undeniable transfer of paint from the dummy's head to the car roof depicted in a photograph that plaintiffs introduced into evidence at trial. (R.257a-66a, 335b-37b; 327b). Such a head-strike was an outcome that Honda's corporate representative acknowledged, in a videotaped deposition that was played for the jury, "Honda doesn't want." (R.1551a, 284b).

Plaintiffs pursued two theories of liability against Honda at trial: design defect and failure to warn. Honda was liable for a design defect because the seatbelt failed to provide meaningful occupant protection to Martinez. The feasible alternative design presented by plaintiffs was an all-belts-to-seat ("ABTS") system as well as a cinching latchplate, which was exactly the design in another vehicle: the 1999 Chrysler Sebring, lawfully manufactured and sold the same year as the 1999 Integra at issue here. (R.277a-79a, 340b-41b). A cinching latchplate keeps the lap-belt portion of

the seatbelt snug against the occupant, so that even if the car is in a rollover, the occupant's body remains anchored to the bottom of the seat, preventing the occupant's head from contacting the vehicle's roof. (R.290a-91a, 296a, 344b-45b).

Plaintiffs also sought recovery for failure to warn, because Honda completely failed to warn of the hazard at issue — the lack of passenger protection in the event of a rollover due to an occupant's head striking the roof. (R.294a-97a, 306a, 345b, 348b). Martinez testified at trial that had he received warning of the defect, he would not have purchased the 1999 Integra, thereby avoiding the catastrophic injuries that he sustained. (R.564a-65a, 614b).

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

2. Damages

At trial, plaintiffs provided the jury with unimpeached testimony that Carlos Martinez, who then had already lived four years as a motorized wheelchair-dependent quadriplegic, has a normal life expectancy of an additional 23.8 years. (R.510a-12a, 541a-42a, 579b, 610b). Consequently, he and his wife will endure approximately 28 years of unrelenting hardship associated with a completely helpless man who cannot even turn himself over and is entirely dependent on others for every single aspect of daily living.

Plaintiffs review the details of the damages-related evidence that they presented to the jury, and the jury's damages award stemming directly from what the evidence in this case supports, in responding below to Honda's arguments that the jury's award was excessive and a remittitur should be ordered.

B. Relevant Procedural History

Plaintiffs initiated this lawsuit in the Court of Common Pleas of Philadelphia County in December of 2011. (R.1a). Because Honda regularly conducts business in Philadelphia, venue in Philadelphia was proper.

Nevertheless, after the case had been pending for years and was ready for trial, Honda filed a motion seeking to transfer venue to York County from Philadelphia County based on alleged forum *non conveniens*. (R.1049a).

On December 30, 2013, the Honorable Lisa M. Rau issued an order denying Honda's motion. (R.1377a). Honda based its motion, almost exclusively, on the supposed need for five fact witnesses to testify at trial. Yet, Honda never attempted to take trial depositions of any of these five witnesses. Then, at trial, Honda called none of these five witnesses and read no portion of any of these witnesses' discovery deposition transcripts to the jury.

At the conclusion of an eight-day trial, a unanimous 12-person jury returned the verdict giving rise to the judgment that is the subject of Honda's appeal. Thereafter, Honda filed a lengthy motion for post-trial relief asserting numerous issues, some of which Honda has opted to renew on appeal. While Honda's motion for post-trial relief remained pending before the trial court, the Supreme Court of Pennsylvania issued its ruling in *Tincher* v. *Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). As a result, via supplemental briefing, the parties were able to address at length what impact, if any, *Tincher* might have on the outcome of this case. After

hearing from both sides on that issue, the trial court determined, without any suggestion of doubt or uncertainty, that *Tincher* does not necessitate a retrial of this case.

III. SUMMARY OF THE ARGUMENT

The Supreme Court of Pennsylvania's ruling in *Tincher* v. *Omega Flex, Inc.*, 104 A.2d 328 (Pa. 2014), contains four holdings relevant to this appeal. First, the Court ruled that the Second Restatement, and not the Third Restatement, would continue to govern strict products liability claims under Pennsylvania law. *Id.* at 399. Second, the Court ruled that the jury as fact-finder, rather than solely the trial judge, must decide whether the product in question suffers from a design defect. *Id.* at 406-08. Third, the Court ruled that a careful case-by-case inquiry was necessary to determine whether *Tincher* necessitated a retrial of any products liability case tried under pre-*Tincher* law, and the Court did not conclude that a new trial was necessary even in *Tincher* itself. *Id.* at 410. Fourth and finally, the Court explained that a plaintiff pursuing a strict liability design defect claim may establish a defendant's liability using either or both a risk-utility or consumer expectation approach. *Id.* at 406.

In this case, as the trial court has already concluded, *Tincher* does not necessitate a retrial. The jury verdict slip and the trial court's instructions required the jury to decide, as the jury did decide in plaintiffs' favor, whether the 1999 Integra's seatbelt restraint system was defective. Thus, notwithstanding Honda's inaccurate arguments to the contrary, the trial of this case already satisfied *Tincher*'s central holding — that the jury rather than the trial judge must decide the existence of a defect.

The garden-variety products liability claim at issue in *Tincher* was not the basis for Honda's liability in this case, in which plaintiffs pursued a claim for crashworthiness and failure to warn. In finding for plaintiffs on their crashworthiness claim, the jury in this case already had to engage in, and resolve favorably to plaintiffs, the very sort of risk-utility and consumer expectation inquiries that *Tincher* contemplates.

Moreover, because *Tincher* rejected any *per se* requirement of a new trial in every pending case tried under pre-*Tincher* law, Honda's assertion that it should be entitled to a new trial here simply fails to persuade. Despite the Pennsylvania Supreme Court's express refusal to adopt the Third Restatement approach, which would have allowed defendants to introduce evidence relevant to negligence and government and industry

standards, Honda's appellate arguments proceed as if the Court adopted the Third Restatement approach in substance while rejecting that approach in name alone. Nothing could be further from the truth. There is simply nothing in *Tincher* to suggest that any of the evidence that the trial court properly excluded under the Second Restatement would now be admissible or that the exclusion of such evidence represented harmful error on this record.

Honda's seven other remaining arguments on appeal are equally without merit. *Tincher* involved only a design defect claim, and thus that decision neither had, nor did it claim to have, any effect on existing Pennsylvania failure-to-warn law. The trial court's crashworthiness jury instruction properly conveyed to the jury all applicable and relevant principles of Pennsylvania law. The trial court's heeding instruction on plaintiffs' warning claim was appropriate based on the evidence that the parties introduced in this case.

Plaintiffs' safer feasible alternate seatbelt design is not unlawful under federal law, nor does federal law preempt plaintiffs' argument that Honda should have instead installed safer seatbelts of the alternate design that would have altogether avoided Martinez's devastating head-strike.

Next, plaintiffs introduced more than sufficient evidence to allow the jury to find Honda liable for failure to warn, including that Martinez would not have purchased the 1999 Integra if an adequate warning had been supplied.

The jury's damages award, while large, is not unlawfully excessive, as the trial court cogently recognized in its Rule 1925(a) opinion. (Trial court's 1925(a) opinion at 10-11). The devastating impact that Honda's tortious conduct will have on Martinez and his wife for the rest of Martinez's natural life span more than adequately justifies the jury's damages award. Lastly, the trial court did not abuse its discretion in denying Honda's motion to transfer venue due to forum *non conveniens*.

For all of these reasons, the trial court's judgment and order denying Honda's post-trial motion should be affirmed.

IV. ARGUMENT

A. Honda's 'Kitchen Sink' Appellate Presentation Reveals The Weakness Of Honda's Appeal

Honda's Brief for Appellant presents eight issues for this Court's review. As the Supreme Court of Pennsylvania observed in *Commonwealth* v. *Ellis*, 626 A.2d 1137 (Pa. 1993): "We concur with the view of an eminent appellate jurist, Judge Ruggero Aldisert, that the number of claims raised in an appeal is usually in inverse proportion to their merit and that a large number of claims raises the presumption that all are invalid." *Id.* at 1140. Honda's appeal once again confirms the validity of that wise observation.

