IN THE
SUPERIOR COURT OF PENNSYLVANIA

NO. 445 EDA 2015

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

v.

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

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

APPLICATION FOR REARGUMENT *EN BANC* OF APPELLANT AMERICAN HONDA MOTOR CO., INC.

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INTRODUCTION

On April 19, 2017, a panel of this Court affirmed the largest crashworthiness verdict in Pennsylvania history—$55 million—against appellant American Honda Motor Co., Inc. for using a federally compliant, industry-standard seatbelt design and not the illegally modified alternative design Plaintiffs presented. *En banc* reargument is warranted for multiple reasons.

First, the panel decision (attached as Appendix A) exacerbates existing conflicts and widespread confusion among this Court's decisions regarding the most important product liability issue in Pennsylvania today: the meaning and application of the Supreme Court's landmark decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). Other panels of this Court have correctly observed that *Tincher* "significantly altered the common law framework for strict products liability claims in Pennsylvania," *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. 2017), and should not be "narrow[ly] read[]." *Renninger v. A&R Machine Shop*, ___ A.3d ___, 2017 WL 1326515, at *10 (Pa. Super. Apr. 11, 2017).

Here, the panel did not just read *Tincher* narrowly; it rendered it a dead letter. Although *Tincher* expressly overruled *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), and returned to the jury the question whether a product is "unreasonably dangerous" under a multi-factor risk/utility test, the trial court

rejected Honda's unreasonably-dangerous and risk/utility jury charges and delivered the same "manufacturer-as-guarantor-of-safety" jury charge that *Tincher* repudiated. The panel nonetheless held that this complied with *Tincher* or was at most harmless error. If a verbatim *Azzarello* jury instruction—properly objected to—is merely harmless error, then *Tincher*'s overruling *Azzarello* was for naught. This cannot be so.

Attached as Appendix B is a chart that graphically demonstrates the confusion and inconsistency now reigning among this Court's decisions applying *Tincher*. This case is an ideal vehicle for the Court to address what *Tincher* requires and end the current confusion.

Second, the panel wrongly overlooked controlling precedent regarding Plaintiffs' warning-defect claims. The panel failed to apply this Court's binding decision in *Amato v. Bell & Gossett*, 116 A.3d 607 (Pa. Super. 2015), *app. dismissed*, 150 A.3d 956 (Pa. 2016), which holds that *Tincher* applies to warning-defect claims. The panel erroneously concluded that this issue "remains unsettled" after *Amato* because of a supposedly pending Supreme Court appeal. Slip op. at 10-11. But the panel failed to recognize that the Supreme Court *had dismissed* the *Amato* appeal, so *Amato* is controlling precedent. The panel also erroneously affirmed use of a "heeding presumption" that effectively directed a verdict on Plaintiffs' warning-defect claim. The panel ignored the three contrary precedential

decisions of this Court holding that no such presumption applies outside of asbestos/workplace-injury cases, and thus avoided Honda's argument that controlling precedent barred any presumption instruction in this case.

Third, this Court repeatedly has approved a three-element crashworthiness jury instruction. The panel dismissed this precedent as not requiring "any particular level of specificity" in the charge. Slip. op. at 14. It erroneously allowed a crashworthiness charge that eliminated the critical second element on which Honda based its defense: whether an alternative design would have made a difference. The panel's decision thereby sows confusion about the proper elements of a crashworthiness claim.

The panel's decision is "inconsistent with ... decision[s] of ... different panel[s] of the ... court," and the panel plainly "overlooked or misapprehended ... controlling [and] directly relevant authorit[ies]." Pa. R.A.P. 2543, Official Note. *En banc* reargument therefore is warranted.

REASONS RELIED UPON FOR ALLOWANCE OF REARGUMENT AND POINTS OF FACT OR LAW OVERLOOKED BY THE PANEL

I. The Panel's Decision Renders *Tincher* Meaningless, and Exacerbates the Confusion Regarding *Tincher*'s Scope and Breadth.

This case was tried under the products-liability standards of *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), which the Supreme Court overruled in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). The jury received the

verbatim *Azzarello* charge, with both the "any element" defect test and the manufacturer as "guarantor" language repudiated in *Tincher*. Nonetheless, the panel held that Honda's trial complied with *Tincher*, which raises a significant question: If a case tried under the repudiated *Azzarello* standard complies with *Tincher*, then what exactly does *Tincher* require? If, as here, a verbatim *Azzarello* jury charge combined with no mention of the "unreasonably dangerous" standard is not reversible error, then trial courts can simply continue as before. The panel effectively held that *Tincher* changed nothing about Pennsylvania's products-liability law; whereas other panels have correctly recognized *Tincher*'s significant impact. Rehearing is warranted to resolve conflict and confusion over at least three critical *Tincher*-related questions.

First, the Court should resolve how, after *Tincher*, courts should instruct juries on the "unreasonably dangerous" inquiry. Under *Azzarello*, courts decided whether a product was unreasonably dangerous, and juries were instructed that the manufacturer is a "guarantor" of safety and liable if the product lacked "any element necessary to make it safe." *Tincher* overturned that approach, held that *juries* decide if products are unreasonably dangerous, and disapproved the *Azzarello* jury charge. *See* 104 A.3d at 365, 379 (holding that the "guarantor" language was a "term[] of art" that created an "impractical" standard, and that the "any element" jury charge was taken "out of context" from an earlier case).

Here, the trial court gave the standard *Azzarello* charge and never instructed the jury that it must find the Honda Integra unreasonably dangerous. *See* Jury charge on defect (attached as Appendix C). The panel nonetheless held that the *Azzarello* charge "made it clear to the jury that it was the arbiter of whether" Honda's product "was 'unreasonably dangerous.'" Slip op. at 8. That conclusion cannot be correct. The *Azzarello* charge was intended precisely to *prevent* juries from assessing whether products were unreasonably dangerous. If the *Azzarello* jury charge were sufficient, there would have been no need to overrule *Azzarello*. *Tincher* must require a different charge informing the jury of its obligation to decide whether the product is unreasonably dangerous, *and* so it knows that liability does not attach simply because the product lacked "any element necessary to make it safe." Rehearing is warranted on this basis alone.

Second, the Court should resolve confusion over the contours of *Tincher*'s "risk/utility" test. Before *Tincher*, courts used the seven-factor risk/utility test that is prevalent in "multiple jurisdictions." *Tincher*, 104 A.3d at 389-90. *Tincher* returned the risk/utility inquiry to the jury, and it approvingly cited this seven-factor test. *Id.* Honda requested a multi-factor risk/utility jury charge, but the trial court rejected it. R. 932a.

The panel held a risk/utility charge unnecessary, because Plaintiffs' crashworthiness claim required the jury to address the "practicability of an

alternate design." Slip. op. at 8. The panel stated that this language "inherently requires the jury to balance factors such as the cost of implementing the design against the relative safety of the alternate design," and therefore "the jury could not have reached a verdict in the case without conducting a risk utility analysis." *Id.*

The trial record lacks any evidence of the "cost of implementing" Plaintiffs' alternative design, *id.*, and in any event, the panel's decision fundamentally misunderstands *Tincher*'s risk/utility analysis. At most, the crashworthiness charge addressed *one* of seven risk/utility factors. The charge failed to instruct the jury to consider factors such as "[t]he usefulness and desirability of the product," "[t]he user's ability to avoid danger by the exercise of care," or "[t]he user's anticipated awareness of the dangers inherent in the product"—all factors that *Tincher* cited approvingly. *Tincher*, 104 A.3d at 389-90. The panel presumed that the jury performed a complete risk/utility test without ever being instructed on the factors, and where Plaintiffs introduced no cost-of-alternative-design evidence. This Court has rejected after-the-fact speculation about an improperly instructed jury's deliberations. "[T]he jury must be afforded an opportunity to make a finding, and we will not presume which facts will be accepted by the jury." *Nelson v. Airco Welders Supply*, 107 A.3d 146, 160 (Pa. Super. 2014) (en banc). At most, this jury considered *one* risk/utility factor, and rehearing is warranted to resolve the contours of the risk/utility test under Pennsylvania law.

