IN THE SUPERIOR COURT OF PENNSYLVANIA

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445 EDA 2015

CARLOS MARTINEZ AND
ROSITA DE LOS SANTOS DE
MARTINEZ, H/W,

Plaintiff-Appellees

v.

AMERICAN HONDA MOTOR CO., INC.,

Defendant-Appellant

APPEAL OF DEFENDANT FROM THE JUDGMENT OF THE
COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
JANUARY 21, 2015
IN DECEMBER TERM 2011, NO. 03763

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANT-APPELLANT

Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, VA 22091
703-264-5300

Of Counsel

Christopher Scott D'Angelo (# 28463)
Patrick T. Ryan (# 37728)
Montgomery, McCracken,
Walker & Rhoads, LLP
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-1500

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

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INTEREST OF THE AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 103 corporate members from a broad cross-section of American and international product manufacturers. A list of PLAC's corporate members is attached in an addendum to this brief. In addition, several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC.

PLAC seeks to contribute to the improvement and reform of the law affecting product liability in the United States and elsewhere. PLAC's point of view reflects the experience of corporate members in diverse manufacturing industries. Since 1983, PLAC has filed over 1000 briefs as *amicus curiae* in state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in product liability law.

This case is of paramount importance to PLAC because, in denying the manufacturer's motion for post-trial relief, the trial court ignored the significant changes the Pennsylvania Supreme Court made in *Tincher v. Omega Flex, Inc.*, ___ Pa. ___, 104 A.3d 328 (2014), to the law of strict product liability. This *amicus curiae* brief is respectfully submitted to the Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex, Inc.*, ___ Pa. ___, 104 A.3d 328 (2014), made enormous changes in the Pennsylvania common law of strict product liability. Even though the strict liability cause of action described in § 402A of the Restatement (Second) of Torts has many of its roots in the law of negligence and expressly includes the concept of "unreasonably dangerous," the court's earlier decision in *Azzarello v. Black Brothers Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), banned the use of negligence-based concepts – such as reasonableness and foreseeability – from the instructions a jury is given on how to determine if the product at issue was sold in a defective condition. No other state in the country adopted the *Azzarello* rule that all forms of "the 'reasonable man' negligence terminology" (480 Pa. at 559 n.12, 391 A.2d at 1027 n.12) must be excluded from the jury instructions in a strict products liability case. That artificial wall between strict liability under § 402A and negligence greatly influenced how trials were conducted and how juries were instructed in Pennsylvania for some thirty-six years – including the trial in the present case.

Azzarello also declared that the trial judge, not the jury, should weigh the utility of the product against the risks it poses to users and consumers and make a preliminary determination of whether, under the facts alleged by the plaintiff, the

product could be said to be "unreasonably dangerous." 480 Pa. at 558, 391 A.2d at 1026. The jury was to determine whether the product was "defective" but not whether it was "unreasonably dangerous." *Id*. No other state's law divides responsibility for making determinations under § 402A in this way.

In *Tincher*, the Pennsylvania Supreme Court overruled *Azzarello* and began to bring Pennsylvania back into the mainstream of product liability law. Several of the fundamental changes *Tincher* made to the common law are important to this Court's assessment of the appeal by American Honda Motor Co., Inc. ("Honda") from the judgment the trial court entered in this case – because the trial judge made evidentiary rulings based on the now-demolished wall that *Azzarello* built between strict liability and negligence and instructed the jury with the set of instructions that *Azzarello* approved but *Tincher* rejected.

The trial judge asserted in its opinion in support of the judgment that it did not "believe that Tincher mandated any change in any legal or evidentiary ruling" the court had made in this case and that, "even if Tincher changed the law of the case concerning defective design, it did not concern the failure to warn" – which the court concluded was "an independent basis of liability" here, unaffected by *Tincher*.

But, as is plain from the 137-page opinion the Pennsylvania Supreme Court issued in *Tincher*, that long-awaited decision was not intended simply to apply to the case before the court or indeed to apply solely to cases alleging a design defect. The court did limit its holding to the type of defective design case before it, but it explained that "the foundational principles upon which we touch may ultimately have broader implications by analogy," 104 A.3d at 384 n.21, and that the new standard of proof it was announcing "may have an impact upon other foundational issues regarding manufacturing or warning claims[.]" *Id*. at 409.

In fact, in a decision the trial court here appears to have ignored, this Court has already held that *Tincher* "provided something of a road map for navigating the broader world of post-*Azzarello* strict liability law" and that the principles *Tincher* announced ***do indeed apply to failure-to-warn claims***. *Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. 2015).