The order in which Honda has chosen to present its appellate issues to this Court is, in itself, rather befuddling. Honda's Statement of Questions Involved first lists three new trial issues, followed by three issues seeking judgment notwithstanding the verdict, followed by two more potential new trial issues. In the Argument section of Honda's brief, arguments for j.n.o.v. are presented in a manner subsidiary to arguments in favor of a new trial. Lastly, Honda argues merely that "[a]ny new trial should be transferred to York County." As Honda presents its venue argument, it is unclear whether Honda is arguing that a new trial is needed

because the original trial should have occurred in York County, or only that, *if a new trial is needed*, then it should be held in York County. On its face, Honda's opening brief seems to recognize that holding the original trial in Philadelphia does not, in and of itself, constitute an independent ground for granting a new trial in Honda's favor.

Perhaps the most incessant flaw plaguing Honda's entire appellate presentation, however, is Honda's failure, refusal, or inability to depict the relevant facts of this case in the light most favorable to plaintiffs as verdict-winners. As explained above in the Standard of Review section of this brief, whether Honda is seeking j.n.o.v., a new trial, or remittitur, in each instance the appellate court must view the facts in the light most favorable to plaintiffs. Honda's presentation of the facts in its opening brief failed to provide any meaningful assistance to this Court in that regard, necessitating plaintiffs' thorough review of the relevant facts in responding to Honda's appellate arguments.

B. The Trial Court Did Not Abuse Its Discretion In Holding That *Tincher* Does Not Require A New Trial On Plaintiffs' Crashworthiness Or Failure To Warn Claims

1. Notwithstanding Honda's assertions to the contrary, the jury in this case was specifically asked to find, and did in fact find, that the 1999 Acura Integra's seatbelt restraint system was defectively designed

After the jury rendered its verdict in this case, while post-trial motions were pending, the Supreme Court of Pennsylvania issued its opinion in *Tincher* v. *Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). That opinion analyzed the history of Section 402A of the Restatement (Second) of Torts beginning with the landmark 1966 decision of *Webb* v. *Zern*, 220 A.2d 853 (Pa. 1966), in which Pennsylvania became the very first state to adopt Section 402A, promulgated only one year earlier.

While *Tincher* discusses many aspects of strict liability law, two things are abundantly clear: *first*, Pennsylvania remains firmly committed to the Second Restatement approach to strict liability in tort, rejecting the concepts of the Third Restatement in so doing; and *second*, the central holding of *Tincher* is that the jury, rather than the trial judge, must determine whether a product is defective. *See Tincher*, 104 A.3d at 407

("whether a party has met the burden to prove the elements of the strict liability cause of action are issues for the finder of fact").

Honda agrees, contending in the very first argument point of its appellate brief that whether the 1999 Integra's seatbelt restraint system was unreasonably dangerous is a jury question. Brief for Appellant at 19. According to Honda, a new trial is necessary here because the jury supposedly was not asked to determine that issue. In actuality, however, both the trial court's jury instructions and the verdict form confirm that the jury was asked to decide, and in fact did decide, that the 1999 Integra's seatbelt restraint system was defectively designed. Restatement §402A defines a defective product as one that is "unreasonably dangerous," and thus a jury's determination that a product is defectively designed is the equivalent of a determination that the product is unreasonably dangerous. *See* Restatement (Second) of Torts §402A(1).

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

> The issues for you to decide in accordance with the law as I give it to you are: One, was the driver's seat belt in the subject 1999 Acura Integra defective in its design?

> Two, was there an alternative, safer, practicable design available for the subject 1999 Acura Integra?

R.871a, 1184b (jury charge).

These questions, which the jury had to answer in the affirmative to return a verdict for the plaintiffs, encapsulate the issue of whether the seatbelt was "unreasonably dangerous" and thus demonstrate the jury's consideration and resolution of that issue in plaintiffs' favor.

Eliminating any doubt whatsoever concerning whether the jury in this case was asked to find whether the 1999 Integra's seatbelt restraint system was unreasonably dangerous, question one on the jury's verdict form asked:

> Do you find that the design of the driver's seat belt in the subject 1999 Acura Integra was defective in its design and that there was an alternative, safer, practicable design.

R.888a, 1201b (jury charge). The jury answered this question "yes." R.911a, 1222b (transcript of jury's verdict). This establishes that the jury was asked to find, and did in fact find, in plaintiffs' favor, whether the 1999 Integra's driver's seatbelt system was unreasonably dangerous.

This is the second crashworthiness case to reach this Court on appeal since the Pa. Supreme Court decided *Tincher*. The first was *Cancelleri* v. *Ford*

Motor Co. Trials in both *Cancelleri* and this case resulted in jury verdicts in favor of the plaintiffs before *Tincher* was decided. Both cases were pending on post-trial motions when *Tincher* issued, and in both cases the trial courts carefully reviewed *Tincher* and held that the decision did not affect crashworthiness cases, which already satisfied *Tincher*'s requirements. *See Cancelleri* v. *Ford Motor Co.*, No. 11-CV-6060, 2015 WL 263476 (C.C.P. Lackawanna Cty., Pa. Jan. 9, 2015), *aff'd*, No. 267 MDA 2015, 2016 WL 82449 (Pa. Super. Ct. Jan. 7, 2016) (non-precedential memorandum opinion).

The trial court in *Cancelleri* gave the jury in that case the same sort of crashworthiness charge that the trial court delivered here. *See Cancelleri*, 2015 WL 263476, at **30-32. As in *Cancelleri*, Honda's argument here that *Tincher* necessitates a new trial of plaintiffs' crashworthiness claim is entirely without merit.

2. *Tincher* did not purport to alter Pennsylvania law applicable to crashworthiness claims

The claim that Pennsylvania's highest court considered in *Tincher* was a garden-variety strict liability design defect claim. By contrast, the sort of "crashworthiness" claim on which plaintiffs prevailed here was

already recognized under Pennsylvania law as imposing a more rigorous burden of proof on the plaintiff than the run-of-the-mill design defect claim that *Tincher* involved.

Indeed, in *Tincher*, the trial court refused to allow the case to go to the jury on a "fireworthiness" claim as defendant Omega Flex had requested, which is analogous to the "crashworthiness" doctrine applicable to automobile cases. Here, by contrast, plaintiffs proved their crashworthiness claim, which necessitated proof of a feasible alternative design. In *Tincher*, the Pa. Supreme Court described Omega Flex's invocation of the "fireworthiness" doctrine as "a Third-Restatement-like approach similar to the more familiar 'crashworthiness' exception to the Second Restatement." *Tincher*, 104 A.3d at 341. Because plaintiffs in this case proved and prevailed on a crashworthiness claim that already imposed on them requirements far more stringent than a mere Restatement (Second) design defect claim, *Tincher*'s rejection of *Azzarello* v. *Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), does not necessitate a new trial here.

3. Even if *Tincher* is understood to have altered Pennsylvania crashworthiness law, the plaintiffs in this case have prevailed on the same type of design defect claim that *Tincher* recognized

Tincher explained that, in the non-crashworthiness context, a strict liability design defect claim may proceed under either (or both) a risk-utility or consumer expectation analysis. Even if this holding were to apply to a crashworthiness claim, the evidence in this case suffices to uphold the verdict in plaintiffs' favor under either theory.

