In the Superior Court of Pennsylvania

No. 445 EDA 2015

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

Plaintiffs/Appellees

v.

AMERICAN HONDA MOTOR CO., INC.,

Defendant/Appellant

Appeal of Defendant from the Judgment of the
Court of Common Pleas of Philadelphia County,
Pennsylvania, dated January 21, 2015
at December Term 2011, No. 03763

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST

The Pennsylvania Association for Justice (hereinafter "PAJ") (formerly known as the Pennsylvania Trial Lawyers Association) is a non-profit organization, incorporated under the laws of Pennsylvania, with a membership of approximately 2000 attorneys of the trial bar of the Commonwealth of Pennsylvania. The mission of PAJ is to promote a fair and effective justice system, and to support attorneys as they work to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in Pennsylvania's courtrooms, even when challenging the most powerful interests. Established in 1968, for over forty-five years, PAJ has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges or immunities for any individual, group or entity.

Through its *Amicus Curiae* Committee, the Pennsylvania Association for Justice strives to maintain a high profile in the Commonwealth and Federal Courts by promoting, through advocacy, the rights of individuals and the goals of its membership. PAJ has been actively involved in recent years in advocating for a proper calibration of the law of products liability to provide for a fair and just

system to adjudicate the rights of individuals injured by defective products. This appeal, involving the law of products liability following the Pennsylvania Supreme Court' s decision in *Tincher v. Omega Flex*, is of vital concern to PAJ and its membership.

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amicus Curiae adopts the Counterstatement of the Scope and Standards of Review set forth in the brief of Appellees, Carlos Martinez and Rosita De Los Santos DeMartinez.

COUNTERSTATEMENT OF THE CASE

Amicus Curiae relies upon the Counterstatement of the Case as set forth in the brief of Appellees, Carlos Martinez and Rosita De Los Santos DeMartinez.

SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court's recent decision in *Tincher v. Omega Flex,* 104 A.3d 328 (Pa. 2014), overruling *Azzarello v. Black Bros. Co.,* 391 A.2d 1020 (Pa. 1978), represents a reaffirmation and re-calibration of the strict liability principles in place since the adoption of Restatement (Second) of Torts §402A. The argument of Appellant Honda and its *Amicus Curiae*, the Product Liability Advisory Council, that *Tincher* "reconnected" Pennsylvania's law of product liability to its "negligence roots" is demonstrably incorrect. A careful reading of the *Tincher* opinion reveals the Supreme Court's clear recognition that the "roots" of the strict liability action under Section 402A lay in the distinction between the duty of due care in negligence, and the duty to sell a product free from a defective condition. *Tincher,* 104 A.3d at 383. In reaching its decision that the *Azzarello* bifurcation of the functions of judge and jury in strict liability claims should no longer be applied, the Supreme Court did not repudiate the social policy underpinnings of *Azzarello*. Rather, the Court reaffirmed the viability of those policies, *id.* at 381-82, and concluded that the Restatement Second §402A "properly calibrated" should remain the law of Pennsylvania. *Tincher,* 103 A. 3d at 399. The proper "calibration" involves allowing the jury to weigh the evidence relevant to the risk-utility calculus or consumer expectations test, but it manifestly does not involve proof of conduct under a negligence based rubric. The focus of a

strict liability claim continues to be on the nature of the product and the consumer's reasonable expectations with respect to the product, rather than upon the conduct of either the manufacturer or the person injured.

In light of this reaffirmation of the substantive law and policy considerations underlying Section 402A, this Honorable Court should reject the argument that *Tincher* dictates a new trial based solely upon the use of language from pre-*Tincher* precedents in the trial court's instructions to the jury. *Tincher* specifically noted that "the test we articulate today is not intended as a rigid formula to be offered to the jury in all situations." *Tincher*, 104 A. 3d at 408. *Tincher* also reinforced the long-established principles that the trial court has broad discretion in phrasing its instructions and the charge should be read in its entirety against the factual background and evidence of the case. Specific language in charging the jury was neither mandated nor prohibited. The trial court judge in the case at bar charged the jury in a manner consistent with the principles enunciated in *Tincher*. She advised the jury that the defendant manufacturer could be liable in spite of the exercise of due care, but she also reiterated several times that under the facts of this crashworthiness case, only the injuries attributable to the design defect were compensable.