This Court also recognized in *Amato* that the Supreme Court has now "returned to the finder of fact the question of whether a product is 'unreasonably dangerous,' as that determination is part and parcel of whether the product is, in fact, defective." 116 A.3d at 620. But asking jurors to make a determination on a matter that juries have been barred from considering for over thirty-six years requires guidance – in the form of targeted jury instructions on how to assess

whether the product is "unreasonably dangerous" – and, following *Azzarello*, the trial court did not do that here.

The trial court's rulings that prevented Honda from offering evidence that the seat belt design at issue complied with governmental and industry standards and that instructed the jury that it could find the 1999 Acura Integra defective if it lacked "any element necessary to make it safe," without requiring the jurors to engage in any type of risk-utility or cost-benefit assessment, cannot survive *Tincher*. Honda was barred from presenting evidence that under *Tincher* is clearly relevant, and the jury was given inadequate and incorrect guidance on how it should decide whether Mr. Martinez's vehicle was sold "in a defective condition unreasonably dangerous to the user or consumer."

For these reasons alone, a new trial – under the law as articulated in *Tincher* and with jury instructions on the "risk-utility" analysis that *Tincher* mandates – is required.[1]

[1] PLAC concurs with appellant Honda's additional arguments that the trial court erred (a) in giving an incorrect crashworthiness charge, (b) in giving an inappropriate "heeding" instruction (which it erroneously presented to the jury as an irrebuttable presumption), and (c) in permitting the case to go to the jury on evidence of a claimed alternative design that was both unlawful under and preempted by federal motor vehicle regulations.

ARGUMENT

I. BETWEEN 1975 AND 2014, PENNSYLVANIA PRODUCT LIABILITY LAW WAS LARGELY BASED ON THE NOTION THAT NEGLIGENCE CONCEPTS HAD NO PLACE IN A STRICT LIABILITY CASE UNDER § 402A

In *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), the Pennsylvania Supreme Court declared, "We hereby adopt the … language [of § 402A of the Restatement (Second) of Torts] as the law of Pennsylvania." 422 Pa. at 427, 220 A.2d at 854. Section 402A states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A. In the mid-1970s, however, the Pennsylvania Supreme Court issued two decisions – a two-justice opinion announcing the judgment in *Berkebile v. Brantley Helicopter Corp.,* 462 Pa. 83, 337 A.2d 893

(1975), and a majority decision in *Azzarello v. Black Brothers Co.*, 480 Pa. 547, 391 A.2d 1020 (1978) – that dictated how trial courts would apply § 402A for the next thirty-six years. Most of what the court said in those two decisions has now been abrogated.

The opinion announcing the decision in *Berkebile* was an opinion of only two justices (Chief Justice Jones and Justice Nix), but as the *Tincher* opinion noted, "parts of [the *Berkebile* opinion] later became law in *Azzarello*[.]" 104 A.3d at 364.

In *Berkebile*, the Pennsylvania Supreme Court affirmed this Court's determination that the underlying verdict for the defendant-manufacturer had to be reversed because the trial court gave erroneous instructions to the jury. Although the reported opinions do not recite the instructions the trial court gave on the strict liability claim, it is likely that the trial court used the language from § 402A – in particular the language that the product be in a "defective condition unreasonably dangerous to the user or consumer" – because it is the "unreasonably dangerous" language that the two-justice opinion in *Berkebile* (and later a majority in *Azzarello*) said should not be part of the jury instructions. The rationale was that asking the jury to assess whether the product or the claimed defect was

"unreasonably dangerous" would improperly inject negligence concepts into a strict liability claim.

The opinion announcing the decision in *Berkebile* said:

> The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant. … What the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory. In attempting to articulate the definition of "defective condition" and to define the issue of proximate cause, the trial court here unnecessarily and improperly injected negligence principles into this strict liability case.
>
> * * *
>
> We hold today that the "reasonable man" standard in any form has no place in a strict liability case. The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's actions and knowledge, even if merely to define "defective condition" undermines the policy considerations that have led us to hold in *Salvador* that the manufacturer is effectively the guaranter [sic] of his product's safety. The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge the jury on "reasonableness."

462 Pa. at 94-95, 96-97, 337 A.2d at 899, 900.

In *Azzarello*, the court did several significant things in applying and expanding upon *Berkebile* that influenced Pennsylvania strict liability law – until *Tincher* disapproved them:

First, *Azzarello* adopted the principle from the two-justice *Berkebile* opinion that there must be a strict separation of negligence-based concepts from strict liability. The court held that it was error to use the phrase "unreasonably dangerous" in instructing the jury on the issue of how it should determine if the product was sold in a defective condition. 480 Pa. at 557-59, 391 A.2d at 1026-27.