Third, this Court should resolve the admissibility of regulatory-compliance and industry-standards evidence under *Tincher*. The Supreme Court previously held in *Lewis v. Coffing Hoist*, 528 A.2d 590 (Pa. 1987), that industry standards were inadmissible in strict liability actions. But *Lewis* was "in harmony with the *Azzarello* decision," which *Tincher* overruled, 104 A.3d at 368, and *Tincher* noted the "impact" of its ruling on "subsidiary issues … such as the availability of negligence-derived defenses." *Id.* at 409.

Here, the panel rejected the admissibility of industry-standards evidence, quoting (without attribution) an unpublished and uncitable opinion for the proposition that "*Tincher* does not, nor did it purport to, affect the applicability of the rulings in *Gaudio* or *Lewis*." Slip op. at 9.[1] However, only one week before, the precedential *Renninger* decision held just the opposite, that the *Lewis* line of cases are part of "a large body of post-*Azzarello* and pre-*Tincher* case law" that this Court is no longer "bound by … in the wake of *Tincher*." *Renninger*, 2017 WL 1326515, at *10. Here, Honda was not allowed to argue federal regulatory compliance or conformity to industry standards, and the jury was prohibited from considering them.

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[1] Identical language appears in *Cancelleri v. Ford Motor Co.*, No. 267 MDA 2015, 2016 WL 82449, at *3 (Pa. Super. Jan. 7, 2016), a memorandum opinion that Plaintiffs improperly cited at oral argument after having been ordered by the Court to remove such citations from their brief.

These errors were extremely prejudicial, given that Honda's seatbelt design was federally compliant and is found in 98% of vehicles on the road, whereas Plaintiffs' alternative design was tested under conditions that could not legally apply to passenger cars. *See* Honda Principal Br. at 34-37 (Plaintiffs' design was always tested with at least 5.5 pounds of tension, in violation of federal standards). When this evidence is properly considered, it is clear that federal law preempted Plaintiffs' claim, and that Honda lacked fair notice that it could be subject to liability for not equipping the Integra with an illegal seatbelt design. *See id.* at 37-41; *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) ("laws which regulate persons or entities must give fair notice of conduct that is forbidden or required").

Rehearing is warranted to resolve the admissibility of regulatory-compliance and industry-standards evidence—an issue that *Tincher* expressly delegated to this and other courts to decide. This case, in which these issues are fully preserved, provides an ideal vehicle to resolve this important and recurring issue of Pennsylvania law. *See* IOP § 65.38(B)(5); *see also* Pa. R.A.P. 2543.

II. The Panel Overlooked or Failed to Apply Binding Precedents Regarding Plaintiffs' Warning-Defect Claims.

The panel also failed to apply controlling precedents regarding Plaintiff's warning-defect claims.

First, the panel misunderstood the precedential effect of this Court's decision in *Amato*. *Amato* held that *Tincher* "provided something of a road map for navigating the broader world of post-*Azzarello* strict liability law," including strict-liability warning-defect claims, which (like design-defect claims) now require the jury to decide whether a product is unreasonably dangerous absent a particular warning. 116 A.3d at 620. The panel mistakenly believed that *Amato* was pending before the Supreme Court and thus did not treat it is as precedential. Slip op. at 10-11. Five months ago, however, Honda notified the panel that the Supreme Court had dismissed the *Amato* appeal as improvidently granted, meaning that *Amato* remained controlling precedent. *See Vinciguerra v. Bayer CropScience Inc.*, 150 A.3d 956 (Pa. 2016) (dismissing *Amato* appeal as "improvidently granted"). The panel either overlooked or misunderstood that fact and, as a result, failed to apply binding precedent. Pa. R.A.P. 2543, Official Note.

Second, the panel approved a charge instructing the jury that it "may not find for the defendant based on a determination that … the plaintiff would not have read or heeded" "adequate warnings or instructions," but "instead" the jury "must presume … that if there had been adequate warnings or instructions, the plaintiff would have followed them." Slip op. at 15-16 (quoting N.T. 6/26/14, p.m., at 23-25).

This "heeding presumption" instruction conflicts with three decisions of this Court—one affirmed by the Supreme Court, another involving automobiles—holding that the presumption applies only to workplace-related warnings. *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 587 (Pa. Super. 2004) ("[T]he heeding presumption … does not apply in the context of this case, which involves the voluntary choice of a smoker to begin and continue smoking tobacco."); *Moroney v. General Motors Corp.*, 850 A.2d 629, 634 n.3 (Pa. Super. 2004) (heeding presumption exists "only" in cases "where plaintiffs faced exposure during their employment"); *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005) (per curiam) (rejecting expansion of presumption to consumer products; "where the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful").

Honda repeatedly argued that these controlling decisions preclude any "heeding presumption" in this case, rebutted or unrebutted, and that the trial court's "heeding presumption" instruction necessarily requires a new trial. Principal Br. at 43-45, Reply Br. at 24-27. Yet the panel simply ignored all three binding decisions, failing to cite let alone apply any of them.[2]

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[2] Indeed, a panel with two of the same judges reached the diametrically opposite conclusion—that the heeding presumption applies only to asbestos cases—in

Instead, the panel found the trial court's heeding presumption "appropriate" because *Honda* did not introduce evidence that Mr. Martinez would *not* have heeded a warning. Slip. op. at 16. But that is not how presumptions work. The party with the burden of proof does not receive a presumption simply because the opposing party offered no rebuttal evidence. It was *Plaintiffs'* burden to prove Mr. Martinez would have heeded a warning. But because Plaintiffs offered no evidence that he ever possessed, much less read, the owner's manual, Honda had no further burden. The jury could have rejected Mr. Martinez's unsupported testimony that he would have heeded a warning, but the heeding presumption improperly took that issue away from the jury. *En banc* reargument is warranted for this reason as well. Pa. R.A.P. 2543, Official Note.

III. The Panel's Holding Regarding the Crashworthiness Charge Conflicts with Numerous Decisions of This Court.

The panel also "overlooked or misapprehended … controlling [and] directly relevant authorit[ies]" regarding the trial court's crashworthiness charge, and the panel's decision is thus "inconsistent with [numerous] decision[s] of … different

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Dolby v. Ziegler Tire & Supply Co., No. 694 WDA 2016, 2017 WL 781650, at *5 (Pa. Super. Feb. 28, 2017) (unpublished). Two days before this case was decided, the *Dolby* panel denied an application to publish its contrary result. This inconsistency is another reason to grant *en banc* reargument.

panel[s] of" this Court. Pa. R.A.P. 2543, Official Note. This Court repeatedly has held that:

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

Parr v. Ford Motor Co., 109 A.3d 682, 689 (Pa. Super. 2014) (en banc) (emphases added) (quoting *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532 (Pa. Super. 2009)); *accord Colville v. Crown Equipment Corp.*, 809 A.2d 916, 922-23 (Pa. Super. 2002) (same). In *Gaudio*, this Court quoted and expressly approved as "adequate" a crashworthiness jury charge incorporating these three elements. 976 A.2d at 550-51.

The panel quoted the same "three elements." Slip. op. at 12-13 (quoting *Colville*, 809 A.2d at 922-23). It is undisputed that the trial court gave no instruction at all on the second element.[3] Yet the panel ignored this omission, ruling that the trial court's instruction nonetheless "adequately encapsulated the elements of the doctrine" and concluding that a jury need not be instructed "on the three elements … with any particularly level of specificity." Slip op. at 14.

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[3] Plaintiff's expert conceded head-to-roof contact with the alternative design, so there is no argument the error was harmless. Honda Principal Br. at 11, 32; Reply Br. at 17.