Tincher did not reverse the bar to admission of governmental and industry standards in strict liability cases. The Court explicitly indicated that it had not

considered that issue. *Tincher,* 104 A.3d at 345 n. 4. The public policy pronouncements in *Tincher* support the continued exclusion of such evidence. A focus upon industry standards would lead to a situation where the conduct of the manufacturer is judged by reference to other manufacturers, and tend to lead to a "least common denominator approach." It would also be contrary to the theory of strict liability reaffirmed in *Tincher*, that the focus should be upon whether the particular product is defective, and would distract the jury from their proper inquiry, the quality of the design. Further, allowing evidence of industry custom would provide a disincentive to manufacturers to seek out safer design alternatives, a social policy objective in Pennsylvania strict liability theory recognized in *Tincher*. The "proper calibration" of the Restatement (Second) Section 402A at the heart of the *Tincher* decision will only be achieved by the continued exclusion of governmental and industry standard evidence.

ARGUMENT

I. *TINCHER* REPRESENTS A RE-CALIBRATION AND REITERATION OF PENNSYLVANIA'S PRODUCTS LIABILITY LAW CONSISTENT WITH LIABILITY WITHOUT FAULT PRINCIPLES

The Supreme Court's recent decision in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), has altered the landscape of products liability law in Pennsylvania. It is erroneous, however, to view it as a reinsertion of negligence principles into claims under Section 402A of the Restatement (Second) of Torts, as Appellant Honda (hereinafter "Honda") and its *Amicus Curiae,* the Product Liability Advisory Council, would have this Court believe. The majority opinion in *Tincher* is clear that the law of strict liability for defective products in Pennsylvania is directed at "tortious conduct… ***not the same as that found in traditional claims of negligence*** and commonly associated with the more colloquial notion of 'fault.' " *Tincher*, 104 A.3d at 400 (emphasis added). The Court explained:

> Essentially, strict liability is a theory that effectuates a further shift of the risk of harm onto the supplier than either negligence or breach of warranty theory …

Id. at 402.

In an opinion authored by then Chief Justice Castille, the majority in *Tincher* rejected the approach of the Restatement (Third) of Torts-Product Liability and

reconfirmed that Section 402A of the Restatement (Second) of Torts remains the law of Pennsylvania. *Id.* at 335, 399. In so doing the Court did not repudiate the social policy underpinnings of *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1024 (Pa. 1978), but rather stated:

> We agree that reconsideration of *Azzarello* is necessary and appropriate, ***and to the extent that*** the pronouncements in *Azzarello* are in tension with the principles articulated in this Opinion, the decision in *Azzarello* is overruled.

Tincher, 104 A.3d at 376 (emphasis added).

It is critical to a proper understanding of *Tincher* to examine the holding in *Azzarello*. The precise issue decided by the court in *Azzarello* was whether, in a design defect case under the Restatement (Second) of Torts §402A, the trial judge should instruct the jury that the plaintiff must prove that the product was both "defective" and "unreasonably dangerous." *Azzarello*, 391 A.2d at 1024 (Pa. 1978) ("It is the propriety of instructing the jury using the term of 'unreasonably dangerous' which forms the basis of appellee's objection to the jury instructions given below"). The court in *Azzarello* recognized that "the critical factor under this formulation [the Restatement (Second) Section 402A] is whether the product is 'unreasonably dangerous' " because it "'serve[d] the beneficial purpose of preventing the seller from being treated as the insurer of its products.' " *Id.* at 1025-26 (*quoting Cronin v. J.B.E. Olson Corp.*, 501 P. 2d 1153, 1162 (Cal. 1972)). The Court's concern was with the effect this language might have upon a jury

because "the term, 'unreasonably dangerous' tends to suggest considerations which are usually identified with the law of negligence." *Azzarello*, 391 A.2d at 1025. The Court resolved this dilemma, in a non-crashworthiness context, by assigning to the judge the function of determining whether a product was "unreasonably dangerous," and assigning to the jury the task of considering whether the product was in a defective condition. *Id.* at 1025-27.