Second, it expanded upon the notion, discussed in earlier cases, that strict liability for product defects makes a seller the guarantor but not the insurer of its products. In the process, the court announced a standard (which *Tincher* later said it took out of context from *Berkebile*) that became the standard in Pennsylvania for what constitutes a product defect:

> While this expansion of the supplier's responsibility for injuries resulting from defects in his product has placed the supplier in the role of a guarantor of his product's safety, it was not intended to make him an insurer of all injuries caused by the product.
>
> * * *
>
> For the term guarantor to have any meaning in this context the supplier must at least provide a product which is designed to make it safe for the intended use. Under this standard, in this type case, the jury may find a defect where the product left the supplier's control ***lacking any***

> ***element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use***.

480 Pa. at 553, 559, 391 A.2d at 1024, 1027 (bold italicized emphasis added).

Third, the court created a kind of gatekeeper role for the trial judge in strict liability cases, which required the trial judge to make a preliminary determination – based on considerations of "social policy" – of whether the claims being alleged about the product warranted the case going to the jury on a strict liability theory. The *Azzarello* court said:

> [T]he mere fact that we have approved Section 402A, and even if we agree that the phrase "unreasonably dangerous" serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury's consideration. Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? ***These are questions of law and their resolution depends upon social policy.*** Restated, the phrases "defective condition" and "unreasonably dangerous" as used in the Restatement formulation are terms of art invoked when *strict liability* is appropriate. ***It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint.*** They do not fall within the orbit of a factual dispute which is properly assigned to

> the jury for resolution. A standard suggesting the existence of a "defect" if the article is unreasonably dangerous or not duly safe is inadequate to guide a lay jury in resolving these questions.

480 Pa. at 558, 391 A.2d at 1026 (bold italicized emphasis added).

Fourth, the court expressly approved a jury instruction that, no doubt, has been given in almost every strict liability case between *Azzarello* and *Tincher* – and indeed was given in the present case. The *Azzarello* court said:

> We believe than an adequate charge to the jury, one which expresses clearly and concisely the concept of "defect," while avoiding interjection of the "reasonable man" negligence terminology, is the jury instruction directed to the definition of a "defect," which was fashioned in large part by the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, Civil Instruction Subcommittee:
>
> > "The [supplier] of a product is the guarantor of its safety. The product must, therefore, 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, then the product was defective, and the defendant is liable for all harm caused by such defect."
>
> Pennsylvania Standard Jury Instruction 8.02 (Civil), Subcommittee Draft (June 6, 1976).

480 Pa. at 559 n.12, 391 A.2d at 1027 n.12.

All of these fundamental ideas – the banning of negligence-based concepts, the "guarantor but not insurer" notion, the "lack[ing] any element necessary to make it safe" standard, and the trial judge's separate "social policy"-based gatekeeper role – were rejected in *Tincher*. 104 A.3d at 376-81.

Between *Azzarello* (1978) and *Tincher* (2014), the Pennsylvania appellate courts decided several questions about the type of evidence a plaintiff in a strict liability case could offer to prove that the product was in a defective condition and the types of defenses a seller-defendant could raise. Those post-*Azzarello* decisions include:

(1) *Lewis v. Coffing Hoist Division, Duff-Norton Co., Inc.*, 515 Pa. 334, 528 A.2d 590 (1987), where the court held that evidence of industry standards and evidence of a design's widespread use in industry was inadmissible in a strict products liability case.

(2) *Kimco Development v. Michael D's Carpet Outlets*, 536 Pa. 1, 637 A.2d 603 (1993), where the court held that comparative negligence principles should not be applied on a strict product liability claim to reduce a seller-defendant's liability for damages.

(3) *Carrecter v. Colson Equipment*, 346 Pa. Super. 95, 499 A.2d 326 (1985), where this Court held that a manufacturer could not defend a strict liability claim on the basis that what the defendant-manufacturer knew or did was "state of the art" at the time.

In *Tincher*, the Pennsylvania Supreme Court did not expressly overrule any of these decisions. Instead, it said:

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

104 A.3d at 409-10 (bold italicized emphasis added) (citations omitted). Nevertheless, the court's express rejection of the idea that negligence principles must be kept out of strict liability law eliminates the rationale for many *Azzarello*-based

decisions because the rulings in those cases were made because of the perceived need to maintain that now-rejected doctrinal separation.