This conclusion conflicts with this Court's multiple controlling decisions and profoundly unsettles the law of crashworthiness. In *Gaudio*, for example, the Court concluded a "charge correctly advised the jury of the *specific elements* of a crashworthiness claim" where the jury was instructed the plaintiff must prove (among other things) "that [the Deceased] would not have suffered these injuries if the alternative design were used"—the second element. 976 A.2d at 550-51 (emphasis added). In *Colville*, the Court "[found] that a jury should have been instructed on the elements of crashworthiness," and noted that "[t]he second of these elements *required* the plaintiff to demonstrate 'what injuries, *if any*, the plaintiff would have received had the alternative safer design been used.'" 809 A.2d at 924 (first emphasis added).

The panel here did not explain how a jury charge could eliminate altogether one of the three elements yet still be sufficient on all three. No precedent allows jettisoning the second element, and the panel's outlier decision will create confusion over the crashworthiness elements if not corrected. Nor could this error be harmless. When Mr. Martinez's injuries occurred was not in dispute. Rather, Honda's defense centered on the omitted second crashworthiness element—whether the purported alternative design would have prevented those injuries.

CONCLUSION

For the foregoing reasons, *en banc* reargument should be granted.

Dated: May 3, 2017

Respectfully submitted,

/s/ James M. Beck

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R.A.P. 2544(d), I hereby certify that the foregoing Application for Reargument En Banc by Appellant American Honda Motor Co, Inc. complies with the word count limits set forth in Pa. R.A.P. 2544(c). The foregoing application contains 2,946 words, exclusive of supplementary material excluded by the Rules of Appellate Procedure.

/s/ James M. Beck

PROOF OF SERVICE

I hereby certify that on May 3, 2017, copies of the foregoing Application for Reargument En Banc by Appellant American Honda Motor Co, Inc. were sent by electronic service to:

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APPENDIX A

AMERICAN HONDA MOTOR CO., INC., Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CARLOS MARTINEZ AND ROSITA DE LOS SANTOS DE MARTINEZ, H/W	:	No. 445 EDA 2015

Appeal from the Judgment Entered January 21, 2015
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 111203763

BEFORE: BENDER, P.J.E., DUBOW, J., and MUSMANNO, J.

MEMORANDUM BY DUBOW, J.: **FILED APRIL 19, 2017**

This appeal of a Judgment in a products liability case has a unique and uncommon procedural posture. After the jury returned a verdict in favor of Appellees, and against Appellant, but before the trial court ruled on Honda's Post-Trial Motion, the Pennsylvania Supreme Court issued its decision in ***Tincher v. Omega Flex, Inc.***, 104 A.3d 328 (Pa. 2014), which overruled a dispositive products liability case. Therefore, the issues in the Post-Trial Motion and on appeal deal with whether the holding in ***Tincher*** negatively impacted the trial court's jury instructions and evidentiary rulings. We find that the trial court, even in light of ***Tincher***, properly instructed the jury and precluded certain evidence. We, therefore, affirm.

More specifically, the Appellant in this appeal is American Honda Motor Co., Inc. ("Honda"), which appeals from the judgment entered in favor of Carlos Martinez and Rosita de los Santos de Martinez ("Appellees") and

against Honda for $55,325,714. The trial court aptly set forth the facts and procedural history as follows:

> On May 1, 2010, [Appellee] Carlos Martinez, was driving a 1999 Acura Integra, manufactured by Honda, when he lost control of the vehicle. His car left the roadway and rolled over twice. He sustained serious injuries from the accident that rendered him a quadriplegic. [Appellees] timely brought suit against Honda for damages as a result of the accident.[1] In their claim against Honda, [Appellees] alleged the seatbelt in [Appellee] Carlos Martinez's vehicle was defectively designed.
>
> The matter was tried before a jury from June 17, 2014 to June 26, 2014. The jury returned a verdict against Honda, finding Honda negligent under two independent theories. First, the jury found that the design of the seatbelt in Carlos Martinez's car was defective and there was an alternative, safer, practicable design. The jury also determined the subject vehicle was defective because of Honda's failure to warn. The jury also found both the defective design and Honda's failure to warn were factual causes of [Appellee] Carlos Martinez's injuries. As a result, the jury awarded [Appellees] $14,605,393.00 in future medical expenses, $720,321.00 in past and future lost earnings and earnings capacity, $25 million in past and future non-economic damages, and $15 in loss of consortium, totaling an award of $55,325,714.00.

Trial Ct. Op., 9/17/15, at 1-2.

On July 7, 2014, Honda filed a timely Post-Trial Motion. While the Post-Trial Motion was pending, our Supreme Court issued its decision in ***Tincher***

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[1] In their Complaint, Appellees also raised claims against Bowser Automotive, Inc., and Takata Corporation. Appellees dismissed their claims against Bowser Automotive, Inc. by Stipulation entered on January 14, 2014. In response to a Rule to Show Cause issued upon the parties by this Court on January 24, 2017, the parties jointly represent that Appellees never served their Complaint on Takata Corporation and Takata Corporation never entered an appearance in this case.

supra. In ***Tincher***, the Supreme Court overruled the long-standing decision in ***Azzarello v. Black Bros. Co.***, 391 A.2d 1020 (Pa. 1978), by holding that in a design defect case, it should be the jury, and not the trial court, that determines the threshold question of whether a product is "unreasonably dangerous." ***Tincher***, ***supra*** at 406, (citing ***Azzarello***, ***supra*** at 1025-27).

The trial court heard argument on the Post-Trial Motion that addressed the issue of the impact of ***Tincher*** on the trial court's evidentiary rulings and jury instructions.[2] On January 21, 2015, the trial court denied Honda's Post-Trial Motion, and entered Judgment in favor of Appellees in accordance with the jury's allocation of damages. Honda timely appealed. Honda and the trial court complied with Pa.R.A.P. 1925.

Honda raises the following eight issues on appeal:

> 1. Whether the Supreme Court's decision in ***Tincher*** [***v. Omega Flex, Inc.***, 104 A.3d 328 (Pa. 2014)] requires a new trial because the trial court: (i) failed to instruct the jury that [Appellees] had the burden of proving that the product was "unreasonably dangerous," (ii) charged the jury with ***Azzarello***[***v. Black Bros. Co.***, 391 A.2d 1020 (Pa. 1978)]'s vague and confusing "guarantor"/"any element" instruction which ***Tincher*** rejected, (iii) barred Honda from introducing evidence of applicable regulatory and industry standards, and (iv) denied ***Tincher***'s applicability to warning claims.

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[2] Because the trial court had not ruled on the Post-Trial Motion when the Supreme Court issued its decision in ***Tincher***, ***Tincher*** applies retroactively to the issues raised in Honda's Post-Trial Motion. ***See Passarello v. Grumbine***, 87 A.3d 285, 307-08 (Pa. 2014).

> 2. Whether the trial court's design defect jury instruction was erroneous for omitting the second crashworthiness element and misstating the third element.
>
> 3. Whether the trial court erroneously instructed the jury on [Appellees'] warning-defect claim by imposing an irrebuttable heeding presumption.
>
> 4. Whether Honda is entitled to a [J]udgment *n.o.v.* on the design-defect claim because the only alternative design [Appellees] presented to the jury was unlawful under federal regulations.
>
> 5. Whether [Appellees'] unlawful design-defect claim is preempted by federal motor vehicle regulations.
>
> 6. Whether Honda is entitled to a [J]udgment *n.o.v.* on the warning-defect claim because [Appellees] offered no causation evidence that [Appellee Carlos] Martinez would have heeded any additional warning.
>
> 7. Whether the excessive damages award violates Pennsylvania law and Due Process.
>
> 8. Whether refusal to transfer venue warrants that any new trial occur in [Appellees'] county of residence.

Honda's Brief at 4-5.