As one commentator has observed, the court in Azzarello

> ...did not relieve plaintiffs in strict liability cases of the substantive burden of proving that the product in fact was unreasonably dangerous....the holding in ***Azzarello was not intended to alter the underlying substantive law of strict liability.*** Rather, the holding was based on the court's belief that use of the specific term "unreasonably dangerous" in jury instructions would be "misleading" to lay jurors unfamiliar with the nuances of strict liability and negligence law.

John M. Thomas, *Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 TEMP. L. REV. 217, 219-20 (1998) (emphasis added) (internal citations omitted).

The *Tincher* Court clearly recognized the narrow basis of the *Azzarello* holding. Its conclusion that *Azzarello* should be overruled was likewise a carefully focused and limited decision. Chief Justice Castille's opinion thoroughly reviewed the history and development of strict liability, including its underlying social policy, and turned to an examination of foundational principles in order to reach

the conclusion that the Second Restatement - "properly calibrated" - should remain the law of Pennsylvania. *Tincher*, 103 A.3d at 399.

The Court noted that the strict liability cause of action sounds in tort, which implicates duties "imposed by law as a matter of social policy" rather than in contract, which involves duties imposed by mutual agreement between particular individuals. *Id.* Chief Justice Castille wrote:

> Strict liability in tort for product defects is a cause of action which implicates the social and economic policy of this Commonwealth. *See Ash v. Continental Ins. Co.,* 593 Pa. 523, 932 A.2d 877, 884 (2007) ("Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals."). The policy was articulated by the concurring and dissenting opinion of Justice Jones in *Miller,* upon which the *Webb* Court relied in "adopting" the strict liability theory as a distinct cause of action in tort: those who sell a product (*i.e.,* profit from making and putting a product in the stream of commerce) are held responsible for damage caused to a consumer by the reasonable use of the product. *See Miller,* 221 A.2d at 334–35 (Jones, J., concurring and dissenting). The risk of injury is placed, therefore, upon the supplier of products.

Tincher, 104 A.3d at 381-82.

The policies embodied in Pennsylvania's approach to products liability--specifically, that the risk of loss should be placed upon those who profit from making and putting a product in the stream of commerce, as articulated in *Miller v. Preitz,* 221 A.2d 320 (Pa. 1966), upon which *Webb v. Zern*, 220 A.2d 853 (Pa. 1966) relied-- were in turn derived from the Restatement (Second) approach.

Tincher, 104 A.3d at 381-82. "Incorporating the strict liability cause of action into Pennsylvania common law, the *Webb* court expressly relied upon the Second Restatement and relevant scholarly commentary to supply its justification." *Id.* at 383.

The Court in *Tincher* held that those policies remain, regardless of the overruling of *Azzarello*, and concluded that a departure from the approach of the Second Restatement, which focuses upon the nature of the product and the consumer's reasonable expectations with respect to the product, rather than upon the conduct of either the manufacturer or the person injured, was not warranted. *Id.* at 369, 399. In a telling footnote, Justice Castille declared: "While the Second Restatement formulation of the principles governing the strict liability cause of action in tort may have proven substantially less than clear, the policy that formulation embodies has not been challenged here and has largely remained uncontroverted." *Id.* at 400 n. 25.

The principles underlying *Azzarello* have not been changed by *Tincher.* The decision in *Tincher* simply altered the way *Azzarello* is applied. Instead of a bifurcation of functions between the judge and the jury, the court will exercise its "traditional role" of determining issues of law, by ruling on dispositive motions, and articulating the law through jury instructions. *Id.* at 407. The jury, as factfinder, will determine the credibility of witnesses and testimony offered, the

weight of evidence relevant to the risk-utility calculus or consumer expectation test, and whether a party has met the burden to prove the elements of the strict liability cause of action. *Id.* at 406-7.[1]

Therefore, after *Tincher*, Pennsylvania courts will continue to require that a plaintiff prove that the seller, manufacturer or distributor placed a product on the market in a "defective condition," but will not require proof of conduct under a negligence-based rubric. Under *Tincher*, the focus of the cause of action should also continue to be on the product, rather than on conduct. The word "defective" was added to the Section 402A language "to ensure that it was understood that something had to be wrong with the ***product.***" John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830 (1973) (emphasis added). "The term "unreasonably dangerous" was included in §402A specifically to obviate any contention that a manufacturer of a product with inherent possibilities

