NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOHN A. CANCELLERI AND ROSETTA CANCELLERI, HIS WIFE Appellees v. FORD MOTOR COMPANY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 267 MDA 2015

Appeal from the Judgment Entered January 20, 2015
In the Court of Common Pleas of Lackawanna County
Civil Division at No(s): 11-CV-6060

BEFORE: PANELLA, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J.: **FILED JANUARY 07, 2016**

Ford Motor Company appeals from the judgment entered in favor of John A. Cancelleri and Rosetta Cancelleri in the Court of Common Pleas of Lackawanna County following a strict products liability trial stemming from a motor vehicle accident. After careful review, we affirm based upon the opinion of the Honorable James A. Gibbons dated March 2, 2015, which incorporated Judge Gibbons' opinion dated January 9, 2015.

On August 20, 2010, John Cancelleri was driving south on Pennsylvania Route 307 in his 2005 Mercury Sable. A 2007 Ford Mustang, traveling in the opposite direction, turned left into Cancelleri's path. The Mustang collided with Cancelleri's Sable at an angle in the left front of the

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* Retired Senior Judge assigned to the Superior Court.

vehicle. Cancelleri was wearing his seatbelt, but his airbag did not deploy. During the collision, Cancelleri's body moved forward and he hit his head against the windshield. After Cancelleri received emergency treatment at the scene of the accident, he was hospitalized at Community Medical Center in Scranton where he was treated for a four-inch laceration on his scalp. The next day, Cancelleri indicated that he was having difficulty feeling his legs, and an MRI showed that he had suffered a C7-T1 disc herniation and spinal cord compression. Spinal fusion surgery was performed immediately. Since the accident, Cancelleri has been confined to a wheelchair, in addition to suffering other medical problems, such as bladder problems, urinary tract infections, and the onset of diabetes.

Based upon the injuries stemming from the accident, Cancelleri initiated the instant lawsuit against Ford Motor Company, the manufacturer of the Mercury Sable, and Ray Price Motors, the seller of the car, for negligence, strict liability, breach of implied warranty of fitness and/or merchantability, and punitive damages. His wife, Rosetta Cancelleri, also brought a claim for loss of consortium in the suit.

Trial in this matter began on August 11, 2014. Prior to trial, the Cancelleris had limited their claims to strict liability under crashworthiness design defect and malfunction theories, breach of implied warranty, and loss of consortium. In addition, the Cancelleris withdrew all claims as to Ray Price Motors on the final day of the eight-day trial. The jury unanimously found in favor of the Cancelleris on the claims of crashworthiness design

defect and loss of consortium,[1] and the verdict included an award of $5,940,706.86.

Ford filed a timely post-trial motion on September 2, 2014, and oral argument on the motion was held on November 14, 2014. Thereafter, on November 19, 2014, our Supreme Court rendered its decision in ***Tincher v. Omega Flex, Inc.***, 104 A.3d 328 (Pa. 2014).[2] Ford filed a post-argument notice of supplemental authority regarding ***Tincher***. The trial court issued

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[1] The jury did not find that Ford had breached any implied warranty and ultimately was not required to decide any questions regarding the Cancelleris' malfunction claim.

[2] In ***Tincher***, our Supreme Court addressed the standard of proof required to determine whether a product is in a defective condition in strict product liability cases. A plaintiff may pursue a strict liability claim asserting that a product is defective under a "consumer expectations" theory, a "risk-utility" theory, or both. Prior to ***Tincher***, based upon the Pennsylvania Supreme Court opinion in ***Azzarello v. Black Bros. Co.***, 391 A.2d 1020 (Pa. 1978), "the balancing of risks and utilities, when implicated, was an issue of law dependent upon social policy to be decided by the trial court." ***Tincher, supra*** at 406. ***Tincher*** overruled ***Azzarello*** in this regard to hold that

> when a plaintiff proceeds on a theory that implicates a risk-utility calculus, proof of risks and utilities are part of the burden to prove that the harm suffered was due to the defective condition of the product. The credibility of witnesses and testimony offered, the weight of evidence relevant to the risk-utility calculus, and whether a party has met the burden to prove the elements of the strict liability cause of action are issues for the finder of fact.

Id. at 407. However, the ***Tincher*** Court declined to adopt the Restatement (Third) of Torts, such that Pennsylvania remains a Second Restatement jurisdiction. ***See id.*** at 410.

an opinion and order denying Ford's post-trial motion on January 9, 2015, and entered judgment against Ford on January 20, 2015. This timely appeal followed.