II. *TINCHER* RE-CONNECTED PENNSYLVANIA STRICT PRODUCT LIABILITY LAW TO ITS ROOTS IN THE COMMON LAW OF NEGLIGENCE

In *Tincher*, the Pennsylvania Supreme Court ruled that *Azzarello*'s notion that the question of whether a product could be found "unreasonably dangerous" should be separated from the question of whether the product was "defective" and that the jury should answer only the "defective" question "is incompatible with basic principles of strict liability." 104 A.3d at 380. The court explained:

> [I]n a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is "defective"; ***in the context of a strict liability claim, whether a product is defective depends upon whether that product is "unreasonably dangerous."*** Yet, *Azzarello* divorced one inquiry from the other[.]
>
> * * *
>
> Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason in light of the considerations pertaining to the case.

Id. at 380-81 (bold italicized emphasis added).

In *Amato*, this Court recognized that *Tincher*:

> rejected the blanket notion that 'negligence concepts create confusion in strict liability cases." … [I]n *Tincher*, the Court returned to the finder of fact the question of whether a product is "unreasonably dangerous," as that determination is part and parcel of whether the product is, in fact, defective.

Amato, 116 A.3d at 620 (quoting *Tincher*, 104 A.3d at 381).

Tincher thus re-connected the strict products liability cause of action in Pennsylvania to its roots in negligence law. No longer must courts expend time and effort trying to prevent the jury from considering negligence-based concepts, such as reasonableness and foreseeability, in assessing whether the product left the defendant-seller's control in a "defective condition."

To accomplish this correction in the common law, *Tincher*:

(a) eliminated the "lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use" standard for proving a defective condition that *Azzarello* had adopted and that has been used in strict liability cases since 1978 – including in the present case;

(b) replaced it with a standard of proof that allows plaintiffs a choice of proving that the product left the defendant-seller's control "in a defective condition unreasonably dangerous to the user or consumer" by one or both of two alternative tests;

(c) eliminated the special gatekeeping role that *Azzarello* assigned to the trial judge; and

(d) declined to adopt the Restatement (Third) of Torts as the statement of Pennsylvania common law on strict products liability.

The two alternative tests *Tincher* adopted as the legal standards for guiding the jury's determination of whether the product was in a "defective condition unreasonably dangerous to the user or consumer" are (1) the "consumer expectations" standard and (2) the "risk-utility" standard. 104 A.3d at 387-91. The opinion explained:

> [T]wo standards have emerged, that purport to reflect the competing interests of consumers and sellers, upon which all American jurisdictions judge the adequacy of a product's design: one measures "consumer expectations," and articulates the standard more from the perspective of the reasonable consumer; the second balances "risk" and "utility," and articulates the standard more from the perspective of the reasonable seller.

104 A.3d at 387. The court held that, "in Pennsylvania, the cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." *Id*. at 401.

Tincher described the "consumer expectations" standard as follows:

> The consumer expectations test defines a "defective condition" as a condition, upon normal use, dangerous beyond the reasonable consumer's contemplations. The test offers a standard of consumer expectations which, in typical common law terms, states that: the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer. The

> test has been described as reflecting the "surprise element of danger." The product is not defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains (*e.g.,* a knife). The nature of the product, the identity of the user, the product's intended use and intended user, and any express or implied representations by a manufacturer or other seller are among considerations relevant to assessing the reasonable consumer's expectations.

Id. at 387 (citations omitted).

Tincher described the "risk-utility" standard as:

> a test balancing risks and utilities or, stated in economic terms, a cost-benefit analysis. The test offers a standard which, in typical common law terms, states that: a product is in a defective condition ***if a "reasonable person" would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions***. Stated otherwise, a seller's precautions to advert the danger should anticipate and reflect the type and magnitude of the risk posed by the sale and use of the product. The risk-utility test offers courts an opportunity to analyze *post hoc* ***whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability***. Other jurisdictions have generally cited favorably the works of Dean Wade, which articulated factors relevant to the manufacturer's risk-utility calculus implicated in manufacturing or designing a product. The factors are:
>
> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 389-90 (bold italicized emphasis added) (citations omitted).

These various factors – in particular, (a) what "the reasonable consumer" would contemplate; (b) how "the reasonable seller" would balance the probability and seriousness of harm potentially caused by a product against the burden or costs of taking precautions; and (c) the extent to which a consumer could "avoid danger by the exercise of care in the use of the product" – plainly now permit and in fact

require the jury to consider the types of negligence-based concepts that *Azzarello* and its progeny excluded from strict product liability cases in Pennsylvania.