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[1] "A question of whether the party has met its burden of proof is properly 'removed' —for example, via adjudication of a dispositive motion—'from the jury's consideration only where it is clear that reasonable minds [cannot] differ on the issue.' Thus, the strict liability construct we articulate today comfortably accommodates the gate-keeping role ordinarily relegated to the trial court in tort actions" *Tincher*, 104 A.3d at 407 (internal citations omitted).

of harm would become automatically responsible for every harm that could conceivably happen from the use of the product." *Riley v. Warren Mfg., Inc.*, 688 A.2d 221, 228 (Pa Super. 1997). "The words 'unreasonably dangerous' limit liability and signal that a seller is not an insurer but a guarantor of the product." *Tincher*, 104 A.3d at 367. The "unreasonably dangerous" terminology was intended to apply to the nature of the product and was not meant to focus upon whether the supplier of the product acted "unreasonably," *i.e.,* negligently. Although "[s]trict liability arose in part because of a basic presumption that persons not abusing products are not usually injured unless the manufacturer failed in some respect in designing, manufacturing or marketing the product....strict liability theory was designed to facilitate redress for the injured user or consumer because of the difficulty in proving negligence." *O'Brien v. Muskin Corp.*, 463 A.2d 298, 312 (N.J. 1983). The opinion in *Tincher* demonstrates the Court's understanding that the "roots" of the strict liability action under Section 402A lay in this distinction, acknowledging

> ....the policy of those jurisdictions that have incorporated the Second Restatement into their common law is that those who engage in the business of selling a product are subject ***both*** to a duty of care in manufacturing and selling the product and a duty to sell a product free from a defective condition. ***The duty spoken of in strict liability is intended to be distinct from the duty of due care in negligence.*** RESTATEMENT (SECOND) OF TORTS §402A(2).

Tincher, 104 A.3d at 383 (emphasis added).

Clearly, the essential theories and policy underpinnings of Restatement (Second) §402A have not been altered by the *Tincher* Court. The law of products liability developed in response to changing societal concerns over the relationship between the consumer and the seller of a product. *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa.1975). The courts recognized that "the increasing complexity of the manufacturing and distributional process placed upon the injured plaintiff a nearly impossible burden of proving negligence where, for policy reasons, it was felt that a seller should be responsible for injuries caused by defects in his products." *Id.*; *see also Walton v. Avco Corp.*, 610 A. 2d 454, 458 (Pa. 1992) ("[T]he circumstances behind some injuries would make negligence practically impossible for an injured plaintiff to prove.") The complexity of products and the marketing process has increased exponentially, not diminished, in intervening years. In an era that has seen the explosion of the global marketplace, this social policy rationale would appear to be even more valid. The notion, advanced by Honda and the Product Liability Advisory Council, that *Tincher* has "reconnected" Pennsylvania's law of product liability to its "negligence roots" is simply a misreading of the *Tincher* opinion – and of the history of Pennsylvania products liability law generally.

II. *TINCHER* UNDERSCORED THE NEED TO AVOID FORMULAIC JURY INSTRUCTIONS OR THE ORDERING OF NEW TRIALS BASED SOLELY UPON USE OF LANGUAGE FROM PRE-*TINCHER* PRECEDENTS

"[A] new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently." *Harman v. Borah*, 756 A.2d 1116, 1122 (Pa. 2000). Rather, a new trial is necessary because the moving party "has suffered prejudice from the mistake." *Id.*

When the challenge is to a trial court's jury instruction, the so-called "harmless error test" also comes into play:

> To constitute reversible error, a jury instruction must not only be erroneous, but also harmful to the complaining party.

Leaphart v. Whiting Corp., 564 A.2d 165, 168 (Pa. Super. 1989).

This standard was also recognized in Schmidt v. Boardman, as follows:

> Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law ***which controlled the outcome of the case***....In reviewing a trial judge's charge, the proper test is not whether certain portions taken out of context appear erroneous. ***We look to the charge in its entirety, against the background of the evidence in the particular case***, to determine whether or not error was committed and whether that error was prejudicial to the complaining party.