Standard of Review

This Court will only reverse a trial court's denial of Judgment N.O.V. if the trial court committed an error of law that controlled the case or, if the court, after reviewing the evidence in the light most favorable to the verdict-winner and giving the verdict-winner the benefit of all inferences, abused its discretion:

> Appellate review of a denial of JNOV is quite narrow. We may reverse only in the event the trial court abused its discretion or committed an error of law that controlled the

> outcome of the case. Abuse of discretion occurs if the trial court renders a judgment that is manifestly unreasonable, arbitrary or capricious; that fails to apply the law; or that is motivated by partiality, prejudice, bias or ill will. When reviewing an appeal from the denial of a request for JNOV, the appellate court must view the evidence in the light most favorable to the verdict-winner and give him or her the benefit of every reasonable inference arising therefrom while rejecting all unfavorable testimony and inferences. . . . Thus, the grant of JNOV should only be entered in a clear case and any doubts must be resolved in favor of the verdict-winner[.]

Sears, Roebuck & Co. v. 69th Street Retail Mall, L.P., 126 A.3d 959, 967 (Pa. Super. 2015) (citations, quotation marks, and brackets omitted).

Applying this standard, we find that the trial court did not err in denying Honda's Motion for Judgment N.O.V.

Trial Court's Jury Instructions in Light of *Tincher*

In large part, Honda's first three issues challenge the trial court's jury instructions.[3] In reviewing the jury instructions, we must determine whether there was an omission from the charge that amounts to a fundamental error:

> To determine whether the trial court abused its discretion or offered an inaccurate statement of law controlling the outcome of the case. A jury charge is adequate unless the issues are not made clear, the jury was misled by the instructions, or there was an omission from the charge amounting to a fundamental error. **This Court will afford a new trial if an erroneous jury instruction amounted to a fundamental error or the record is**

[3] This is true with the notable exception of sub-issue three of issue one, which raises a challenge to an evidentiary ruling.
We will address this issue in the next section of this Memorandum.

> **insufficient to determine whether the error affected the verdict.**

Tincher, 104 A.3d at 351 (emphasis added). Moreover, the trial court has wide discretion in charging a jury and a charge is considered adequate unless the jury instruction palpably misled the jury or there was an omission that amounted to a fundamental error:

> A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear[,] or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the [a]ppellant was prejudiced by that refusal.

Amato v. Bell & Gossett, 116 A.3d 607, 621 (Pa. Super. 2015), *appeal granted*, 130 A.3d 1283 (Pa. 2016) (emphasis added).

Honda raises four challenges to the jury charge in light of ***Tincher***. The first three deal with the charge for the design defect claim and the final challenge deals with the charge for the failure to warn claim. ***See*** Honda's Brief at 19-20, 22-27. We first address the challenges to the jury charge that address the design defect claim.

Honda argues that it is entitled to a new trial because, contrary to the holding in ***Tincher***, it was the judge, and not the jury, who made the

threshold determination of whether Appellees' 1999 Integra's seat belt restraint was "unreasonably dangerous."

It is well established that a plaintiff, as a threshold matter, must establish that a product is "unreasonably dangerous" by either a risk utility analysis or consumer expectation analysis. ***Tincher***, ***supra*** at 426-27. In this case, the trial court, in fact, did engage in a risk utility analysis before sending the case to the jury and concluded that Appellees met their burden.

Honda, in particular, argues that since it was the judge, and not the jury, who engaged in a risk utility analysis, Appellant is automatically entitled to a new trial. However, our analysis does not end with only evaluating whether it was the judge or the jury who engaged in a risk utility analysis. Rather, we must look to the jury instructions and determine whether a portion of the jury charge included a risk utility analysis.

When conducting a risk utility analysis, a jury must determine whether "a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." ***Id.*** at 389.

In this case, one of theories that Appellees advanced was a crashworthiness theory, which required, *inter alia*, proof that there was an **alternative, safer, practicable** design for the seat belt restraint system. ***See Gaudio v. Ford Motor Co.***, 976 A.2d 524, 532 (Pa. Super. 2009).

Although the language in this charge—that there was an "alternative, safer, practicable design" for the seat belt restraint system—is not precisely the language required for the risk utility analysis, we conclude that the charge is not fundamentally flawed. The portion of the charge to determine the "practicability of an alternate design" inherently requires the jury to balance factors such as the cost of implementing the design against the relative safety of the alternate design. Accordingly, the jury could not have reached a verdict in the case without conducting a risk utility analysis.

Therefore, we find that the trial court did not abuse its discretion in denying Honda's request for a new trial. The jury charge here was adequate because the court made it clear to the jury that it was the arbiter of whether the 1999 Integra's seat belt restraint system was "unreasonably dangerous," and the absence of explicit "risk-utility" language from the court's instruction did not amount to a fundamental error.

In its second sub-issue, Honda claims it is entitled to a new trial because the court erroneously charged the jury with ***Azzarello***'s vague and confusing "guarantor"/"any element" instruction, which ***Tincher*** rejected. Following our review of ***Tincher***, we disagree with Honda that the court's instruction contained a fundamental error in this regard. Although ***Tincher*** overruled ***Azzarello***, the holding in ***Tincher*** does not require that the trial court remove the "guarantor" language from a jury instruction. Therefore, Honda is not entitled to relief on this claim.

In its third sub-issue, Honda avers that it is entitled to a new trial because the court erred in preventing Honda from introducing evidence of its compliance with applicable federal regulatory and industry standards. This claim is meritless.

We review a trial court's ruling on the admission of evidence for an abuse of discretion or misapplication of the law. ***Gaudio***, 976 A.2d at 535.

Our Supreme Court has held that evidence of applicable federal regulatory and industry standards "'should be excluded because it tends to mislead the jury's attention from their proper inquiry,' namely 'the quality or design of the product in question.'" ***Id.*** at 543 (quoting ***Lewis v. Coffing Hoist Division, Duff-Norton Co., Inc.***, 528 A.2d 590, 594 (Pa. 1987)). ***Tincher*** does not, nor did it purport to, affect the applicability of the rulings in ***Gaudio*** or ***Lewis***. Based upon precedent that remains unchanged, the trial court determined that the proposed evidence was inadmissible. We agree.

With respect to Honda's fourth, and final, sub-issue pertaining to ***Tincher***'s applicability to failure to warn claims, we reiterate that our Supreme Court decided ***Tincher*** in the context of a design defect strict liability case. Although Honda correctly notes that in ***Amato v. Bell & Gossett***, 116 A.3d 607, 621 (Pa. Super. 2015), this Court extended the holding in ***Tincher*** to warning defect strict liability cases, Honda is not entitled to relief on this claim.

In ***Amato***, the defendants sought, and the trial court denied, a failure to warn jury instruction incorporating the negligence concept of reasonableness. ***Amato***, 116 A.3d at 620. In considering the defendant's claim of trial court error, this Court recognized that the ***Tincher*** Court itself acknowledged that its "decision is limited to the context of a 'design defect' claim[.]" ***Tincher***, 104 A.3d at 384 n.21. However, we concluded that, because ***Tincher*** returned reasonableness "considerations to the purview of the jury as a question of fact in cases concerning strict liability[,]" ***Tincher*** is applicable to failure to warn strict liability actions. ***Amato***, 116 A.3d at 620.

After concluding that the holding in ***Tincher*** applied to design defect and failure to warn cases alike, however, the ***Amato*** court found that the trial court's failure to warn instruction did not prejudice the defendant because the defendant's proposed instruction was not justified by its theory of the case or the evidence it presented at trial. ***Id.*** at 622-23. ***Amato*** did not shed any light on how a court should word a failure to warn jury instruction to comply with ***Tincher***.

It bears noting that the Pennsylvania Supreme Court recently granted the ***Amato*** plaintiffs' Petition for Allowance of Appeal for the limited purpose of considering whether, under ***Tincher***, a defendant advancing a strict-liability claim based on a failure to warn theory has the right to have a jury determine whether its product was unreasonably dangerous. ***See Amato v.***

Bell & Gossett, 130 A.3d 1283 (Pa. 2016). Thus, the applicability of ***Tincher*** to warning defect claims remains unsettled.