III. A NEW TRIAL IS REQUIRED BECAUSE THE JURY WAS NOT GIVEN INSTRUCTIONS THAT *TINCHER* REQUIRES AND WAS GIVEN INSTRUCTIONS THAT *TINCHER* REJECTED

As this Court has already recognized, *Tincher* "returned to the finder of fact the question of whether a product is "unreasonably dangerous," as that determination is part and parcel of whether the product is, in fact, defective." *Amato*, 116 A.3d at 620. Until *Tincher*, the jury was barred from performing any type of risk-utility assessment – because *Azzarello* reserved that role for the judge. *Tincher* explains the factors a jury should now consider in making that assessment, but the jury in this case was not given any instruction on those factors.

Here, the final instructions the trial court gave to the jury on June 26, 2014 took 39 pages of the trial transcript. But of those 39 pages, ***only two pages*** contain the court's instructions on how the jury should assess and decide the central issue of the case: namely, whether – either because of its seat belt design or because of a lack of adequate warnings – the 1999 Acura Integra that Mr. Martinez was driving was defective. The trial court used (a) the abbreviated generic instruction on "defect" that *Azzarello* approved in 1978 and that appears as Pennsylvania

Suggested Standard Civil Jury Instruction ("SSCJI") 16.20 and (b) the abbreviated generic instruction on warnings that appears as Pennsylvania SSCJI 16.30 and that the Subcommittee Note to SSCJI 16.30 explains was "taken substantially from *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 903 (Pa. 1975)."

As noted above, *Azzarello*'s footnote 12 stated:

> We believe than an adequate charge to the jury, one which expresses clearly and concisely the concept of "defect," while avoiding interjection of the "reasonable man" negligence terminology, is the jury instruction directed to the definition of a "defect," which was fashioned in large part by the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, Civil Instruction Subcommittee:
>
> > "The [supplier] of a product is the guarantor of its safety. The product must, therefore, 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, then the product was defective, and the defendant is liable for all harm caused by such defect."
>
> Pennsylvania Standard Jury Instruction 8.02 (Civil), Subcommittee Draft (June 6, 1976).

480 Pa. at 559 n.12, 391 A.2d at 1027 n.12. And in *Berkebile*, the two-justice opinion said the following about the necessity of warnings:

> It must be emphasized that the test of the necessity of warnings or instructions is not to be governed by the reasonable man standard. In the strict liability context we reject standards based upon what the "reasonable" consumer could be expected to know, or what the "reasonable" manufacturer could be expected to "foresee" about the consumers who use his product.

462 Pa. at 101, 337 A.2d at 902.

These generic jury instructions cannot survive *Tincher*. As to the "lack[ing] any element necessary to make it safe" standard that *Azzarello* approved, *Tincher* explained that the *Azzarello* majority took that language "out of context" from *Berkebile* and, without any explanation, "chose this iteration of the law to fill the legal void caused by its bright-line rule that any negligence rhetoric carries an undue risk of misleading lay jurors in strict liability cases." 104 A.3d at 379-80. Moreover:

> Predictably, the "approval" of such jury instructions operated to discourage the exercise of judicial discretion in charging the jury … and likely stunted the development of the common law in this area from proceeding in a more logical, experience-based and reason-bound fashion.

Id. at 379. As a result, courts (like the trial court here) have repeatedly given the same three-sentence instruction that *Azzarello*'s footnote 12 approved – without any explanation whatsoever of what the "guarantor" concept is intended to mean and incorrectly suggesting by the "lack[ing] any element necessary to make it safe"

language that, if the product could be made safer by the addition of some feature, the jury may find it defective. Under *Tincher*, giving this instruction is error.

Instead, in cases like the present one, where the plaintiff's theory of liability includes an assertion that an alternate safer design existed, the trial court must instruct the jury on the factors it needs to assess in performing the "risk-utility" analysis to determine whether the product's actual design made it "unreasonably dangerous." 104 A.3d at 389-90, 407.

As to the trial court's SSCJI 16.30 instruction on warnings – taken from *Berkebile* and its prohibition on the use of the "reasonable man standard" – that instruction is likewise inconsistent with what this Court has described as *Tincher*'s "return[ing] to the finder of fact the question of whether a product is 'unreasonably dangerous.'" *Amato*, 116 A.3d at 620. Contrary to the two-justice opinion in *Berkebile*, what the "reasonable consumer" can be expected to know and what the "reasonable manufacturer" would foresee about the consumers who use its product are indeed relevant factors expressly adopted in *Tincher* that a jury should consider in determining whether the absence of a warning makes a product defective.