Schmidt v. Boardman, 958 A. 2d 498, 514-15 (Pa. Super. 2008) (emphasis added); *accord Commonwealth v. Sandusky*, 77 A. 3d 663, 667 (Pa. Super. 2013) (charge considered as a whole is adequate "unless the jury was palpably misled...or there

is an omission which is tantamount to fundamental error.") Moreover, the refusal to give a requested charge does not require reversal unless the appellant was prejudiced by that refusal. *Id.* at 667.

The *Tincher* Court noted that a trial court's instructions should be tailored to the facts of the case. "It is essential for the bench and bar to recognize that the test we articulate today is not intended as a rigid formula to be offered to the jury in all situations." *Tincher*, 104 A.3d at 408; *see also Amato v. Bell & Gossett*, 116 A. 3d 607, 621-23 (Pa. Super. 2015) (examining jury charge against defendant's theory of the case and the evidence presented at trial), *appeal granted in part*, No. 447 EAL 2015 (Pa. Feb. 1, 2016). "***The trial court has broad discretion in phrasing its instructions***, and may choose its own wording so long as the law is clearly, adequately and accurately presented to the jury for its consideration." *Tincher*, 104 A.3d at 408 (emphasis added). Indeed, it was the application of a formulaic instruction across all factual circumstances in post-*Azzarello* jurisprudence that the Supreme Court decried in its decision to overrule *Azzarello*, stating, "This case speaks volumes to the necessity of reading legal rules--- especially broad rules--- against their facts." *Id.* at 378.

The *Amicus Curiae* supporting Honda, however, urges precisely the opposite. The Product Liability Advisory Council ("PLAC") contends in its submission that the jury charge in this case must be found to be in error because it

did not "give instructions that *Tincher* requires." (Brief of *Amicus Curiae* Product Liability at 19). *Tincher* itself, however, does not mandate the use of any particular jury instruction. PLAC's argument ignores the Supreme Court's admonition to avoid dogmatic application of the rhetoric of judicial pronouncements, as well as the obvious fact that the trial judge could not have known that such an instruction was purportedly "required" (which it was not) until months ***after*** the jury was charged in this case.[2] Honda and its *Amicus* further gloss over the fact that nowhere in the *Tincher* decision does the Supreme Court mandate an instruction utilizing the "Wade factors" or "unreasonably dangerous" language, nor does it declare that the "guarantor" description is prohibited. *Tincher*, 104 A.3d at 408 ("the test we articulate today is not intended as a rigid formula to be offered to the jury in all situations.")

Honda's discussion of the *Tincher* decision in this regard is misleading at best. Honda asserts that *Tincher* rejected the *Azzarello* charge, citing to page 346 of the opinion. (Brief of Appellant at 23). In fact, that page contains a recitation of Omega Flex's argument. *Tincher*, at 346. The *Tincher* opinion did not reject the notion that a manufacturer/seller is the guarantor of its product as opposed to an insurer; on the contrary, as the foregoing discussion demonstrates (*see* Section I, *supra*), the Court embraced the concept that strict liability was not absolute

[2] The jury was charged in this case on June 26, 2014. The *Tincher* opinion was issued November 19, 2014.

liability. *See Tincher*, at 367 ("The words 'unreasonably dangerous' limit liability and signal that a seller is not an insurer but a guarantor of the product"); *see also id.* at 382 ("A broad reading …suggests that liability would attach absolutely…in modern application, strict liability doctrine is a substantially narrower theory…'and the producer cannot be made an insurer of every one who may possibly be hurt' "). Chief Justice Castille merely expressed the criticism that the term "guarantor" needed to be placed in the context of an explanation of its practical import. *Id.* at 379.