With respect to risk-utility, plaintiffs' seatbelt design expert, Larry Sicher, opined that a feasible alternative design existed and could have been used by Honda in the 1999 Integra consisting of an all-belts-to-seat ("ABTS") system as well as a cinching latchplate. (R.278a-79a, 290a-91a, 341b, 344b). Sicher demonstrated through his testing that, had Honda used this feasible alternate design, Martinez's head would not have contacted the roof of the Integra when the Integra's roof hit the ground (R.296a, 303a, 345b, 347b), and thus Martinez would have avoided sustaining any serious injury in the rollover. (R.425a-27a, 431b-33b).

The evidence in this case permitted the jury to consider the total use and utility of plaintiffs' proposed alternative design to make the 1999

Integra's seatbelt system safe. The chief thrust of *Tincher* was to relocate the *Azzarello* risk-utility calculus from the judge to the jury, which is precisely what occurred here.

With regard to the consumer expectation analysis, plaintiffs presented evidence that approximately 18 years before Martinez's crash, Honda conducted a 30-mph rollover test for the Acura Integra which conclusively demonstrated that a seatbelted driver would strike his head on the roof with great force. Such a head-strike was an outcome that Honda's corporate representative acknowledged, in a videotaped deposition that was played for the jury, "Honda doesn't want." (R.1551a, 284b).

Plaintiffs also presented Martinez's own testimony that he would not have purchased the 1999 Integra if Honda had provided him with an adequate warning that the vehicle's seatbelt system could not protect him from a devastatingly harmful head-strike injury in a low-speed rollover event. (R.564a-65a, 614b).

The combined force of this evidence, from both a Honda corporate representative and the consumer whose seatbelt did not perform as expected, thereby causing him to sustain grievous injuries, establishes that

plaintiffs' evidence also satisfies the consumer expectation test recognized in *Tincher*, were this Court to view *Tincher*'s holding as applicable to a crashworthiness case.

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

Notably, in both *Barker*, 573 P.2d at 446, 449-52, and an earlier case captioned *Cronin* v. *J.B.E. Olson Corp.*, 501 P.2d 1153, 1163 (Cal. 1972), the Supreme Court of California rejected the argument that Honda makes here that a trial court should use the words "unreasonably dangerous" in charging the jury. Rather, in the aftermath of *Tincher*, under Pennsylvania law, as under California law, a jury must decide if a product is "defective" using either the risk utility or consumer expectation approach, or both.

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

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

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

The jurors in this case had, from their own experience, ample capability to determine whether a seatbelt should protect the driver of an automobile from a devastating head-strike in a low-speed rollover. The consumer expectation test is a subjective test. Here, the relevant evidence — consisting of the testimony from a Honda executive that a head-strike was unacceptable under these circumstances; the testimony from Martinez that he never would have expected to sustain this sort of an injury while wearing his seatbelt; and the evidence from Sicher that a feasible alternate design existed that would have avoided Martinez's devastating injuries — provided a more than sufficient evidentiary basis for a decision in plaintiffs' favor under the consumer expectation test. *See Jackson* v. *General Motors Corp.*, 60 S.W.3d 800, 803-06 (Tenn. 2001) ("the consumer expectation test is applicable to any products liability case in which a party seeks to establish that a product is unreasonably dangerous under Tennessee law," including where plaintiff alleges that the seatbelt/restraint system was defective because it failed to conform to ordinary consumer's

expectations); *General Motors Corp.* v. *Farnsworth*, 965 P.2d 1209, 1220-21 (Alaska 1998) (holding that consumer expectation test applies in seatbelt defect case); *Brethauer* v. *General Motors Corp.*, 211 P.3d 1176, 1183-84 (Ariz. Ct. App. 2009) (same).

When viewed in their totality, as they must be, the trial court's jury instructions made it clear that the finding of whether the driver's seatbelt system Honda selected for the 1999 Integra was defective was a decision for the jury, and the jury alone, to make. Thus, *Tincher*'s holding that defectiveness was a decision for the jury to make rather than the trial judge was both anticipated and followed by the trial court in its jury charge in this case.

Honda's arguments at the trial of this case, requesting the admission of evidence and jury instructions in accordance with the Restatement (Third) of Torts, were resoundingly rejected in *Tincher*. As *Tincher* makes clear, Pennsylvania's highest court has chosen to continue to adhere to the underlying principles of Pennsylvania strict liability law — with its focus on the nature of the product and the consumer's reasonable expectations with respect to the product — rather than on the conduct of either the manufacturer or the person injured. *See Tincher*, 104 A.3d at 369. And,

contrary to Honda's suggestion, despite overruling *Azzarello*, the Court endorsed the policy underlying the Restatement (Second) of Torts §402A that a manufacturer is effectively the guarantor of its product's safety. *See Tincher*, 104 A.3d at 364-67.

In short, Honda asks this Court to go where the Supreme Court in *Tincher* refused to journey — to make a quantum leap to find prejudicial error from the mere inclusion of the "guarantor" and "every element" language in a jury charge. Those same words appeared in the *Tincher* jury charge, but Pennsylvania's highest court purposefully did not hold that the use of those terms in the *Tincher* jury charge mandated a new trial there. And those words also appeared in the trial court's charge to the jury in the *Cancelleri* case. *See Cancelleri*, 2015 WL 263476, at **30-32.

To summarize, the Pa. Supreme Court's ruling in *Tincher* establishes the following with respect to this case: (1) *Tincher* did not recognize a *per se* need for a new trial in any case that proceeded to verdict under *Azzarello*'s principles; (2) *Tincher* has no effect on a crashworthiness claim such as this, because such a claim was already recognized as outside of the Second Restatement; and (3) more than sufficient evidence exists in the record of

this case to uphold the jury's verdict on either a risk-utility or consumer expectation analysis.

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

The Pennsylvania Supreme Court's ruling in *Tincher* — because it did not adopt Restatement (Third) of Torts — does not overrule longstanding Pennsylvania precedent establishing the inadmissiblity of industry and governmental standards in a products liability case. *See Tincher*, 104 A.3d at 367-69 (discussing but not critiquing or overruling the Court's decades-old decision in *Lewis* v. *Coffing Hoist Div.*, 528 A.2d 590 (Pa. 1987)). The rationale of *Lewis* comes not from *Azzarello*, but from the express language of §402(A):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> > (a) the seller is engaged in the business of selling such a product, and

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

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

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

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

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

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

In *Tincher*, the Supreme Court discussed its earlier holding in *Lewis* without any hint of criticism, explaining that "[t]he *Lewis* Court observed that jurisdictions with various approaches agreed that relevant at trial is

the condition of the product rather than the reasonableness of the manufacturer's conduct." *Tincher*, 104 A.3d at 368. Obviously, to allow the manufacturer's conduct to become the focus of the trial would undermine the main thrust of the Second Restatement approach. It is the product itself that must withstand the scrutiny of the fact-finder. *See Nathan* v. *Techtronic Indus. N. Am., Inc.*, 92 F. Supp. 3d 264, 271 (M.D. Pa. 2015) ("under the *Tincher* formulation of the Second Restatement the focus remains upon the condition of the product rather than the conduct of the manufacturer").

For these reasons, the trial court did not abuse its discretion in recognizing that *Tincher* did not alter existing Pennsylvania law to mandate the admission of industry and government standards evidence in a strict products liability case.

5. *Tincher* expressly disclaimed any alteration of Pennsylvania failure-to-warn law, and Honda failed to preserve this argument in the trial court

The Pa. Supreme Court's ruling in *Tincher* contained a section titled "Related Legal Issues" that appeared immediately before that opinion's conclusion section. *See* 104 A.3d at 409-10. There, Pennsylvania's highest court remarked:

> We recognize . . . that the decision to overrule *Azzarello* and articulate a standard of proof premised upon alternative tests in relation to claims of a product defective in design *may have an impact* upon other foundational issues *regarding* manufacturing or *warning claims* . . . . *These considerations and effects are outside the scope of the facts of this dispute* and, understandably, have not been briefed by the Tinchers or Omega Flex.
>
> *This Opinion does not purport to either approve or disapprove prior decisional law*, or available alternatives suggested by commentators or the Restatements, *relating to foundational or subsidiary considerations and consequences of our explicit holdings*. In light of our prior discussion, the difficulties that justify our restraint should be readily apparent. The common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy.