Rather than the one-size-fits-all jury instructions the trial court gave here, *Tincher* requires trial courts to avoid "rigid formula[s]" and to craft instructions that explain the factors the jury should consider in making its decision:

> In charging the jury, the trial court's objective is "to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict." Where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted. At that point, "[t]he 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."
>
> 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. The alternate theories of proof contour the notion of "defective condition" in principled terms intended as comprehensive guidelines that are sufficiently malleable to account for product diversity and a variety of legal claims, products, and applications of theory. The crucial role of the trial court is to prepare a jury charge that explicates the meaning of "defective condition" within the boundaries of the law, i.e., the alternative test standard, and the facts that pertain.

104 A.3d at 408 (citations omitted).

Because the trial court used jury instructions that did not explain to the jury the factors it should consider in assessing whether the 1999 Acura Integra was sold "in a defective condition unreasonably dangerous to the user or consumer," its instructions were inadequate and erroneous. For this reason alone, a new trial is required.

IV. THE PRINCIPLES ANNOUNCED IN *TINCHER* PERMIT THE TYPE OF EVIDENCE OF COMPLIANCE WITH INDUSTRY AND REGULATORY STANDARDS THAT THE TRIAL COURT BARRED HONDA FROM PRESENTING TO THE JURY

One of the fundamental mistakes the two-justice opinion in *Berkebile* made – which then became law in *Azzarello* – is taking § 402A's statement that liability for selling a defective product is imposed even though "the seller has exercised all possible care in the preparation and sale of his product" to mean that "the existence of due care, whether on the part of the seller or consumer, is irrelevant." *Berkebile*, 462 Pa. at 94, 337 A.2d at 899. It is simply incorrect – as a matter of logic – to say that just because proof that the seller acted reasonably ***does not suffice*** to absolve it from liability under § 402A for a defective product, such evidence is irrelevant and cannot be presented to the jury.

Tincher's recognition that the "risk-utility test offers courts an opportunity to analyze *post hoc* whether a manufac-turer's conduct in manufacturing or designing a product was reasonable," 104 A.3d at 389, corrects that mistake. It eliminates the ban that Pennsylvania courts, relying on *Berkebile* and *Azzarello*, have imposed on evidence relating to the seller-defendant's conduct and substitutes a rule that such evidence is admissible but not necessarily dispositive on the issue of whether the product is defective.

Here, the trial court excluded evidence that the allegedly defective vehicle complied with federal motor vehicle standards and with automotive industry standards. This evidence would have been admissible on a negligence claim, but an *Azzarello*-based decision, *Lewis v. Coffing Hoist Division, Duff-Norton Co., Inc.*, 515 Pa. 334, 528 A.2d 590 (1987), ruled it inadmissible on a strict liability claim. In *Lewis*, the Pennsylvania Supreme Court re-affirmed what it had "concluded, if not expressly, then certainly by clear implication" in *Azzarello*: namely, "that negligence concepts have no place in a case based on strict liability." 515 Pa. at 341, 528 A.2d at 593. Since it viewed evidence of industry standards as relevant to "the reasonableness of [defendant's] conduct in making its design choice," the majority in *Lewis* ruled that such evidence "improperly brought into the case concepts of negligence law" and was therefore inadmissible. 515 Pa. at 343, 528 A.2d at 594. Two justices dissented, arguing that the evidence should be admissible but not conclusive.

Although the continued viability of *Lewis* was not before the Pennsylvania Supreme Court in *Tincher*, its very premise was struck down in the court's decision. The court acknowledged that its ruling "may have an impact upon other foundational issues regarding manufacturing or warning claims, and upon subsidiary issues constructed from *Azzarello*, such as the availability of negligence-

derived defenses[.]" 104 A.3d at 409. *Lewis*' preclusion of evidence of compliance with industry standards plainly was based on the wall *Azzarello* erected between strict liability and negligence and therefore cannot survive in light of *Tincher*.

Tincher's adoption of the risk-utility test as one standard under which the jury should assess whether the product at issue was sold "in a defective condition unreasonably dangerous to the user or consumer" means that this type of evidence is relevant to the jury's task – as *Tincher* has redefined that task. One of the factors *Tincher* identified as pertinent to the risk-utility test is:

> - The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

104 A.3d at 389. Governmental and industry standards that relate to the safety of a product represent the results of regulatory and industry analysis of safety issues. They are typically formulated by persons with expertise and experience in the industry and its products. Evidence of a product's compliance with those standards tends to support a defendant-seller's contention that its design decisions were reasonable and that its product is not "unreasonably dangerous" to users or consumers. *See Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at *7 (Pa. C.C.P. Clarion Co. Oct. 19, 2015) ("Whether a product comports with industry

standards is particularly relevant to factor (2) of [the risk-utility factors *Tincher* listed], specifically 'The safety aspects of the product …'").