The opinion did not, however, dictate that the language "guarantor" and "every element" be excised from the court's lexicon when charging the jury, or find that its inclusion constituted prejudicial error in every case. In a post-*Tincher* opinion affirmed on appeal by this Court, the Court of Common Pleas of Lackawanna County correctly held that the mere usage of the phrases "guarantor" and "every element" did not automatically amount to fundamental error necessitating a new trial. *Cancelleri v. Ford Motor Company*, No. 11-CV-6060, 2015 Pa. Dist. & Cnty, Dec. LEXIS 320, *99-100 (C.C.P. Lackawanna Cty. Jan. 9, 2015), *aff'd* 2016 Pa. Super. Unpub. LEXIS 53 (Jan. 7, 2016). In the case at bar, the instruction in question was similar to that upheld in *Cancelleri* as well as in *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 550 (Pa. Super. 2009). The language of Pennsylvania Suggested Standard Civil Jury Instructions §§16.10 and 16.20 was

utilized in *Gaudio* and by the trial court in this case in the context of explaining that the defendant manufacturer could be liable in spite of the exercise of due care, which is entirely consistent with *Tincher*. (Tr. 6/26/14 (afternoon session) at 23:1-15).

Notably, *Tincher* was not a crashworthiness case. Claims brought under a crashworthiness theory have long included a requirement that the plaintiff provide proof of a reasonable alternative design that would prevent the injuries incurred. *See, e.g., Kupetz v. Deere & Co., Inc.*, 644 A. 2d 1213, 1218 (1994).

> First explicitly recognized as a specific subset of product liability law ..... in *Kupetz v. Deere & Co., Inc.,* 435 Pa.Super. 16, 644 A.2d 1213 (1994), the term "crashworthiness" means "the protection that a motor vehicle affords its passenger against personal injury or death as a result of a motor vehicle accident." *Id.* at 1218. The 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." *Id.* To avoid liability, a manufacturer must design and manufacture the product so that it is "reasonably crashworthy," or, stated another way, the manufacturer must include accidents as intended uses of its product and design accordingly. *Id.*

Gaudio, 976 A.2d at 532.

The jury, in finding for a plaintiff in a crashworthiness case, must compare the existing design against an alternative offered by the plaintiff. Therefore, the jury necessarily performs a risk-utility analysis. That calculus includes a determination as to "whether the design choice thus made [by the defendant] may

justly require compensation for injury…" *Tincher*, 104 A.3d at 403.

Unquestionably, in the case at bar, the jury was instructed that it must make this determination. In its summary of the issues, and its review of the verdict sheet, the trial court framed the jury's task in terms of a consideration of the design of the vehicle's seat belt versus an "available," "alternative, safer, practicable design." (Tr. 6/26/14 (afternoon session) at 21:24-22:22; 39:3-12). The court also reiterated several times that under the facts of the case and the evidence adduced at trial, (Tr. 6/26/14 at 25:17-23) ("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"), it was only the injuries attributable to the design defect that were compensable:

> ….was a defect…. a factual cause of any injuries plaintiff received solely attributable to the impact that occurred when the roof of the car hit the ground?

(Tr. 6/26/14 at 22:17-25)(emphasis added).

> 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.

(Tr. 6/26/14 at 25:24-26:7).

> Was the defective design a factual cause of any injuries suffered…*solely attributable* to the impact that occurred when the roof of the car hit the ground?

(Tr. 6/26/15 at 39:13-17)(emphasis added).

> State the amount of damages sustained by the plaintiff *solely attributable* to the impact that occurred when the roof of the car hit the ground.

(Tr. 6.26/15 at 50:17-25)(emphasis added).

The trial court's charge, tailored to the facts of the case as *Tincher* instructed, properly and adequately presented the law of a crashworthiness claim to the jury and advised the jury in line with the principles set forth in *Tincher*.[3]

[3] Appellee's principal brief discusses in detail Honda's argument concerning whether the trial court's charge adequately instructed the jury on the elements of a crashworthiness case. This brief does not repeat that discussion. Nevertheless, where the evidence (when viewed in the light most favorable to plaintiff) was that the plaintiff's head would not have hit the roof using the alternative design, a close examination of the charge against the facts of the case demonstrates that, by phrasing her instructions to require that the plaintiff could only recover if the defective condition was "a factual cause of any harm attributable solely to the impact that occurred when the roof of the car hit the ground" (Tr. 6/26/14 at 25:11-16), the trial judge followed the law of crashworthiness.