Id. (citation omitted; emphasis added).

Notwithstanding that the Supreme Court, in the passage from *Tincher* quoted above, expressly denied altering or overruling any aspect of Pennsylvania failure-to-warn law, Honda argues in its brief that the *Tincher* decision in fact did just that. In so arguing, Honda cites to and relies on this Court's decision in *Amato* v. *Bell & Gossett*, 116 A.3d 607 (Pa. Super. Ct. 2015), *alloc. granted in part*, 130 A.3d 1283 (Pa. 2016), where this Court observed:

> In the instant matter, Crane's claim is that it was entitled to a failure-to-warn instruction incorporating considerations of

> reasonableness. Because *Tincher* returned such considerations to the purview of the jury as a question of fact in cases concerning strict liability, we hold that it is applicable to the case *sub judice*.

Id. at 620.

In *Amato*, this Court did not consider or address in any detail how *Tincher* might possibly apply to a failure-to-warn claim, because this Court held that the defendant's requested jury instruction was properly disallowed as it was irrelevant to the defendant's theory of non-liability. *See Amato*, 116 A.3d at 621-24. Whether the instruction that the defendant requested in *Amato* should have been given is the issue that the Supreme Court of Pennsylvania has granted allowance of appeal to consider. *See Amato*, 130 A.3d 1283 (Pa. 2016) (order granting allowance of appeal in part).

In this case, by contrast, Honda never requested any jury instruction on plaintiffs' failure-to-warn claim, let alone an instruction such as the one the defendant requested in *Amato*, 116 A.3d at 622, which sought to interject the concept of "unreasonably dangerous" into the jury's determination of a failure to warn claim. R.923a-39a (Honda's requested jury instructions). Nor did Honda's counsel object to the omission of such

language when the trial court in this case formulated and delivered its failure-to-warn jury charge. R.731a-32a, 741a-42a, 771a-72a, 963b, 965b, 1016b-17b, 1210b.

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

C. Honda is not entitled to a new trial or j.n.o.v. on plaintiffs' crashworthiness claim

1. The trial court's crashworthiness charge properly instructed the jury on the elements of that claim

The trial court in this case carefully instructed the jury to find liability against Honda only if: (a) the seatbelt system was defective; and (b) the defect caused injuries to Martinez solely when the roof of the vehicle struck the ground. (R.871a-75a, 1184b-88b). This instruction, and the same language contained in the jury verdict sheet, is the epitome of "second collision"/"enhanced injury." (R.785a-86a, 1023b-24b). Nevertheless, Honda argues on appeal that *Colville* v. *Crown Equip. Corp.*, 809 A.2d 916, 925 (Pa. Super. Ct. 2002), a forklift case decided more than a decade before the current crashworthiness standard civil jury instruction was formulated, somehow supports its argument that a new trial is required.

Honda asserts that this Court held in *Colville* that a trial court must "instruct the jury on the three elements of a crashworthiness defect claim." Brief for Appellant at 34. *Colville* does not support this position. In fact, the phrase "three prong test" does not appear anywhere in the *Colville* decision. What does appear in *Colville* is the trial court's refusal to charge on crashworthiness and the trial court's erroneous refusal to recognize that

there was a second collision. Neither of these issues applies to this case, because here the trial court specifically instructed the jury to focus solely on the second collision: "In order for the plaintiff to recover in this case, the defective condition must have been a factual cause of any harm attributable solely to the impact that occurred when the roof of the car hit the ground." R.874a, 1187b.

This Court's rationale for reversal in *Colville* was the fact that the trial judge failed to impress upon the jury that the initial impact (and any injuries resulting therefrom) was not the fault of the defendant (just as, in this case, Honda is not responsible for the tire blow out, or the fact that the vehicle rolled over). Therefore, the jury in *Colville* could have incorrectly determined that the manufacturer was responsible for the initial impact and assessed all resulting damages incorrectly against the manufacturer. *Colville*, 809 A.2d at 926.

Unlike the trial court in *Colville*, in this case the trial court did charge on crashworthiness: namely, it gave the Suggested Standard Civil Jury Instruction crashworthiness charge (16.70) which does not include the phrase "enhanced injury." The trial court in this case went even further to narrow the inquiry both in the jury charge as well as the verdict sheet to

defect-caused injuries and damages "solely" attributable to the roof of the Integra's striking the ground, so as to be "crystal clear" to the jury. R.785a-86a, 874a, 1023b-24b, 1187b. Therefore, Honda's assertion that the trial court in this case made any error analogous to the error made by the trial court in *Colville* is completely without merit.

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

Thus, even if "enhanced injury" was a severable concept from "second collision" (although *Colville*, as well as SSCJI 16.70, makes it clear that it is not), Honda would still not be able to establish that the trial court committed error, because the biomechanical engineers agreed on the mechanism of the injury (head on the roof when the roof of the vehicle struck the ground) resulting in this becoming an "all or nothing" case. The jury ultimately believed plaintiffs' experts that the alternative design would have kept Martinez's head off the roof, thereby resulting in the elimination of his injuries.

In accordance with Pennsylvania law, Martinez was entitled to recover in full from Honda for the injuries sustained from any defect in the restraint system during the second collision of the rollover accident (*i.e.*, "solely when the roof of the vehicle struck the ground"). The trial court did not abuse its discretion in rejecting Honda's challenge to the crashworthiness charge.

2. Both the jury and the trial court properly rejected Honda's assertion that plaintiffs' feasible alternate design somehow violated federal law

Honda is incorrect that the ABTS system with a cinching latchplate that plaintiffs offered at trial as their feasible alternate design could not have been lawfully sold in compliance with federal safety regulations. The jury heard unrebutted evidence that the very restraint system that plaintiffs' expert, Sicher, advocated was used in the Chrysler Sebring in the same timeframe as the 1999 Integra, and the use of that system in another automobile available for sale on the market in that timeframe unambiguously established the lawfulness of that restraint system. Stated another way, the Chrysler Sebring could not have been lawfully offered for sale to the public if that vehicle contained a restraint system that violated federal safety regulations. Therefore, the existence of the restraint system in the Sebring conclusively established that restraint system's lawfulness.

As a result, Honda does not directly challenge the lawfulness of the Sebring restraint system (used in 1999 model year vehicles, thousands of which have been lawfully sold to U.S. customers); rather, Honda asserts that an aspect of Sicher's testing would have rendered his proposed alternative unlawful because Sicher supposedly added extra lap belt

tension to 5.5 pounds. *See* Brief for Appellant at 35. Yet Honda's argument in this respect is factually inaccurate and misrepresents Sicher's clear testimony.

During direct and cross-examination, Sicher repeatedly testified that he did not alter any tension existing on the Sebring seatbelt system, but, instead, tested the Sebring seat in conformance with the owner's manual which, like the Integra's owner manual, demands that the occupant "tug," "snug," and "pull" the shoulder belt. R.321a-22a, 324a-25a, 342a-43a, 347a-48a, 350a-51a, 354a-55a, 351b-52b, 357b-60b.

Based on that testimony, the jury had a sufficient basis in the evidence to find, as the jury did find, that Sicher's proposed alternate seatbelt design complied with federal law and the owner's manual instructions for both the Chrysler Sebring and Acura Integra.