This approach is consistent with the view most courts outside Pennsylvania have taken. For example, the Illinois Supreme Court explained why evidence of a product's compliance with governmental regulatory standards is relevant to a strict liability claim in *Rucker v. Norfolk & Western Railway Co.*, 77 Ill.2d 434, 396 N.E.2d 534 (1979). The court said:

> [E]vidence of compliance with Federal standards is relevant to the issue of whether a product is defective, as well as the issue of whether a defective condition is unreasonably dangerous…. If the product is in compliance with Federal standards, the finder of fact may well conclude that the product is not defective, thus ending the inquiry into strict liability. If a finding is entered that the product is defective, evidence of compliance becomes additionally relevant to the issue of whether the defective condition is unreasonably dangerous. The fact of compliance may indicate to the finder of fact that the defect is not unreasonably dangerous.
>
> * * *
>
> The evidence which we approve is that a product, not a manufacturer's conduct, conforms to Federal standards. Any misapprehension that negligence is the standard of liability stems only from the injection of a "reasonableness" element in determining whether a defective condition is unreasonably dangerous. As Prosser states, a strict liability design case resembles a negligence action because the reasonableness of the manufacturer's design choice is a key issue.

77 Ill.2d at 439, 396 N.E.2d at 537 (citations omitted).

Indeed, the vast majority of states permit juries to consider evidence of compliance with governmental regulatory standards or industry standards on a strict liability claim. *See, e.g.,* ***Alabama***: *General Motors v. Edwards*, 482 So.2d 1176, 1198 (Ala. 1985) (proof of compliance with federal automotive safety standards "may be admitted as evidence that a vehicle is not defective"); ***Arkansas***: Ark. Code Ann. § 16-116-105(a) ("Compliance by a manufacturer or supplier with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards of design, inspection, testing, manufacture, labeling, warning, or instructions for use of a product shall be considered as evidence that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards."); ***Colorado***: Colo. Rev. Stat. § 13-21-403(1)(b) (compliance with regulatory standards creates a rebuttable presumption that product is not defective); ***Connecticut***: *Wagner v. Clark Equip. Co.*, 243 Conn. 168, 186-92, 700 A.2d 38, 48-52 (1997) (when a governmental regulation "relates to the safety of a product, evidence that the product is in compliance with that regulation may be considered by the jury as a factor in determining whether the product is defectively designed"); ***Florida***: *Jackson v. H.L. Bouton Co., Inc.*, 630 So.2d 1173, 1175 (Fla. 1st DCA 1994) ("[C]ompliance

with industry standards is merely evidence that a product was not defective."); ***Georgia***: *Banks v. ICI Americas*, 264 Ga. 732, 736 n.6, 450 S.E.2d 671, 675 n.6 (1994) ("proof of compliance with industry-wide practices, state of the art, or federal regulations" is one factor to be considered but is not conclusive); ***Kansas***: Kan Stat. Ann § 60-3304 (allocating evidentiary burdens based on whether product was in compliance with governmental regulatory standards); ***Kentucky***: *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 70 (Ky. 1973) (compliance with industry standards is relevant but not determinative); ***Louisiana***: *Dunne v. Wal-Mart Stores, Inc.*, 679 So.2d 1034, 1037 (La. Ct. App. 1st Cir. 1996) (compliance with American Society for Testing and Materials standards is relevant but not determinative); ***Maryland***: *Kent Village Assocs. Joint Venture v. Smith*, 104 Md. App. 507, 522, 657 A.2d 330, 337 (1995) (safety standards promulgated by American National Standards Institute are admissible); ***Massachusetts***: *Back v. Wickes Corp.*, 375 Mass. 633, 643, 378 N.E.2d 964, 970 (1978) (evidence of compliance with industry standards is relevant but not dispositive); ***Michigan***: Mich. Comp. Laws § 600.2946(4) (rebuttable presumption of nonliability if product complies with governmental standards); ***New York***: *Vannucci v. Raymond Corp.*, 258 A.D.2d 198, 200, 693 N.Y.2d 347, 349 (3d Dep't 1999) (considering evidence of product's compliance with industry standards); ***Oregon***: *Hagan v.*

Gemstate Mfg., Inc., 328 Or. 535, 542-43, 982 P.2d 1108, 1112-13 (1999) (relevant governmental safety rules may be introduced as evidence at trial); ***Texas***: *Lorenz v. Celotex Corp.*, 896 F.2d 148, 149-50 (5th Cir. 1990) (applying Texas law) ("Compliance with government safety standards constitutes strong and substantial evidence that a product is not defective."); ***Washington*****:** *Soproni v. Polygon Apartment Partners*, 137 Wash.2d 319, 328, 971 P.2d 500, 505-6 (1999) (evidence of compliance with regulatory codes may be considered by the finder of fact in a strict liability case).