III. *TINCHER* DID NOT MANDATE THAT EVIDENCE OF GOVERNMENTAL AND INDUSTRY STANDARDS IS ADMISSIBLE AND *TINCHER'S* SOCIAL POLICY PRONOUNCEMENTS SUPPORT CONTINUED EXCLUSION OF SUCH EVIDENCE

Honda argues that the Court must grant a new trial because the trial court's exclusion of evidence of government and industry standards was erroneous, based upon the "risk-utility framework that *Tincher* adopted." (Brief of Appellant at 23). It is clear, however, that the *Tincher* court did not mandate the admission of such evidence. The opinion explicitly indicated that the Court had ***not*** considered that question as part of its holding:

> Omega Flex notes that this approach [of assigning the risk-utility calculus to the judge under *Azzarello*] has the collateral effect of rendering, laws, regulations and industry standards irrelevant to the risk-utility inquiry, with deleterious and unpredictable consequences for plaintiffs and defendants. Omega Flex does not develop this assertion, and, as a result we do not address it in any detail.

Tincher at 345 n. 4.

In *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 528 A.2d 590 (Pa. 1987), the Pennsylvania Supreme ruled that evidence of industry standards and business custom is not admissible in defense of a strict liability action. The Court explained that " 'industry standards' go to the negligence concept of reasonable care, and…such a concept has no place in an action based on strict liability in tort." *Id.*

at 594 (*citing Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069 (3d Cir.1979)). In so holding, this Court stated:

> Having reached the conclusion that evidence of industry standards relating to the design of the control pendant involved in this case, and evidence of its widespread use in the industry, go to the reasonableness of the appellant's conduct in making its design choice, we further conclude that such evidence would have improperly brought into [this strict liability] case, concepts of negligence law.

Lewis, 528 A.2d at 594.

The Pennsylvania appellate courts have also consistently held that it is impermissible to show compliance with government standards as a defense to a strict liability claim because the manufacturer's conduct is irrelevant in strict liability. In *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989), the Pennsylvania Superior Court, relying on the Pennsylvania Supreme Court decision in *Lewis*, held that OSHA standards were ~~in~~admissible in a strict liability action. *Sheehan*, 555 A. 2d at 1355. The court recognized that "OSHA regulations…would introduce into a strict liability action the reasonableness of [the manufacturer's actions], an issue irrelevant to whether liability attaches." *Id.*; *see also Majdic v. Cincinnati Machine Co.,* 537 A.2d 334, 339 (Pa. Super. 1988) (trial court's admission of evidence of compliance with American National Standards Institute ("ANSI") safety standards was error warranting reversal and remand); *accord Harsh v. Petroll,* 840 A.2d 404, 425 (Pa. Commw. 2003)(based upon

Lewis, evidence of compliance with FMVSS standards is inadmissible in products liability actions).

This type of evidence is sometimes referred to as "state of the art" evidence. "State of the art" is also sometimes used to refer to technological or scientific feasibility. In crashworthiness cases, such as the case at bar, feasibility of an alternative design is an element of a plaintiff's claim. A distinction must be made, however, between what is technically feasible with respect to particularized product designs and what an industry customarily does. The latter type of evidence departs from strict liability theory in two important ways:

> First, the state of the art evidence approach focuses on the conduct of the manufacturer rather than on the product. The second departure is that such evidence measures the manufacturer's conduct against the conduct of others in the industry.

Ellen Wertheimer, *Azzarello Agonistes: Bucking the Strict Products Liability Tide*, 66 TEMP. L. REV. 419, 441 (1993). Allowing the admission of such evidence will force the plaintiff to shift from demonstrating the dangerous characteristics of the product to an attack on the entire "state of the art" of the defendants' industry, a nearly insurmountable task. It has been observed that "because of the complexity of the technology, and the intricacy of the issues, such cases tend to ***begin*** with a strong presumption in favor of the manufacturer." Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 691(1995)(emphasis added). A significant effect of admitting evidence of industry

and governmental standards will be to introduce an extra weight on the scale against design complaints. *Id.*

Moreover, a focus upon industry standards would lead to a situation where the conduct of the manufacturer is judged by reference to other manufacturers, which is essentially a discussion of ***minimum*** standards. The inevitable danger is that allowing evidence of industry standards and government regulations will lead to a "least common denominator" approach. As Justice Larsen commented in his concurrence is *Lewis*, "[A] manufacturer cannot avoid liability to its consumers that it injures or maims through its defective designs by showing that 'the other guys do it too.'" *Lewis,* 528 A.2d at 595; see also *Gaudio,* 976 A.2d at 543 ("there is no relevance in the fact that such a design is widespread in the industry").