In the instant matter, however, we need not consider whether the trial court's instruction to the jury on Appellees' failure to warn theory of liability complied with ***Tincher***, as any such failure would amount to harmless error. Because the jury returned a verdict against Honda on both of Appellees' theories of liability, Honda's argument that it is entitled to a new trial fails as Honda cannot demonstrate that the court's instruction prejudiced it or that the allegedly erroneous instruction was responsible for the verdict. ***See Chanthavong v. Tran***, 682 A.2d 334, 340 (Pa. Super. 1996) (holding that, "[t]o constitute reversible error, a jury instruction must not only be erroneous, but must also be harmful to the complaining party.") (citations omitted)).

Crashworthiness

In its next issue, Honda claims that it is entitled to a new trial because the trial court's design defect jury instruction was erroneous. Honda's Brief at 29. Relying on ***Colville v. Crown Equipment Corp.***, 809 A.2d 916 (Pa. Super. 2002), Honda avers that, because Appellees pursued a crashworthiness cause of action against it,[4] the trial court must explicitly

[4] Appellees do not dispute that they raised a crashworthiness claim against Honda. We note that, the "application of the crashworthiness doctrine is required where the alleged defect did not cause the accident or initial

instruct the jury on each of the three elements of crashworthiness. ***See*** Honda's Brief at 31 (citing ***Colville supra***). Honda claims that the court adequately charged the jury on element one of the crashworthiness burden of proof, but failed to charge on element two, and incorrectly charged on element three. ***Id.***

"[T]he crashworthiness doctrine extends the liability of manufacturers and sellers to situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the design defect."[5] ***Colville***, 809 A.2d at 922. In a crashworthiness case, a plaintiff bears the burden of proving three elements. ***Id.*** at 922; ***see also*** Rest. 2d Torts § 402A. "First, the plaintiff must demonstrate that the design of the vehicle was defective and that when the design was made, an alternative, safer, practicable design existed." ***Colville***, ***supra*** at 922 (citations omitted). "Second, the plaintiff must show what injuries, if any, the plaintiff would have received had the alternative safer design been used." ***Id.*** at 923 (citation omitted). "Third,

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impact, but merely serves to increase the severity of the injury." ***Colville***, ***supra*** at 933 (citation omitted).

[5] It is for this reason that the crashworthiness doctrine is also sometimes known as the second collision doctrine. ***Colville***, ***supra*** at 922. "[A] second collision, as used in the definition of a crashworthiness of a motor vehicle in products liability cases, generally refers to the collision of the passenger with the interior part of the vehicle after the initial impact or collision." ***Id.*** at 923 (citation and quotation omitted).

the plaintiff must prove what injuries were attributable to the defective design." ***Id.***

Here, the trial court instructed the jury as follows:

> If you find that the product at the time it left [Honda's] control lacked any element necessary to make it safe for its intended use or contained any condition that made it unsafe for its intended use and there was an alternative, safer, practicable design, then the product was defective, and [Honda] is liable for all harm caused by the defect.

N.T., 6/26/14 (afternoon session), at 23.

The court also instructed the jury that,

> [i]n order for [Appellees] to recover in this case, the defective condition must have been a factual cause of harm attributable solely to the impact that occurred when the roof of the car hit the ground.
>
> [Appellees are] required to prove only that the defective condition was a factual cause of those damages that occurred when the roof of the car hit the ground. [Appellees are] not required to prove that the defective condition caused the tire to blow out or the rollover itself.

N.T., 6/26/14 (afternoon session), at 25-26.

Our review of this instruction reveals that, when considered in its totality, the court's instruction to the jury on the crashworthiness doctrine was adequate.

Moreover, we find Honda's reliance on ***Colville*** unpersuasive. In ***Colville***, this Court remanded the case to the trial court after concluding that the court failed to provide the jury with any instruction whatsoever on crashworthiness. ***Colville***, ***supra*** at 926. Contrary to Honda's averments,

Colville did not direct the court to instruct the jury on the three elements of a crashworthiness defect claim with any particular level of specificity. Here, as set forth ***supra***, the trial court made it clear to the jury that it was to focus its inquiry into Honda's liability on the "second collision," *i.e.*, the injury Carlos Martinez suffered when the roof of his car hit the ground.

Accordingly, we find that our decisional law does not prescribe a jury instruction meeting the level of specificity demanded by Honda, and that the court's instruction to the jury on crashworthiness adequately encapsulated the elements of the doctrine. Honda is not entitled to relief on this claim.

The Heeding Presumption Instruction

In its third issue, Honda claims it is entitled to a new trial because the trial court erroneously instructed the jury on Appellees' warning defect claim by imposing an irrebuttable heeding presumption. Honda's Brief at 42, 45. Honda argues that the court's instruction was improper because the Pennsylvania Suggested Standard Civil Jury Instruction ("Pa.SSJI (Civ)") § 16.50 is incomplete and obsolete, and because it charged the jury that the heeding presumption was not rebuttable. ***Id.*** at 44-45.

With respect to this claim, the trial court explained its decision to instruct the jury pursuant to the Pa. SSJI (Civ) § 16.50 as follows:

> Based upon the evidence introduced in this case, this [c]ourt instructed the jury pursuant to Pa. SSJI (Civ) § 16.50, which instructed the jury that they must presume that if there were adequate warnings[, Carlos Martinez] would have followed them. Honda claims error because the [c]ourt did not charge pursuant to Pa.SSJI (Civ) §

> 16.60. That instruction, as the subcommittee noted, is appropriate when the defendant has presented evidence rebutting the heeding presumption. The [c]ourt did not give the requested instruction because Honda presented no evidence to rebut the presumption. The only evidence on this issue was Mr. Martinez's testimony that had a warning been given[,] he would have heeded it by not buying the car.

Trial Ct. Op., 9/17/15, at 10.

Our review of the relevant jury instruction reveals that, contrary to Honda's assertion, the court did not, in a vacuum, instruct the jury that it "must presume that Mr. Martinez would have followed any adequate warning." Honda's Brief at 42. Rather, as explained by the court ***supra***, given Appellees' evidence, and Honda's lack of rebuttal evidence, the court instructed the jury that:

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

> Instead, the law presumes, and you must presume, that **if** there had been adequate warnings or instructions, the plaintiff would have followed them.

N.T., 6/26/14 (afternoon session), at 23-25 (emphasis added).

Here, Mr. Martinez testified, over Honda's objection, that, had there been warnings about the car not being able to protect him in a rollover, he would not have bought the car. Honda did not introduce any evidence rebutting this testimony. We find, therefore, that, in the absence of any evidence rebutting Mr. Martinez's testimony, the trial court's heeding instruction was appropriate. Accordingly, no relief is due.

Alternative Design Evidence

In its fourth issue, Honda claims that it is entitled to a Judgment N.O.V. on Appellees' design-defect claim because the only alternative seat belt design Appellees presented to the jury was infeasible because it was unlawful under federal regulations. Honda's Brief at 35. This issue implicates the weight the jury gave to the evidence presented by the parties. Our standard of review of weight of the evidence claims is well-settled:

> appellate review of a weight claim is a review of the trial court's exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the

> weight of the evidence and that a new trial should be granted in the interest of justice.

Phillips v. Lock, 86 A.3d 906, 919 (Pa. Super. 2014) (citation omitted). In addition,

> The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The trial court may award a judgment notwithstanding the verdict or a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. When a fact finder's verdict is so opposed to the demonstrative facts that looking at the verdict, the mind stands baffled, the intellect searches in vain for cause and effect, and reason rebels against the bizarre and erratic conclusion, it can be said that the verdict is shocking.

Brown v. Trinidad, 111 A.3d 765, 770 (Pa. Super. 2015) (citations and quotation marks omitted).

As discussed ***supra***, in order to prevail on a crashworthiness theory of liability, a plaintiff must prove, *inter alia*, "that the design of the vehicle was defective, and that, at the time of design an alternative, safer, and practicable design existed that could have been incorporated instead." ***Parr v. Ford Motor Co.***, 109 A.3d 682, 689 (Pa. Super 2014), *allocatur denied*, 123 A.3d 331 (Pa. 2015); ***see also Colville***, 809 A.2d at 922.