Accordingly, Honda's "enhanced injuries"/"second collision" argument remains devoid of merit. The evidence, when viewed in the light most favorable to plaintiffs, establishes that the seatbelt system was defective and proximately caused injury to Martinez during the "second collision" (*i.e.*, when the roof of the Integra struck the ground) and establishes that plaintiffs proffered an alternative design that would have

prevented Martinez from striking his head on the roof, resulting in the outright elimination of his injuries. The trial court, in turn, properly charged the jury to "solely" consider causation of injuries from a defect when the roof of the vehicle struck the ground, which clearly comports with governing crashworthiness law. (R.871a-75a, 1184b-88b). Therefore, the trial court properly rejected Honda's request for either a new trial or judgment notwithstanding the verdict on these grounds.

3. Federal law does not preempt plaintiffs' claim that the 1999 Acura Integra should have instead contained the feasible alternate design seatbelt that would have avoided Martinez's head-strike and resulting injuries

In *Williamson* v. *Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011), the Supreme Court of the United States held that because federal motor vehicle safety regulations gave manufacturers a choice between two different types of seatbelts, federal law did not preempt a state law tort suit premised on the manufacturer's failure to install the safer of the two designs in a motor vehicle. *Id.* at 335-36. *Williamson* thus clarified that a federal agency's deliberate decision to offer manufacturers a choice between two types of

seatbelt systems is, in and of itself, insufficient to establish federal preemption.

This case is on all fours with *Williamson*. Here, federal regulations gave Honda a choice to select whichever of two competing seatbelt systems Honda believed was safer for the 1999 Integra. Nevertheless, despite knowing of the rollover risk of head injury inherent in this particular vehicle-mounted seatbelt system, Honda selected the less safe of the two available seatbelt systems for the Integra. As in *Williamson*, federal law does not preempt Honda's liability under state law for having exercised the choice that federal law provided in a way that unnecessarily inflicted harm on those injured.

This is not a case where the defect at issue is inherent in an entire category of products that Congress or a federal agency has approved. That is, the defect at issue here is not intrinsic to a vehicle-mounted restraint system. Instead, the defect is limited to safety belts that allow 8.25 inches of vertical excursion (and ensuing head-contact) in a low speed rollover crash. Plaintiffs' expert testified that this is not an inherent flaw in either vehicle-mounted or seat-mounted restraints. The defect can be avoided in each. R.307a-08a, 348b.

In arguing for preemption, Honda relies almost exclusively on an unreported federal district court ruling by a single federal judge who concluded, only months after the *Williamson* decision issued, that federal law would preempt a claim based on a manufacturer's decision to use an ABTS seatbelt system rather than a vehicle-mounted seatbelt system. *See Soliman* v. *Daimler* AG, 10-CV- 408, 2011 WL 4594313 (E.D.N.Y. Sept. 30, 2011).

First, the trial court order is not precedential because it is not a Pennsylvania appellate decision. *See Cummins* v. *Atlas R.R. Const. Co.*, 814 A.2d 742, 747 n.5 (Pa. Super. Ct. 2002) (on questions of federal law, decisions of lower federal courts do not bind Pennsylvania state courts). Second, the relevant language of the *Soliman* decision is nothing more than *dicta*, because the district court first ruled that the plaintiff's design defect claim failed due to the absence of any supporting expert opinion. *See Soliman*, 2011 WL 4594313 at **3-4. Third, the issue of preemption was likely not fully litigated, because in *Soliman* the plaintiff was *pro se*.

Fourth, the trial court's order is unpublished and thus of limited value. Fifth, since its issuance, not one court has cited the order for its preemption language. In fact, only one court (from the same state) has cited

the order at all, and then solely for its finding that expert opinion is required to establish a product defect. *See Valente* v. *Textron, Inc.*, 931 F. Supp. 2d 409, 437 (E.D.N.Y. 2013), *aff'd*, 559 Fed. Appx. 11 (2d Cir. 2014). No court has found the trial court's preemption ruling in *Soliman* persuasive. Sixth, as discussed below, even under the preemption ruling in *Soliman*, plaintiffs' claims survive pursuant to the Federal Motor Vehicle Safety Standards ("FMVSS") "savings clause" combined with the evidentiary support proffered by plaintiffs at trial (and found to be persuasive by the jury) that the restraint system that Honda decided to install in the 1999 Integra rendered the vehicle defective and dangerous.

Finally, independent of the order's unreported and uncited status, the order is also unpersuasive in its reasoning on the preemption issue. The judge in *Soliman* assumed that a manufacturer's choice between the two available types of seatbelts represented a "significant objective" of the federal regulation because the goal of the regulation was to increase seatbelt usage. However, the district court overlooked that under either possible scenario, a seatbelt would be provided with the automobile, and thus seatbelt usage would be encouraged and facilitated no matter which design was selected. Because the district court's ruling in *Soliman* is utterly

unpersuasive on the federal preemption issue, due to its lack of reasoned analysis perhaps resulting from the one-sided presentation in a case involving a *pro se* plaintiff, this Court should decline to follow the unpublished order here.

At the very least, this unreported, uncited, non-Pennsylvania order provides no evidentiary basis to satisfy Honda's burden of proving a preemption defense. That is particularly significant given that there is a presumption against a finding of federal preemption. *See Dooner* v. *DiDonato*, 971 A.2d 1187, 1194 (Pa. 2009).

This case is similar to the defective seatbelt claim that was held not to be preempted in *King* v. *Ford Motor Co.*, 209 F.3d 886 (6th Cir. 2000). In *King* the manufacturer argued for preemption and claimed that plaintiffs' alternative design and defect allegations would improperly impinge on its federally-authorized choices as to what type of seatbelt system should be installed in a 1992 Ford Escort: namely, a restraint system with a motorized shoulder belt and manual lap belt.

The Sixth Circuit disagreed, observing that plaintiffs were not asserting that the choice made by the defendant was "inherently defective" (much like Sicher testified that a body-mounted restraint system was not

inherently defective) but that the manufacturer's chosen design — including the lack of certain design features and improper anchorage points for the restraint system — lacked necessary elements to make it safe. *Id.* at 892-93. Furthermore, the Sixth Circuit held that the "savings clause" in the FMVSS prevented the imposition of federal preemption:

> Such a claim is not preempted by the Safety Act. The FMVSS provide only the "minimum standards for motor vehicle or motor vehicle equipment performance." 49 U.S.C. §30102(a)(9). The Safety Act's savings clause, which states that compliance with an FMVSS does not shield a manufacturer from liability at common law, contemplates that manufacturers may be held liable for failure to exceed these minimum standards when their decisions were unreasonable. This is the essence of plaintiffs' claims.

King, 209 F.3d at 892.

Therefore, this case clearly is not subject to preemption pursuant to *Williamson* and *King*. Moreover, this case is distinguishable from *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), in which the U.S. Supreme Court held preempted a state law claim asserting that airbags should have been included in an automobile. In *Geier*, the applicable federal regulation gave manufacturers the choice whether or not to include an airbag in their vehicles. In other words, federal law made inclusion of an airbag optional, but the state law claim would have made an airbag's inclusion mandatory.

Here, by contrast, the automobile manufacturer did not have a choice whether or not to include a seatbelt system; rather, one type of seatbelt or another had to be included, and thus (as in *Williamson*) federal law does not preempt a state law claim asserting that the manufacturer should be held liable for not including the seatbelt that the manufacturer either knew or should have known provided occupants with greater protection from injury.

This case is also distinct from *Geier* in that, here, the jury found that a particular type of safety restraint (a seatbelt) was defectively designed, not that a different type of safety restraint (*e.g.*, an air bag) should have been installed. *Geier*, by contrast, involved a claim that an air bag should have been installed in a vehicle, not a claim that an air bag that was installed was defective. Cases considering the latter have found that, even if a claim that an air bag should have been installed are preempted, claims of installation of a defective air bag are not. *See*, *e.g.*, *Perry* v. *Mercedes Benz of North America, Inc.*, 957 F.2d 1257, 1265-66 & n. 9 (5th Cir. 1992).