The trial court's exclusion of Honda's evidence that its seat belt design complied with federal governmental and industry standards was therefore error under *Tincher*. At the required new trial, such evidence must be permitted.

V. IN ANY CASE WHERE PROOF OF AN ALTERNATIVE, SAFER, AND PRACTICABLE DESIGN IS REQUIRED, A PLAINTIFF CANNOT SATISFY THAT BURDEN BY OFFERING EVIDENCE OF A CLAIMED ALTERNATIVE DESIGN THAT COULD NOT LEGALLY BE USED

The "risk-utility" standard of proof that *Tincher* has now adopted in Pennsylvania requires a plaintiff to prove that "a 'reasonable person' would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." 104 A.3d at 389. Two

factors that the jury may consider in assessing whether the plaintiff has met this burden of proof are:

- The availability of a substitute product which would meet the same need and not be as unsafe; and
- The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

Id.

In the present case, because plaintiffs presented their claim under a "crash-worthiness" theory of strict liability, they were required to prove (among other things), not only that the seat belt design was defective but that "at the time of design an alternative, safer, and practicable design existed that could have been incorporated instead." *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532 (Pa. Super. 2009). They were thus required to present the type of evidence that *Tincher* says is relevant to all strict liability cases – but the jury was given no guidance on how to assess that evidence.

Even more significantly, however, Honda sought judgment notwithstanding the jury's verdict on the basis (among others) that the alternative seat belt design plaintiffs' expert described required the use of an additional amount of tension on the lap belt at a level that would violate Federal Motor Vehicle Safety Standard

209. 49 C.F.R. § 571.209 S4.3(j). The trial court denied that request without addressing Honda's argument that plaintiffs' proposed alternative design would be illegal.

By definition, an alternative design that could not legally be used cannot suffice to meet a plaintiff's burden of proof and should not be presented to a jury as part of its required balancing of utility and risk. *See Lewis v. American Cyanamid Co.*, 715 A.2d 967, 981 (N.J. 1998) ("A plaintiff may not succeed on an alternative design theory that would have required the defendant manufacturer to violate the law.").

Because *Tincher* now requires the jury to perform a "risk-utility" assessment in any case in which a plaintiff asserts that an alternative, safer design existed, this Court should clarify that evidence of an alternative design that cannot be legally used is impermissible and should not be presented to the jury.

CONCLUSION

For these reasons, the trial court erred in failing to recognize that the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex, Inc.* materially undermined the trial court's rulings on the admissibility of evidence of compliance with governmental and industry standards and its instructions to the jury. At a minimum, a new trial is required – and this Court should use this case to provide

further guidance to Pennsylvania trial courts on "the broader world of post-*Azzarello* strict liability law." *Amato*, 116 A.3d at 620.

/s/ Christopher Scott D'Angelo
Christopher Scott D'Angelo
Patrick T. Ryan
Montgomery, McCracken,
Walker & Rhoads, LLP
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-1500

Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.

Of Counsel:

Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, VA 22091
703-264-5300

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CERTIFICATE OF SERVICE

I hereby certify that on Wednesday, December 2, 2015, I caused two true and correct copies of the foregoing document to be served on the following persons by first class mail, addressed as follows:

Stewart J. Eisenberg, Esq.
Eisenberg, Rothweiler, Winkler,
Eisenberg & Jeck, P.C.
1634 Spruce Street
Philadelphia, PA 19103-6719
(215) 546-6636

Howard J. Bashman, Esq.
2300 Computer Rd. – Suite G22
Willow Grove, PA 19090-1755
(215) 830-1458

William J. Conroy, Esq.
Campbell, Campbell, Edwards & Conroy, P.C.
1205 Westlakes Dr. – Suite 330
Berwyn, PA 19312
(610) 964-1900

James M. Beck, Esq.
Reed Smith LLP
1717 Arch Street – Suite 3100
Philadelphia, PA 19103-2713
(215) 851-8100

Theane Evangelis, Esq.
Gibson Dunn & Crutcher, LLP
333 Soiuth Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

/s/ Patrick T. Ryan
Patrick T. Ryan