Appellees' presented evidence at trial of an alternative practicable seat belt design (the "Sicher Design") that it claimed was in use by Chrysler in its

Sebring model during the period relevant in this case. Appellees argue that the use of the Sicher Design in another vehicle established its lawfulness.

Honda, however, argues that the Sicher Design incorporated an element that would have been illegal for Honda to design and sell, and that an illegal alternative design is no alternative at all. ***Id.*** at 37. Honda avers that it proffered evidence that Mr. Sicher, Appellees' expert, never tested his proposed design without the allegedly illegal element, and notes that Mr. Sicher testified that, without the addition of the allegedly illegal element, his "test dummy probably would have suffered head-to-roof contact[.]" ***Id.*** at 36. Honda seeks reversal of the judgment in favor of Appellees' on its crashworthiness claim on the grounds that "[a] design like Mr. Sicher's, dependent on a feature that is illegal to sell, cannot logically or legally be a feasible alternative design." ***Id.***

We conclude that Honda's claim lacks merit. Here, the parties presented conflicting evidence of the legality and practicability of Appellees' alternative design. The jury, as factfinder, was free to believe all, part, or none of the evidence, and to determine which party's witnesses and evidence it found more credible. Having properly done so, the court did not abuse its discretion in denying Honda's Motion for Judgment N.O.V.

Federal Preemption

In its fifth issue, Honda claims that Appellees' unlawful design defect claim is preempted by federal motor vehicle safety standards because it

"frustrates a comprehensive federal regulatory scheme intended to ensure that manufacturers have a choice among a variety of designs for passenger restraint systems." Honda's Brief at 38-39. Honda also argues that this claim is preempted because Appellees' alternative design violates federal law. ***Id.*** at 37.

The trial court explained its denial of Honda's claim as follows:

> In denying Honda's claim we followed the decision of the United States Supreme Court in ***Williamson v. Mazda Motor of America, Inc.***, [562 U.S. 323 (2011)], which held that although the federal regulations provided manufacturers with choices between seat belt designs, victims may still raise state court claims of defective design based upon a manufacturer's decision to install an allegedly less safe design.

Trial Ct. Op. at 8.

We agree with the trial court that the U.S. Supreme Court's holding in ***Williamson*** is clearly applicable to the instant matter and unequivocally permits Appellees' state claim. Moreover, we note that, with the exception of ***Williamson***, Honda did not direct this Court to any binding authority in support of the arguments it proffered, instead relying on decisions of the federal circuit and district courts. ***See NASDAQ OMX PHLX, Inc. v. PennMont Secs.***, 52 A.3d 296, 303 (Pa. Super. 2012) (reiterating that decisions of the lower federal courts are not binding on this Court). For these reasons, Honda's claim lacks merit.

Failure to Prove Causation

In its sixth issue, Honda claims that it is entitled to a new trial or Judgment N.O.V. because "[a]ssuming *arguendo* that Honda had a duty to warn about the open and obvious risk of injury from rollover accidents and did not satisfy it, Appellees failed utterly to prove that any inadequate warning caused Mr. Martinez's injury." Honda's Brief at 48. Honda argues that Appellees failed to offer evidence to support a reasonable inference that an inadequate warning caused Mr. Martinez's injuries. ***Id.*** at 50. Honda further avers that "[i]f the trial court had not erroneously instructed the jury to presume causation irrebuttably,[6] [ ] the jury could not have made a reasonable, evidence-based judgment that Mr. Martinez's injury was caused by the owner's manual lacking a hypothetical warning of an unspecified nature." ***Id.*** at 51.[7]

We review this claim with the following in mind:

> Proximate cause is an essential element in a failure to warn case. A proximate, or legal cause, is defined as a substantial contributing factor in bringing about the harm in question. Assuming that a plaintiff has established both duty and a failure to warn, a plaintiff must further establish proximate causation by showing that had

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[6] This argument is predicated on Honda's claim, disposed of ***supra***, that the trial court erroneously instructed the jury with an irrebuttable heeding presumption. ***See supra*** at 14-16.

[7] Honda also claims, without citation to authority, that Appellees had the burden of proving that the warnings given by Honda were inadequate, and that Appellees failed to sustain that burden. Honda's Brief at 52-53. We find this argument waived.

> defendant issued a proper warning, he would have altered his behavior and the injury would have been avoided. To create a jury question, the evidence introduced must be of sufficient weight to establish . . . some reasonable likelihood that an adequate warning would have prevented the plaintiff from [engaging in the conduct that caused the injury].

Maya v. Johnson and Johnson, 97 A.3d 1203, 1213-14 (Pa. Super. 2014) (citation omitted).

Mr. Martinez testified over Honda's objection that he would not have purchased the automobile if there had been warnings about it not being able to protect him in a rollover. Notably, Honda did not cross-examine Mr. Martinez to ascertain whether, for example, he possessed the manual, or had read it. Appellees', therefore, proffered sufficient evidence from which the jury could conclude that Honda's failure to adequately warn Mr. Martinez was the proximate cause of his injury.

Excessive Damages Claim

In its seventh issue, Honda claims that the damages awarded by the jury were excessive and illegal. Honda's Brief at 53. First, Honda argues that the award "bears no relation to [Appellees'] actual harm, and far exceeds other awards in similar Pennsylvania cases." ***Id.*** at 54. Next, Honda argues that the non-economic portion of the award was disproportionate to the economic component, indicating that the award was punitive in nature, and, therefore, violated Honda's due process rights. ***Id.***

Honda asks this Court to grant remittitur and reduce the allegedly excessive verdict. ***Id.*** at 56.

The decision to grant or deny remittitur is within the sound discretion of the trial court; "judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant." ***Renna v. Schadt***, 64 A.3d 658, 671 (Pa. Super. 2013). "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.***

In deciding whether a jury's verdict is excessive, the court should consider, *inter alia*,

> (1) the severity of the injury; (2) whether the plaintiff's injury is manifested by objective physical evidence or whether it is only revealed by the subjective testimony of the plaintiff (and, herein, the court pointed out that where the injury is manifested by broken bones, disfigurement, loss of consciousness, or other objective evidence, the courts have counted this in favor of sustaining a verdict); (3) whether the injury will affect the plaintiff permanently; (4) whether the plaintiff can continue with his or her employment; (5) the size of the plaintiff's out-of-pocket expenses; and (6) the amount plaintiff demanded in the original complaint.

Gbur v. Golio, 932 A.2d 203, 212 (Pa. Super. 2007).

Instantly, the trial court considered Honda's request for remittitur, and found the following:

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

Trial Ct. Op. at 11.

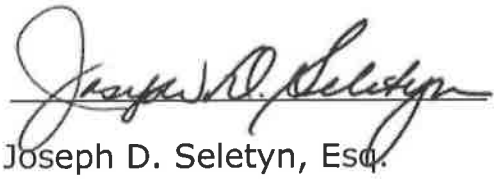
The trial court did not abuse its discretion in concluding that the jury's verdict in this case did not shock its sense of justice, nor in declining to find that partiality, prejudice, mistake, or corruption influenced the jury in its determination of the award. Our review of the record indicates that Appellees' presented ample evidence of Mr. Martinez's injuries and how they impact him and his family now and for the rest of his life. Moreover, the trial court's Opinion on this issue, albeit brief, reflects that it properly weighed the factors set forth in ***Gbur***, ***supra***. Accordingly, no relief is due on this claim.