If the kind of important regulatory objective — to afford manufacturers the choice of employing vehicle- or seat-mounted seatbelts — actually existed similar to the objective in *Geier*, one would be hard-

pressed to explain the Supreme Court's opinion in *Williamson*, the Sixth Circuit's opinion in *King*, and why the vast majority of decisions nationwide in which plaintiffs were advocating ABTS systems as safer alternatives in design defect cases (involving a variety of different types of crash sequences, including rollovers, and a variety of different types of vehicles, including sedans) contained no discussion of preemption whatsoever. *See*, *e.g.*, *Goodner* v. *Hyundai Motor Co.*, 650 F.3d 1034, 1045 (5th Cir. 2011) (Hyundai Tucson rollover); *Long* v. *TRW Vehicle Safety Sys.*, No. CV09-2209, 2011 WL 5007431 (D. Ariz. Oct. 20, 2011) (2003 Ford Expedition rollover); *Elick* v. *Ford Motor Co.*, No. 08-1700, 2010 WL 2505917 (W.D. Pa. June 21, 2010) (1994 Ford Explorer rollover).

Williamson establishes that manufacturer choice between two different types of seatbelts, alone, does not suffice to preempt a state law tort claim that a safer authorized seatbelt design should have been used. Because that was precisely plaintiffs' claim here, and because Honda is unable to establish that preserving seatbelt choice represented a "significant objective" of the federal regulation, Honda's federal preemption argument should be rejected, just as the U.S. Supreme Court rejected a strikingly similar preemption argument in *Williamson*.

D. Honda is not entitled to a new trial or j.n.o.v. on plaintiffs' failure-to-warn claim

1. The trial court's heeding presumption jury charge was proper under the facts of this case or constitutes harmless error at most, and thus no new trial is necessary

Honda asserts that the trial court's use of the standard civil jury charge consisting of the "heeding presumption" necessitates a new trial of plaintiffs' failure-to-warn claim. Specifically, Honda challenges as legally erroneous the trial court's verbatim use of SSCJI 16:50 jury charge on plaintiffs' failure to warn claim:

> 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.873a-74a, 1186b-87b.

In deciding whether to give this charge or a different charge titled, "Heeding Presumption — Rebutted," a trial court must consider the evidence in the record pertaining to whether the plaintiff would or would

not have followed any adequate warning had the defendant provided one. Here, the only evidence in the record of this trial on that issue consisted of Martinez's own testimony:

> 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.
>
> A. No.

R.564a-65a, 614b.

This testimony establishes that Martinez would have heeded the warning (by not purchasing the vehicle) had an adequate warning been provided. Honda introduced no contrary evidence, nor did Honda attempt to discredit Martinez on cross-examination. That is why Honda did not qualify for the "Heeding Presumption — Rebutted" jury charge, as Honda in no way rebutted Martinez's testimony that an adequate warning would have been heeded.

Because Honda failed to provide any evidence, whatsoever, that an adequate warning had been provided and that, even if an adequate

warning had been provided, Martinez would not have followed it, the trial court gave the only SSCJI warning causation charge that was appropriate. The other two SSCJI warning causation charges were, on the facts of this case, entirely inapplicable, because those two particular charges are given only when evidence is produced than an adequate warning was actually provided or the defendant has presented evidence that, if an adequate warning had been provided, the plaintiff would not have heeded the warning.

Comment j to Restatement §402A — which states that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded" — gives the defendant the benefit of a presumption that, if an adequate warning had been given, the plaintiff would have followed the warning. All that the heeding presumption Honda challenges in this case did was provide the plaintiff with the benefit of an equivalent presumption where no adequate warning was provided. Why the presumption that a plaintiff would have followed an adequate warning should be viewed as unlawful or unconstitutional when it benefits the plaintiff, but as lawful and unobjectionable when it benefits a product's manufacturer, Honda's brief fails to address.

Numerous cases applying Pennsylvania law establish the inaccuracy of Honda's argument that the heeding presumption only applies to failure to warn claims in asbestos-related or workplace cases. *See*, *e.g.*, *Harrison* v. *Megabus Northeast, LLC*, Civ. A. No. 12-5017, 2013 WL 5567588, at *3 (E.D. Pa. Oct. 9, 2013) (recognizing heeding presumption's applicability in negligent failure to warn case involving neither asbestos nor the workplace); *Reardon* v. *Illinois Tool Works, Inc.*, Civ. A. No. 12-2451, 2013 WL 1482709, at *4 & n.6 (E.D. Pa. Apr. 10, 2013) (holding that genuine issue of material fact existed on defective warning causation based on heeding presumption); *Steffy* v. *The Home Depot, Inc.*, Case No. 1:06-CV-02227, 2009 WL 904966, at *5 (M.D. Pa. Mar. 31, 2009) (plywood purchaser "enjoys the benefit of a rebuttable presumption that an adequate warning [the risk of formaldehyde] would have been heeded if it had been provided").

Finally, the trial court's use of the heeding presumption charge, even if erroneous (which it was not), would constitute only harmless error. Here, the plaintiffs' evidence established that Martinez would not have purchased the vehicle had an adequate rollover warning been provided. Honda provided the jury with no evidence to contradict or call into question that testimony. Thus, the jury would have been forced to

speculate, without any evidentiary basis, in order to ignore the unrebutted evidence of record that Martinez would have heeded an adequate rollover warning. *See Maya* v. *Johnson & Johnson*, 97 A.3d 1203, 1219 (Pa. Super. Ct. 2014) (rejecting defendant's challenge involving "heeding instruction" charge under the harmless error doctrine where the plaintiff testified, as here, that an adequate warning would have been heeded).

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

For these reasons, this Court should hold that the heeding presumption charge was lawfully given or, at most, constituted harmless error.

2. Plaintiffs' evidence in support of their failure-to-warn claim is more than legally sufficient to justify the trial court's denial of Honda's motion for j.n.o.v. on that claim

Honda devoted zero evidentiary attention to plaintiffs' failure to warn claim at trial — never presenting any evidence or testimony that a relevant warning had been provided and never presenting any evidence that Martinez would have disregarded a warning. Thus, plaintiffs' evidence in support of that claim stood unrebutted before the jury.

Sicher specifically addressed the necessity of warning about the head-strike rollover hazard — without any objection from Honda — via the design engineering hierarchy that he described for the jury:

> A. The design hierarchy is essentially — once a hazard is identified, your first objective is, if you can, is you design a way out of the hazard. If you find a hazard and you can design it out, the hazard goes away and there's no issue. If you can't design it out, then your next step is to try and guard against it. So whatever the hazard is, you put a guard in place to try to prevent that hazard from occurring. If you can't design it out and you can't guard against it, you need to warn about it. You know, hey, here's a hazard, don't do this. If you can't do any of those, then you need to get into training, into trying to train the person not to do what it would be to get that hazard.
>
> Q. Did Honda do any of those things?
>
> A. I have seen no indications from Honda after seeing the head strike that they — which clearly to me is a hazard — that

> they've done any hazard analysis or made any attempts to design away the hazard, no attempt to guard against it, no attempt to warn that I've seen.

R.306a, 348b.

Sicher further testified (without objection) about the false representations made by Honda to the general public in the Integra's owner's manual about the performance of the seatbelt, including the claim that the seatbelt "[h]elps protect you in almost every type of crash including side and rear impact and rollovers." R.295a-97a, 345b.

This failure to warn testimony from a design engineer, even one who does not possess expertise on the specific issue of warnings, is clearly permissible under Pennsylvania law. *See Von Der Stuck* v. *Apco Concrete*, 779 A.2d 570 (Pa. Super. Ct. 2001). In *Von Der Stuck*, the trial court granted a defendant's motion in limine and precluded plaintiffs' expert, Craig Clauser, from testifying that the product should have had a warning because his expertise was in the field of metallurgy and metal failures, and he had no background in drafting warnings or analyzing how readers might respond to them. In precluding Clauser's testimony, the trial court ruled that Clauser would not be allowed to provide testimony as to either the context of the warning, or how people reading the warning would be

expected to react. On appeal, this Court reversed and ordered a new trial, holding that Clauser was competent to provide that warnings-related testimony. *Id.* at 574.

