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445 EDA 2015

In the Superior Court of Pennsylvania

No. 445 EDA 2015

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

v.

AMERICAN HONDA MOTOR CO., INC.,

Appellant.

ANSWER OF PLAINTIFFS/APPELLEES IN OPPOSITION TO AMERICAN HONDA'S APPLICATION TO FILE POST–ARGUMENT SUBMISSION

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

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ANSWER OF PLAINTIFFS/APPELLEES IN OPPOSITION TO AMERICAN HONDA'S APPLICATION TO FILE POST–ARGUMENT SUBMISSION

Apparently dissatisfied with the performance of its arguing counsel at last Tuesday's oral argument, defendant/appellant American Honda Motor Co. has filed an application for leave to file a post–argument submission signed by an entirely different appellate attorney from an entirely different law firm that also represents Honda in this appeal.

Honda's application should be denied. The oral argument of this appeal already lasted more than 30 minutes. There is no reason it needs to continue over days and now weeks. If arguing counsel for Honda would have reserved more than two of his 15 total minutes for rebuttal in this 11–issue appeal, as any prudent appellate advocate would have done, Honda would have had adequate time at oral argument to address all three points discussed in its proposed supplemental submission.

As matters now stand, Honda already made the very same points about this Court's ruling in *Cancelleri* — a decision that arguing counsel for plaintiffs named only at the specific insistence of one of this panel's members, who herself described it is a "mem. op." — during Honda's rebuttal time at oral argument. Honda now seeks to have it both ways,

arguing that *Cancelleri* should not be mentioned, while also suggesting that the decision somehow supports Honda's position on appeal.[1]

With regard to Honda's second point in its proposed supplemental submission, the trial court's ruling on remand in *Tincher* could not have come as a surprise to Honda, because plaintiffs electronically filed that opinion with this Court and instantaneously served the filing on counsel for Honda six days before oral argument. It was not an absence of clairvoyance but rather a strategic decision to only reserve two minutes for

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[1] Honda's Reply Brief for Appellant filed in this appeal noted that this Court affirmed the trial court's judgment in *Cancelleri*. *See* Reply Brief at iii, 7. How that fact can be appropriately noted by Honda in its reply brief but be forbidden from mention by Honda's opposing counsel at oral argument defies understanding. On appeal in *Cancelleri*, Ford advanced the same *Tincher*–based arguments that Honda makes here, including that the design defect jury instructions given to the jury in *Cancelleri* failed to satisfy *Tincher*. This Court's holding in *Cancelleri* that prevailing on a crashworthiness claim under Pennsylvania law necessarily satisfies *Tincher* was not based on the supposed risk–utility instruction given to the jury in *Cancelleri*. Indeed, as explained *infra* at footnote 2 on page 4 of this response, Ford's argument in *Cancelleri* was that the jury in that case was not asked to decide the issue of risk–utility. Both sides in this current appeal are represented by counsel who were involved in the *Cancelleri* appeal. Attorney Bashman, who serves as appellate counsel for plaintiffs–appellees in this appeal, served as appellate counsel for plaintiffs–appellees in *Cancelleri*, together with plaintiffs' trial counsel, James F. Mundy and Bruce S. Zero. Attorney William J. Conroy, trial and appellate co–counsel for Honda in this case, was trial counsel and appellate co–counsel for defendant Ford Motor Co. in *Cancelleri*.

rebuttal that left Honda without time in its rebuttal argument to address the trial court's decision on remand from the Pa. Supreme Court in *Tincher*, which is when Honda should have addressed it, rather than by means of a proposed supplemental submission.

Lastly, as Honda's arguing counsel memorably volunteered at oral argument, Honda strategically decided to have an attorney who is a member of the California bar, rather than one of its numerous appellate attorneys who are admitted in Pennsylvania, deliver Honda's oral argument in this case. Choices such as that have consequences. Chief among them, with regard to Honda's third and final proposed supplemental point, was that Honda's arguing counsel was apparently unfamiliar with Pennsylvania's newly revised, post–*Tincher* Suggested Standard Civil Jury Instructions. Had one of Honda's Pennsylvania–based appellate attorneys instead delivered Honda's appellate oral argument, surely he or she would have been prepared to address the subject, had more than two minutes for rebuttal been reserved.

Unlike Honda, which received the last word at oral argument, counsel for plaintiffs–appellees truly was deprived of any opportunity to address the numerous, material, intentional misstatements that arguing

counsel for Honda rattled off at high speed in his rebuttal argument. Just as Honda has sought to raise three supplemental points, plaintiffs respectfully offer the following three important points of their own pertaining to Honda's rebuttal argument.

(1). *Jury consideration of risk–utility issues*: In Honda's proposed supplemental submission and in its counsel's rebuttal oral argument, Honda referred to the supposed risk–utility jury charge that the jury received in *Cancelleri*. Notably, that charge has been quoted to this Court infinitely more times than it was ever quoted to the panel of this Court that rejected Ford Motor Co.'s appeal in *Cancelleri*. In other words, in *Cancelleri*, the trial court's supposed risk–utility jury charge was not quoted in the parties' appellate briefs, in this Court's memorandum opinion issued in that case, or in the trial court's Rule 1925(a) opinion issued in that case.[2]

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[2] We refer to the *supposed* risk–utility charge that the jury received in *Cancelleri*, because Ford Motor Co.'s Brief for Appellant in *Cancelleri* maintained that the jury was not "allowed to make the risk–utility determination itself" in that case. *See* Ford's Brief for Appellant in *Cancelleri* at page 20; *see also* Ford's Reply Brief for Appellant in *Cancelleri* at page 14 ("Ford's trial defense did not include a risk–utility component; the trial court had ruled *in limine* that Ford could not mount a defect defense that relied on risk–utility principles").