Transfer to York County

In its final issue, Honda claims that any new trial should be conducted in York County. Because we have concluded that Honda is not entitled to a new trial, we need not reach the merits of this issue.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/19/2017

B

APPENDIX B

CONFLICTS AMONG POST-TINCHER SUPERIOR COURT DECISIONS

1) GENERAL SCOPE OF *TINCHER*

***Tincher* broadly changes Pa. law**	***Tincher* is narrow and failure to follow is not reversible error**
Renninger v. A&R Machine Shop, ---A.3d---, 2017 WL 1326515 at *7 (Pa. Super. April 11, 2017) (**Stabile**, Lazarus, Strassburger)	*American Honda Motor Co. v. Martinez*, 2017 WL 1400968 at *4 (Pa. Super. April 19, 2017) (**Dubow**, Bender, Musmanno)
High v. Pennsy Supply, Inc, 154 A.3d 341, 347 (Pa. Super. 2017) (**Stevens**, Ford-Elliott, **Shogan CoDo)**	*Cancelleri v. Ford Motor Co.*, 2016 WL 82449 at *4 (Pa. Super. January 7, 2016) (**Lazarus**, Panella, Platt)
Webb v. Volvo Cars, LLC, 148 A.3d 473, 483 (Pa. Super. 2016) (**Stabile**, Ford-Elliott, **Strassburger, Co**)	----------

2) CONTINUING VITALITY OF PRE-*TINCHER* PRECEDENT

Pre-*Tincher* cases are no longer applicable	**Pre-*Tincher* cases remain viable; *Tincher* did not expressly overrule**	**It is unclear whether pre-*Tincher* precedents are overruled**
Renninger v. A&R Machine Shop, ---A.3d---, 2017 WL 1326515 at *9-10 (Pa. Super. April 11, 2017) (**Stabile**, Lazarus, Strassburger)	*American Honda Motor Co. v. Martinez*, 2017 WL 1400968 at *4 (Pa. Super. April 19, 2017) (**Dubow**, Bender, Musmanno)	*Webb v. Volvo Cars, LLC*, 148 A.3d 473, 482 (Pa. Super. 2016) (**Stabile**, Ford-Elliott, **Strassburger Co**)
----------	*Cancelleri v. Ford Motor Co.*, 2016 WL 82449 at *3 (Pa. Super. January 7, 2016) (**Lazarus**, Panella, Platt)	----------

3) APPLICABILITY OF *TINCHER* TO WARNING CLAIMS

***Tincher* applies to warning claims**	***Tincher* does not apply to warning claims**
Amato v. Bell & Gossett, Clark-Reliance Corp., 116 A.3d 607, 620 (Pa. Super. 2015); appeal dismissed, 150 A.3d 956 (Pa. 2016). (**Lazarus**, Panella, Jenkins)	*American Honda Motor Co. v. Martinez*, 2017 WL 1400968 at *5 (Pa. Super. April 19, 2017) (**Dubow**, Bender, Musmanno)

4) DOES *TINCHER* REQUIRE A COMPLETE EXCLUSION OF NEGLIGENCE PRINCIPLES?

Exclusion no longer viable after *Tincher*	**Exclusion remains viable after *Tincher***
Renninger v. A&R Machine Shop, ---A.3d---, 2017 WL 1326515 at *7 (Pa. Super. April 11, 2017) (**Stabile**, Lazarus, Strassburger)	*American Honda Motor Co. v. Martinez*, 2017 WL 1400968 *5 (Pa. Super. April 19, 2017) (**Dubow**, Bender, Musmanno)
Amato v. Bell & Gossett, Clark-Reliance Corp., 116 A.3d 607, 620 (Pa. Super. 2015); appeal dismissed, 150 A.3d 956 (Pa. 2016). (**Lazarus**, Panella, Jenkins)	----------
Webb v. Volvo Cars, LLC, 148 A.3d 473, 482 (Pa. Super. 2016) (**Stabile**, Ford-Elliott, **Strassburger Co**)	----------

5) JURY INSTRUCTIONS ON "UNREASONABLY DANGEROUS"

Unreasonably dangerous instruction required	**Unreasonably dangerous instruction not required**
Amato v. Bell & Gossett, Clark-Reliance Corp., 116 A.3d 607, 620 (Pa. Super. 2015); appeal dismissed, 150 A.3d 956 (Pa. 2016). (**Lazarus**, Panella, Jenkins)	*American Honda Motor Co. v. Martinez*, 2017 WL 1400968 at *3-4 (Pa. Super. April 19, 2017) (**Dubow**, Bender, Musmanno)

6) STATE OF THE ART EVIDENCE

***Tincher* allows state of the art evidence in strict liability**	**Unclear whether *Tincher* allows state of the art evidence in strict liability**	***Tincher* does not allow state of the art evidence in strict liability**
High v. Pennsy Supply, Inc, 154 A.3d 341, 350-51 n.5 (Pa. Super. 2017) (**Stevens**, Ford-Elliott, **Shogan CoDo**)	*Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016) (**Stabile**, Ford-Elliott, **Strassburger Co**)	*American Honda Motor Co. v. Martinez*, 2017 WL 1400968 at *4 (Pa. Super. April 19, 2017) (**Dubow**, Bender, Musmanno)
Amato v. Bell & Gossett, Clark-Reliance Corp., 116 A.3d 607, 622 (Pa. Super. 2015); appeal dismissed, 150 A.3d 956 (Pa. 2016). (**Lazarus**, Panella, Jenkins)		*Cancelleri v. Ford Motor Co.*, 2016 WL 82449 at *3 (Pa. Super. January 7, 2016) (**Lazarus**, Panella, Platt)

C

APPENDIX C

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

- - -

CARLOS MARTINEZ and ROSITA DE LOS SANTOS DE MARTINEZ, h/w	:	
VS.	:	DECEMBER TERM, 2011
AMERICAN HONDA CO., INC.	:	NO. 03763

- - -

THURSDAY, JUNE 26, 2014

- - -

TRIAL

AFTERNOON SESSION

- - -

COURTROOM 625

CITY HALL

PHILADELPHIA, PENNSYLVANIA

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B E F O R E: THE HONORABLE SHELLEY ROBINS NEW, J.

AND A JURY

FINAL INSTRUCTIONS BY THE COURT

Now, ladies and gentlemen, I have not indicated any opinion on my part concerning the weight you should give to the evidence or to any part of it. I do not want you to think that I have. It is up to you and you alone to decide the believability of each witness.

Now, in a civil case, ladies and gentlemen, the plaintiff has the burden of proving those contentions which entitle him to relief. Defendant is not required to offer evidence on their own behalf.

When a party has the burden of proof, their contention must be established by a fair preponderance of the evidence. A fair preponderance of the evidence means you are persuaded a contention is more probably accurate and true than not true.

To put it another way, think, if you will, of an ordinary balance scale with a pan on each side. Onto one side of the scale, place all of the believable evidence favorable to the plaintiff. Onto the other, place all of the believable evidence

favorable to defendant.

If, after considering the comparable weight of the evidence, you feel the scales tip ever so slightly or to the slightest degree in favor of the plaintiff, your verdict must be for the plaintiff. If the scales tip ever so slightly or to the slightest degree in favor of the defendant or are equally balanced, your verdict must be for the defendant.

Now, you have heard evidence during the trial that the 2007 Honda Element was equipped with an all-belts-to-seat restraint system.

You may consider this evidence only as it relates to the question of whether the all-belts-to-seat restraint system was a feasible restraint design at the time the 1999 Acura Integra was manufactured. You may not consider this evidence for the purpose of determining whether any defect existed in the 1999 Acura Integra.

Now I'm going to discuss with you the issues in the case. The plaintiff claims

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he was harmed by the defective design of the subject seat belt and/or defendant's failure to warn. The defendant denies the plaintiff's claims.

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?

Three, was the subject 1999 Acura Integra defective because of defendant's failure to warn?

Four, was a defect, either in design or in failure to warn, a factual cause of any injuries plaintiff received solely attributable to the impact that occurred when the roof of the car hit the ground?

Five, the damages suffered by the plaintiff solely as a result of the impact that occurred when the roof of the car hit the ground.

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The manufacturer of a product is subject to liability for the injuries caused to the plaintiff by a defect in the product which existed when the product left the possession of the manufacturer. Such liability is imposed even if the manufacturer has taken all possible care in the preparation and sale of the product.

The manufacturer of a product is a guarantor of its safety. The product must be provided with every element necessary to make it safe for its intended use and without any condition that makes it unsafe for its intended use.