Sicher provided precisely this type of testimony, without objection (R.306a, 348b), and the jury, consistent with this Court's holding in *Von Der Stuck*, was free to "[d]etermine what weight to give this evidence." Thus, the evidence before the jury enabled it to find, as it did, that Honda failed to warn about the highly dangerous risks associated with the restraint system that the 1999 Integra presented. Furthermore, on the issue of warning causation, it is notable that, at trial, Martinez specifically testified that he never would have purchased the Integra had there been warnings that the Integra was not able to protect him in a rollover. R.564a-65a, 614b.

This testimony allowed the jury to find, as it did, that had an adequate warning about the restraint system been provided, Martinez would not have purchased that vehicle, and thus his injuries would have been entirely avoided. Critically, Honda opted to conduct absolutely no cross-examination of Martinez, and thus Honda never asked Martinez "Did you read the manual," "Did you possess the manual," "Did you see the manual," or how Martinez would have learned of the warning in question.

Indeed, there was no evidence before the jury whatsoever concerning whether Martinez did or did not have access to the 1999 Integra's owner's manual, which Acura has posted online for anyone with an internet connection to freely access at any time and for any reason. *See* http://owners.acura.com/vehicles/information/1999/Integra/manuals.

The plaintiff in a failure to warn case does not bear the burden of describing precisely what an adequate warning of a product's dangers would say or how that warning would be delivered when, as here, there are multiple obvious ways that a motor vehicle manufacturer can deliver adequate warnings (*e.g.*, warnings printed inside the vehicle, such as on the sun visor or as a tag on the safety equipment in question, or in the marketing and advertising materials for the vehicle where such warnings would unquestionably come to the attention of the public at large).

Honda now asserts that the statement in the 1999 Integra owner's manual, "Of course, seat belts cannot completely protect you in every crash," should preclude Honda's liability on a failure to warn claim. Brief for Appellant at 52. No witness at trial testified that this language constituted a warning, much less an adequate warning. Moreover, even if this language had been characterized by a witness as a warning, it is

important to note that the jury reviewed that language upon request during deliberations and found it not to be an adequate warning. The manual was requested via the first jury question, and counsel for Honda approved the portions of the manual that were admitted into evidence to be sent back to the jury. (R.905a-07a, 1217b-19b). Because the jury necessarily concluded that the language Honda now relies on did not constitute an adequate warning, no portion of the owners' manual provides Honda with any support.

Because the jury in this case found for plaintiffs on both the claim for design defect and the claim for failure to warn, and because plaintiffs' damages were identical under either theory, in order for Honda to obtain a j.n.o.v. in this case, it is necessary for Honda to establish that it is entitled to judgment in its favor on both claims. *See Halper* v. *Jewish Family & Children's Serv.*, 963 A.2d 1282, 1288-89 (Pa. 2009). Because Honda has failed to demonstrate its entitlement to a j.n.o.v. on either claim, let alone on both claims, this Court should affirm the trial court's denial of Honda's request for judgment notwithstanding the verdict.

E. The Jury's Compensatory Damages Award, As The Trial Court Recognized, Is Fully Justified By The Devastating And Permanent Damages That Martinez Has Suffered And Will Continue To Suffer From For Years And Years To Come

Honda devotes a mere two paragraphs of its appellate brief to arguing that the jury's compensatory damages award was excessive under Pennsylvania law. *See* Brief for Appellant at 53-54.

As noted above in the Standard of Review section of this brief, this Court's review of a trial court's refusal to grant remittitur is extremely deferential. This Court will not substitute its judgment for that of the fact-finder, and a court must review the record with consideration of the evidence accepted by the jury. *See Smalls v. Pittsburgh-Corning Corp.*, 843 A.2d 410, 414 (Pa. Super. Ct. 2004).

In this case, any reduction in the jury's verdict is clearly inappropriate and unwarranted given that the jury based its verdict on medical, life care, and economic damages that Honda never challenged, as well as testimony from the Martinez family, a co-worker, and rehabilitation experts whom Honda never cross-examined. (R.548b-56b, 571b-85b, 604b-20b). Furthermore, the pain and suffering and loss of consortium awards

fully comport with the standards and ratios that this Court has applied in a series of cases.

A jury that has seen the evidence and the injured plaintiff first-hand necessarily must exercise its collective judgment concerning what amount of damages will fairly compensate the plaintiff for pain and suffering. A jury's award for pain and suffering cannot be disturbed "unless it is so grossly excessive as to shock our sense of justice," (*Whitaker* v. *Frankford Hosp.*, 984 A.2d 512, 523 (Pa. Super. Ct. 2009)) or, "it clearly appears that the amount awarded resulted from partiality, caprice, prejudice, corruption or some other improper influence." *Delahanty* v. *First Pennsylvania Bank*, 464 A.2d 1243, 1257 (Pa. Super. Ct. 1983). As this Court explained in *Whitaker*, "[w]e begin with the premise that large verdicts are not necessarily excessive verdicts. Each case is unique and dependent on its own special circumstances and a court should apply only those factors which it finds to be relevant in determining whether or not the verdict is excessive." 984 A.2d at 523. Moreover, this Court has held that "[i]f the verdict bears a reasonable resemblance to the damages proven, we will not upset it merely because we might have awarded different damages." *McManamon* v. *Washko*, 906 A.2d 1259, 1285 (Pa. Super. Ct. 2006).

The jury's damages award in this case cannot properly be evaluated without understanding its basis and the evidence on which the jury relied. At trial, plaintiffs provided the jury with unimpeached testimony that Martinez, who had by then already lived four years as a motorized wheelchair-dependent quadriplegic, has a normal life expectancy of an additional 23.8 years. (R.511a-12a, 541a-42a, 579b, 610b).

Consequently, Martinez and his wife will endure approximately 28 years of unrelenting hardships associated with a completely helpless man who cannot even turn himself over and is entirely dependent on others for every single aspect of daily living. The jury heard plaintiffs' unrefuted evidence that Martinez and his wife will be forced to endure almost three decades wherein Martinez: (a) cannot feed himself; (b) cannot dress himself; (c) cannot toilet himself; (d) cannot transfer himself to his motorized wheelchair; (e) cannot bathe himself; (f) cannot have marital relations with his wife; (g) cannot play with his children and grandchildren; (h) is totally dependent on others for every single activity of daily living aside from chewing and swallowing; (i) must be catheterized by a family member or a nurse; (j) must be turned every two hours at night when he is in bed; (k) is totally helpless insofar as defending himself or

responding to an emergency, and thereby lives in a constant state of anxiety and fear; and (*l*) is forced to live with the constant reminder that he has been transformed from being a proud worker and the patriarch of his family into a person who will always require the attention usually reserved for a newborn and who believes he has become a burden to his loved ones, particularly his wife and eldest daughter. (R.548b-56b, 571b-85b, 604b-20b).

The jury's verdict in this case consisted of several components. The jury awarded (a) the full value of the life care plan of $14,605,393, which goes to pay the people, companies, and services associated with taking care of Martinez (which plaintiffs' expert life care planner, who was not subjected to any cross-examination whatsoever, testified about); (b) $720,321 in loss of earnings and earning capacity, which is the approximate average of the range of loss of earnings presented by plaintiffs' expert economist (who, likewise, was subjected to no cross-examination); (c) $25,000,000 in pain and suffering to Martinez, which amounts to $892,857 for each of the 28 years he is forced to live as a helpless, motorized wheelchair-dependent quadriplegic; and (d) $15,000,000 in loss of consortium to Mrs. Martinez, which amounts to $535,714 for each of the 28 years she will spend sharing her husband's life

that has been destroyed as a result of her husband's devastating injuries. She has already spent four years sleeping on a small cot in her living room next to her husband's hospital-style bed, waking every two hours with her daughter in order to turn Martinez in his bed so that he does not develop life-threatening pressure ulcers.