Most importantly, on the issue of the adequacy of the trial court's jury instructions in *this case*, trial counsel for Honda conceded in his closing argument to the jury in this case that plaintiffs' feasible alternate design was safe. R.828a. Because Honda conceded through both its counsel and its relevant expert witness (R.592a) that plaintiffs' feasible alternate design was safe, the jury in this case had no risks unrelated to the defect at issue to balance against utility. Rather, in this case the entire factual dispute on risk–utility between the parties concerned whether the all–belts–to–seat (ABTS) design proposed by plaintiffs would or would not have avoided the headstrike injury that rendered Carlos Martinez a quadriplegic.

The jury instructions thus properly directed the jury to focus on that question as the basis for its risk–utility analysis. As *Tincher* itself made abundantly clear, the appropriate jury instructions for any given case depends on the facts and circumstances of the case itself. *See Tincher* v. *Omega Flex, Inc.*, 104 A.3d 328, 408 (Pa. 2014) (rejecting a one-size-fits-all approach to jury instructions and instead emphasizing that a trial court should tailor the jury instructions in any given case to the facts and circumstances at issue in the case).

Honda's passenger comfort evidence was unquestionably before the jury for its consideration, to weigh against avoiding the devastating risk of being rendered a quadriplegic in a slow-speed 30–mph roll-over that could have been avoided using the ABTS design — a risk Honda knew about as a result of its own testing but chose to ignore and then failed to warn about. Thus, the instructions the jury received pertaining to risk–utility in this crashworthiness case matched the facts in dispute before the jury, which is all that *Tincher* requires.

(2). *Carlos Martinez's height*: During his rebuttal oral argument, arguing counsel for Honda described plaintiff Martinez as being in the first percentile of height for males. In fact, the evidence shows that Carlos Martinez's height was 5'5". What was important for purposes of the ABTS design, however, was Martinez's seated height. The evidence at trial showed that with the ABTS design, instead of hitting his head on the roof of the car at the moment the car's roof made impact with the pavement, thus rendering him a quadriplegic, Martinez would have had some 4.65 inches of safe clearance between his head and the roof. The testimony further established that the safer, feasible ABTS design would have caused the driver's seatbelt in the 1999 Acura Integra to keep the driver safe from

devastatingly injurious headstrike in a slow–speed rollover for men and women of any height below 5'10".

Thus, the vast majority of all drivers of the Acura Integra, men and women (keeping in mind that especially tall people would be unlikely to purchase a car of this size to begin with), would benefit from the ABTS design by avoiding any devastating headstrike in a slow–speed rollover. Honda's contention that Martinez's height somehow undermines the strength of plaintiff's victory at trial, in common with Honda's baseless contention that plaintiffs' feasible alternate design would require that 98% of the vehicles on the market be retrofitted, is simply untrue.

(3). *The crashworthiness jury charge this Court actually approved in Gaudio*: During his rebuttal argument, arguing counsel for Honda described as "false" plaintiffs' counsel's statement during oral argument that the crashworthiness instruction that this Court expressly approved as proper in *Gaudio* v. *Ford Motor Co.*, 976 A.2d 524, 550–51 (Pa. Super. Ct. 2009), was substantively identical to the crashworthiness charge that Judge Robins New delivered to the jury in this case. The jury charge that this Court expressly approved in *Gaudio* as "correctly advis[ing] the jury of the

specific elements of a crashworthiness claim, as set forth in our decision in *Kupetz*," consisted of the following:

> In this case [Gaudio] has the burden of proving that the design of the product was defective, that an alternative safer design practical under the circumstances existed. That [the Deceased's] injuries were caused or exacerbated by the defective design of the product and that [the Deceased] would not have suffered these injuries if the alternative design were used. If after considering all of the evidence you feel persuaded that the propositions are more probably true than not, your verdict must be for [Gaudio]. Otherwise your verdict must be for [Ford].

Id. No three–element test was contained in the actual crashworthiness jury instruction that this Court approved as proper in *Gaudio*.

In this case, Judge Robins New gave a charge virtually identical to the one given in *Gaudio* on crashworthiness and causation. She instructed the jury to determine whether the restraint system in the Acura Integra was defective, whether an alternative safer practicable design existed, and further clarified (in conformity with the trial evidence) that causation only existed if the injuries Martinez sustained when the roof of the car hit the ground were caused by the defect and would not have occurred if the defect did not exist. R.874a–75a. Additionally, the jury verdict sheet

referenced the exact same inquires described in *Gaudio*, as shown in the reading aloud of the jury's verdict on the record. R.910a–11a.

* * * *

In conclusion, Honda's proposed post–argument supplemental submission should be denied. However, in the event that Honda's three points are considered, this Court should also consider the three points that plaintiffs have presented, above, pertaining to Honda's rebuttal oral argument.

Respectfully submitted,

Dated: August 17, 2016

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