If you find that the product at the time it left the defendant's control lacked any element necessary to make it safe for its intended use or contained any condition that made it unsafe for its intended use and there was an alternative, safer, practicable design, then the product was defective, and the defendant is liable for all harm caused by the defect.

Even a perfectly made and designed

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product may be defective if not accompanied by proper warnings and instructions concerning its use. A manufacturer must give the user or consumer any warnings and instructions of the possible risks of using the product that may be required or that are created by the inherent limitations in the safety of such use.

If you find that such warnings or instructions were not given, the defendant is liable for all harm caused to the plaintiff by the failure to warn.

If you find instead that there were warnings or instructions required to make this product non-defective which were not adequately provided by the defendant, then you may not find for the defendant based on a determination that, even if there had been adequate warnings or instructions, the plaintiff would not have read or heeded them.

Instead, the law presumes, and you must presume, that if there had been adequate warnings or instructions, the

plaintiff would have followed them.

Now I'm going to talk to you, ladies and gentlemen, about factual cause. If you find that the seat belt was defective, the defendant is liable for all harm caused to the plaintiff by such defective condition.

A defective condition is the factual cause of harm if the harm would not have occurred absent the defective condition.

In order for 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.

In this case, plaintiff's head came in contact with the roof of the car. After that, the roof of the car hit the ground. In this case, plaintiff alleges that the seat belt was defective because it failed to protect him from the impact when the roof of the car hit the ground.

The plaintiff is required to prove only that the defective condition was a

factual cause of those damages that occurred when the roof of the car hit the ground. The plaintiff is not required to prove that the defective condition caused the tire to blow out or the rollover itself.

A defendant in a strict liability case who puts a defective product into the market remains liable to the user or consumer despite the foreseeable conduct, negligent or otherwise, of others for the harm created by the product as a result of the defect.

I'm now going to talk to you about damages. The fact that I am instructing you about damages does not imply any opinion on my part as to whether damages should be awarded.

If you find that defendant is liable to the plaintiff, you must then find an amount of money damages you believe will fairly and adequately compensate the plaintiff for all the physical injury he has sustained as a result of the

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future non-economic damages, there's a blank; loss of consortium for Rosita De Los Santos De Martinez, and there's a blank -- we'll check in the back to see if I read something incorrectly -- and then there's a place for the day and the foreperson.

I may have made an error in reading the verdict sheet, ladies and gentlemen. There may be some other issues. I'm going to meet briefly with the attorneys in the last sidebar conference to see if there's any other helpful information I should give you. Then the case will be in your hands, though I will still have one very brief final instruction.

I will see counsel along with Mr. Haimowitz and the stenographer at sidebar.

(In camera proceedings as follows:)

THE LAW CLERK: I didn't take the word "negligence" out.

THE COURT: Fix it and I'll read it to them again, too many versions.

THE LAW CLERK: I'll clear it with

counsel as well.

THE COURT: Is there anything else?

MR. SHERRY: Just because I don't think we said "second collision" in the charges that I'm aware of.

THE COURT: Right. I think that should come out.

THE LAW CLERK: I didn't change that on the verdict sheet. I'll fix that.

THE COURT: So it should just be: State the amount of damages sustained by plaintiff solely as a result.

THE LAW CLERK: What was the language we used? That occurred when the roof of the car hit the ground. I will change the verdict sheet before it goes out.

THE COURT: Anything else for the plaintiff plus that correction?

Defense?

MR. CONROY: I did, Your Honor. So on the verdict sheet, first, Question 2 where it says: Was the defective design a factual cause of any injuries suffered by the plaintiff?

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I don't believe that's the proper question. It should be: Was a defective design a factual cause of enhanced injuries suffered by the plaintiff?

Because this is a crashworthiness case that's dealing with injury enhancement. Honda is only responsible in this case if the design -- if the alleged design defect worsened or enhanced the injuries that Mr. Martinez would have otherwise sustained in this accident, and I don't believe Question 2 really addresses that issue.

And the next problem is that there should also be a question on the verdict sheet which goes to the Colville/Kupetz issue that the plaintiff must also prove that the proposed alternative safer design would have prevented the injury.

If the jury were to find in plaintiff's favor on Question 1, yes, Question 2, yes, the question that remains is: Well, would the proposed safer alternative design have prevented the injury in this case? That's part of their

burden in this case, and that's why the alternative design is part of the requirement. And we don't have that on the verdict sheet, so that's an issue.

And then, quickly, we objected before on the fact that the verdict sheet has warnings issues here. Then on Question 4 on the warnings issue where it says: Was the failure to warn a factual cause of any injuries? Again, it should be, if this charge is to be given, any enhanced injuries.

And the same thing on Question 5 at the end where it says: State the amount of damages sustained by the plaintiffs solely as a result of the second collision.

THE COURT: No. It will read: When the roof of the car hit the ground.

MR. CONROY: Yeah, and, again, I think that misses the point, Judge, because it's the -- Honda is only responsible here for the extent of enhanced or aggravated injuries. The fact that Mr. Martinez sustained injuries in the rollover doesn't

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automatically have the plaintiffs win or get damages. It's the enhancement or the aggravation of the injuries that he sustained. That's what Honda would be responsible for. I don't think that the verdict sheet captures that.

THE COURT: All right. Plaintiff, you may respond.

MR. EISENBERG: I totally disagree. This is a verdict sheet. This is not a point for charge. The points for charge state the applicable law. The applicable law is in the jury instructions. The verdict sheet is just for the purposes of finding whether -- letting the jury find whether the defect in the design was in the car and an alternative design existed.

Secondly, the jury needs to find factual cause, which the judge defined for them in the context of a crashworthiness case. That's what they need to find. Was a defective design a factual cause of the injuries suffered by or any injuries suffered by plaintiff, Carlos Martinez?

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There's no evidence that he suffered any other injuries other than when his head hit the ground. Plaintiff does not have to prove enhanced injuries when the injury is one injury and only one injury. There are no enhanced injuries.

It's not like a car that ran into a tree and the air bag didn't go off and you have to prove that the person sustained additional injuries from the air bag not going off as opposed to running into the tree.

This is not that kind of case. He suffered no injuries. No one has said he suffered any injuries until his head hit the ground, so to put that into the case is just not part of the evidence. And it's not the plaintiff's burden to show that he suffered enhanced injuries.

In fact, the verdict sheet says -- not the verdict sheet. The points for charge say that the plaintiff's burden is to prove that there was a defect in the design, that there was an alternative design that was

feasible and practicable, and that had that design been in the vehicle, plaintiff would not have sustained his injuries. If there is some evidence other than that, then that's not the plaintiff's burden.

MR. CONROY: To that, Judge, I would simply say that the Colville case instructs us otherwise. It very clearly does. But I've argued the point, so the record's been preserved.

THE COURT: The record certainly is clear, and I will note that this is the third or the fourth comment by both defense and plaintiff on the verdict sheet. The Court will add the sentence to Question 5. The Court will not change the questions on Question 1, 2, 3, or 4, and then we'll make the change in the future medical expenses.

Anything else, Counsel?

MR. CONROY: I did, Your Honor. On the charge itself, I've already argued the third restatement should have been charged. I've already argued Kupetz and Colville, that three prongs should have been charged.

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My comments about the verdict sheet, that it should have had a statement that the plaintiff must also prove that the proposed alternative design would have prevented the injury, that should have been part of the charge as well.

I object again to the warning charge. The heeding presumption charge was given. Again, I object to that being given. I think I've otherwise got it covered, Judge.

THE COURT: All right. And the Court will note that you preserved all of yours, and as I said before, particularly in regards to the three-prong test, that was clearly covered in the Court's charge. And the other issues have been addressed by the Court. So we will go in, make these corrections.

MS. ALEXANDER: Your Honor, one more. One of our experts was by video, Harry Smith, and so he was not on the list that you gave the jury about an expert.

THE COURT: I apologize.

MS. ALEXANDER: That's okay.