With respect to the pain and suffering award to Martinez, this amount ($25,000,000) should be viewed in the context of the combined award for Martinez's future medical expenses and loss of earnings (namely, $15,325,714). In so doing, this Court will see that the pain and suffering award is 1.6 times the combined award for medical expenses and loss of earnings. This Court recently upheld a pain and suffering award that was four times the combined amount of the awarded medical expenses and loss of earnings. *See Gillingham* v. *Consol Energy, Inc.*, 51 A.3d 841, 864 (Pa. Super. Ct. 2012) ("the award of pain and suffering and related damages is only four times the amount of medical expenses, and lost past and future earnings."). Therefore, the award to Martinez, with regard to pain and suffering, is less than half the multiple that this Court recently upheld in *Gillingham* (*i.e.*, a 1.6 multiplier versus a 4 multiplier).

In *Gurley* v. *Janssen Pharmaceuticals, Inc.*, 113 A.3d 283 (Pa. Super. Ct. 2015), this Court affirmed a trial court's rejection of a defendant's remittitur request challenging a jury's award of $10,620,000.00 in noneconomic damages in a case in which, according to the defendant's argument, the child plaintiff's "cleft lip has been repaired, he has only a faint scar, and his injury does not prevent him from attending school and developing normal relationships with his peers." *Id.* at 294-95. If a $10 million noneconomic damages award was not unlawfully excessive in that case, surely the jury's award in this case, in which the plaintiff experienced the most devastating of injuries, is likewise not excessive.

Moreover, recent loss of consortium awards of Pennsylvania trial judges (who are even less likely than juries to allow passion to sway them when assessing compensatory damages, and who are presumed familiar with applicable legal principles) have included exponentially higher annual amounts than that which the jury in this case awarded to Mrs. Martinez. In *Russell* v. *A.W. Chesterton Co.*, 2010 Phila. Ct. Com. Pl. LEXIS 363 (C.C.P. Phila Ct., Pa. 2010), *aff'd without opinion*, 32 A.3d 263 (Pa. Super. Ct. 2011), the trial court awarded $4,000,000 for loss of consortium for one year of loss. The award for consortium in *Russell* ($4,000,000 per year) —

which this Court affirmed — is approximately 7.5 times greater than that which was awarded to Mrs. Martinez (i.e. $535,714 per year for the approximately 28 years she will spend without the marital relationship she once enjoyed with her husband, instead attending to his basic needs of sustenance both day and night).

Another relevant and recent case in which a judge awarded consortium damages is *Schroeder* v. *Anchor Darling Valve Co.*, 16 Pa. D.&C.5th 449 (C.C.P. Phila. Cty., Pa. 2010), *aff'd without opinion*, 32 A.3d 264 (Pa. Super. Ct. 2011). In *Schroeder*, the trial court awarded $5,000,000 for loss of consortium associated with four years of loss (resulting in an annual loss of consortium of $1,250,000). The award for loss of consortium in *Schroeder* ($1,250,000 per year) — which this Court affirmed — is approximately 2.3 times greater than that which was awarded to Mrs. Martinez ($535,714 per year). Thus, there is nothing at all remarkable about the jury's loss of consortium award in this case.

The jury returned a large compensatory damage award because this case involves catastrophic injuries suffered by someone who was married, working, had a family, and still faces a normal life expectancy. These facts,

and not any desire to impermissibly punish Honda, explain the jury's compensatory damages award.

Honda, by contrast, engages in the purest form of speculation in an attempt to impute impermissible motives to the jury. Simply because the foreperson of the jury, not a legal scholar, happened to say that Honda was "guilty" rather than "liable," Honda speculates that the jury's damages award was intended to exact punishment. This is an untenable argument and, quite obviously, not something that the parties or any court should speculatively explore. The statement was probably benign, spoken by a juror unfamiliar with the legal lexicon. But if this Court were to impute motives to the jury, it could just as easily speculate that the foreperson had applied a higher standard of proof applicable to a criminal case in finding Honda liable. In any event, the statement "guilty" by the foreperson caused no concern to the trial judge, nor to Honda's trial counsel, who made no contemporaneous request to the trial court to launch an inquiry of the jury foreperson. One thing is clear: the jury did not find Honda "guilty" on the verdict slip that officially represents the jury's verdict.

Moreover, it is wholly unconvincing for Honda to impute a punitive purpose to the jury's verdict in this case, in which the jury received no

instructions from the trial court regarding any form of damages other than compensatory damages. Plaintiffs' counsel's argument mentioning certain other automobile manufacturers was entirely proper in the context of the evidence of record in this case, in which Honda's expert witnesses testified that they frequently testified on behalf of various different automobile manufacturers. Plaintiffs' counsel, in his closing argument, did not once call on the jury to punish Honda for the misdeeds of any other automobile manufacturer, nor did he mention any improper conduct associated with any other manufacturer or any other vehicle. In addition, the trial court repeatedly informed the jury that its verdict had to be based solely on the facts that the jury learned from the witness stand and that had been admitted into evidence.

Juries exist to collectively decide questions such as what constitutes fair compensation for pain and suffering. This is based on the realization that such a question is not something about which trial judges or even appellate judges possess any particular expertise. Here, the jury's award of damages cannot be fairly characterized as plainly excessive and exorbitant. Rather, the award falls within the range of fair and reasonable compensation. The award neither shocks the sense of justice nor does it in

any way suggest that the jury was influenced by partiality, prejudice, mistake, or corruption. Accordingly, the trial court's rejection of Honda's request for remittitur should be affirmed.

F. The Trial Court Properly Denied Honda's Motion To Transfer Venue Due To Forum *Non Conveniens*

As noted above, Honda's appellate brief is far from clear regarding whether Honda is raising the venue issue as an independent ground for a new trial or merely asserting that *if any new trial were necessary*, which it is not, it should be held in York County. In either event, Honda's argument lacks merit. The trial court did not abuse its discretion in retaining venue over this case in Philadelphia instead of transferring it to York County. *See Fessler* v. *Watchtower Bible and Tract Society of New York, Inc.*, 131 A.3d 44 (Pa. Super. Ct. 2015).

In requesting a transfer of venue, Honda based its motion (filed approximately two years after the case had begun) almost exclusively on the supposed need for five emergency responder witnesses (none of whom were York County residents) to testify (as well as the front seat passenger, Jose Ruiz, who testified at trial). In so doing, Honda provided no

convenience affidavits whatsoever. Plaintiffs, in turn, responded with a 30-page brief that included seventeen exhibits, including a convenience affidavit from witness Ruiz. Plaintiffs' response in opposition further demonstrated that these five emergency responder witnesses had not provided affidavits asserting that it was oppressive or vexatious for them to testify. Even more importantly, none had any material information to provide, nor did they remember anything about the crash.

Honda did not attempt to take trial depositions of any of the five witnesses it had identified in its forum *non conveniens* motion. Then, at trial, Honda called none of these witnesses to testify and read none of their discovery deposition transcripts to the jury. In short, Honda's motion to transfer venue for forum *non conveniens* was entirely lacking in substance, both at the time it was filed and based on subsequent developments revealed during the trial of this case. *See Fessler*, 131 A.3d at 45 (holding that the defendant must establish that the plaintiffs' chosen venue is actually oppressive, rather than merely inconvenient, in order to justify a transfer of venue).

Accordingly, the trial court did not abuse its discretion in denying Honda's motion to transfer venue originally, or when Honda raised that issue as a ground for relief in its post-trial motion.

V. CONCLUSION

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

Respectfully submitted,

Dated: March 28, 2016

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 13,432 words excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

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