The conduct of the manufacturer should not be judged by reference to other manufacturers; it is the ***product*** which must be judged as either sufficient or deficient, a focus that the *Tincher* court reaffirmed. *Tincher*, 104 A.3d at 382 ("the presumption is that strict liability may be available with respect to any product, provided that the evidence is sufficient to prove a defect.") As noted by the Pennsylvania Superior Court in *Gaudio v.Ford Motor Co.,* evidence of applicable government and industry standards should be excluded because "it tends to mislead the jury's attention from their proper inquiry, namely the quality of design of the product in question." *Gaudio,* 976 A.2d at 543.

Furthermore, the deterrent effect of strict liability suits – promoting the development of safer alternatives to the product at issue -- will be reinforced by refusing to allow industry or government standards to be used as a defense.

> With respect to whether there is a practicable, safer, alternative design, courts can create significant deterrence by distinguishing mere industry custom evidence from evidence of scientific and technological feasibility. The failure to do so can create major disincentives for manufacturers to seek out safer designs.

Gerald F. Tietz, *Strict Products Liability, Design Defects and Corporate Decision-Making: Greater Deterrence Through Stricter Process*, 38 VILL. L. REV. 1361, 1431-32 (1993). "By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research." *Beshada v. Johns-Manville Corp.* 447 A.2d 539, 548 (N.J. 1982).

The Supreme Court in *Tincher* recognized deterrence as a legitimate policy objective of strict liability in tort. *See Tincher*, 104 A.3d at 404 ("… that the theory of strict liability—like all other tort causes of action—is not fully capable of providing a sufficient deterrent incentive to achieve perfect safety goals is not a justification for jettisoning or restricting the duty in strict liability"). "Deterrence of unsafe practices, whether in a manufacturing or a design context, is even more important now in an era of rapidly changing technology, deregulation and underfunding of regulatory agencies than it was in the 1960s." Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered*

Regime, 74 BROOKLYN LAW REV. 1039, 1046 (2009). Indeed, recognizing the weaknesses of a regulatory system comprised of "imperfect federal agencies with limited resources and sometimes limited legal authority" to recall products, United States Supreme Court Justice Sonia Sotomayor recently reiterated the view that "the state design-defect laws play an important role, not only in discovering risks, but also in providing incentives for manufacturers to remove dangerous products from the market promptly." *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2495 (June 24, 2013) (Sotomayor, dissenting).

One commentator, opining upon the deterrent effect of strict liability actions, has noted the consequences of evidentiary rulings on this policy objective:

> When courts fail to create reasonable safety incentives by not reasonably limiting evidence of common industry practice, manufacturers will probably avoid seeking out engineering and incorporating important safety devices into their products. Allowing evidence of industry custom in these circumstances encourages juries to find that an industry's actions were reasonable despite clear evidence that the industry as a whole, or any given manufacturer, reasonably could have provided greater safety that would have prevented the plaintiff's injury. This situation comes perilously close to allowing an industry to set its own standards of liability.

Tietz, *Strict Products Liability: Greater Deterrence*, at 1435-36.

Allowing evidence of industry and governmental standards in this case, therefore, would not only be contrary to the social policy considerations recognized in *Tincher*, it would also suggest that the jury evaluate the defendant's

conduct against that of other manufacturers, crossing over into a negligence assessment. Such a result would be antithetical to the Supreme Court's recognition that "[t]he duty spoken of in strict liability is intended to be distinct from the duty of due care in negligence," *Tincher,* 104 A.3d at 383, and would upset the "proper calibration" of Section 402A of the Restatement (Second) of Torts, which is at the heart of the *Tincher* decision.

CONCLUSION

Based upon the foregoing arguments and authorities, the decision of the trial court should be affirmed.

Respectfully submitted,

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