On appeal, Ford raises the following issues for our review, which have been renumbered for ease of disposition:

> 1. Whether the Supreme Court's decision in ***Tincher*** requires a new trial because the trial court should have submitted the question of whether Plaintiffs' vehicle was unreasonably dangerous to the jury, and because Ford should have been permitted to introduce evidence of applicable government and industry standards.
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> 2. Whether the trial court erred in excluding Insurance Institute for Highway Safety and National Highway Traffic Safety Administration crash tests, which would have significantly impeached Plaintiffs' defect theory, solely because the tests were conducted by industry and government organizations.
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> 3. Whether the trial court erroneously instructed the jury on a malfunction theory that Plaintiffs had withdrawn, that was irrelevant to Mr. Cancelleri's injuries, and that misstated the law regarding malfunction.

Brief for Appellant, at 4-5.

The determination of whether to grant a new trial involves a two-step process:

> First, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal, or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting a new trial. The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Harman v. Borah, 756 A.2d 1116, 1122 (Pa. 2000) (citations omitted).

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

Tincher v. Omega Flex, Inc., 104 A.3d at 351.

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

Amato v. Bell & Gossett, 116 A.3d 607, 621 (Pa. Super. 2015).

Ford's first contention on appeal is that ***Tincher*** requires the grant of a new trial because the jury was not asked to consider whether Mr. Cancelleri's Mercury Sable was "unreasonably dangerous." More specifically, Ford argues that the jury should have been asked to consider risk-utility factors in making this determination.

Ford correctly argues that consideration of whether a product is defective or unreasonably dangerous was a question of law under ***Azzarello*** and that ***Tincher*** has returned that determination to the finder of fact in

strict product liability cases. However, Ford's argument that a new trial is necessary based upon ***Tincher*** is unpersuasive because ***Tincher*** did not involve a crashworthiness case, nor did it mandate specific jury instructions to be used in any type of strict liability matter. ***See Tincher, supra*** at 408 (decision "not intended as a rigid formula to be offered to the jury in all situations.")

We note that in crashworthiness cases, the jury is required to determine whether the vehicle was defective in design as well as whether an alternative, safer, and practicable design existed at the time of design that could have been used instead. ***Gaudio v. Ford Motor Co.***, 926 A.2d 524, 532 (Pa. Super. 2009). Thus, the jury's considerations in crashworthiness cases, including the instant matter, already involve "proof of risks and utilities" regarding whether "the harm suffered was due to the defective condition of the product." ***Tincher, supra*** at 407. Additionally, we agree with the trial court's determination that the jury instructions in this matter were neither erroneous nor prejudicial toward Ford, and we affirm on the basis of Judge Gibbons' thorough opinion.

The fact that the instant matter is a crashworthiness case also bears on Ford's contention that a new trial must be granted because the trial court precluded Ford from introducing evidence of applicable government and industry standards. Our Supreme Court specifically has "held that 'such evidence should be excluded because it tends to mislead the jury's attention from their proper inquiry,' namely 'the quality or design of the product in

question.'" ***Gaudio***, ***supra*** at 543 (quoting ***Lewis v. Coffing Hoist Division, Duff-Norton Company, Inc.***, 528 A.2d 590, 594 (Pa. 1987)). ***Tincher*** does not, nor does it purport to, affect the applicability of the rulings in ***Gaudio*** and ***Lewis***. Based upon precedent that remains unchanged, the trial court determined that the proposed evidence was inadmissible. We agree and rely upon the trial court's detailed opinion.

Ford next argues that the trial court erred by precluding Ford from introducing evidence of crash tests conducted by government and industry organizations. Ford contends that the crash tests are relevant to impeach the Cancelleris' expert witness, Christopher Caruso. However, as the trial court notes, "Caruso could not be impeached with evidence of industry standards previously precluded by this [c]ourt or on tests that were not elicited on direct examination." Trial Court Opinion, 1/9/15, at 56. We discern no error in precluding evidence of the crash tests in question and affirm based upon the thorough analysis of the trial court.

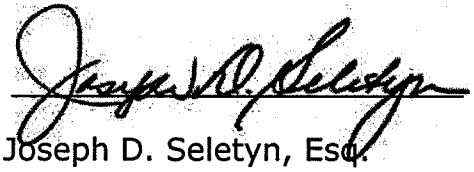
Finally, Ford asserts that the trial court erroneously instructed the trial court on a theory of malfunction. We note that a plaintiff is permitted to proceed simultaneously on design defect and malfunction theories in a crashworthiness case. ***See Raskin v. Ford Motor Co.***, 837 A.2d 518 (Pa. Super. 2003). As to the trial court's decision to instruct on the theory of malfunction and on the precise instruction provided, Judge Gibbons' opinion comprehensively discusses the reasons the instructions were not given in

error and did not result in prejudice toward Ford. We rely upon Judge Gibbons' opinion in finding this claim to be without merit.

We affirm the judgment entered based upon Judge Gibbons' opinions filed March 2, 2015 and January 9, 2015, and we direct the parties to attach a copy of the trial court's opinions in the event of further proceedings.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/7/2016