

IN THE SUPREME COURT OF OHIO

**PATRICK B. McCARTHY,  
MARK COLLIN FUGATE, and  
PATRICIA SUSAN McCARTHY,**

**Plaintiffs/Appellants,**

vs.

**STERLING CHEMICALS, INC.,  
and RESCAR, INC.,**

**Defendants/Appellees.**

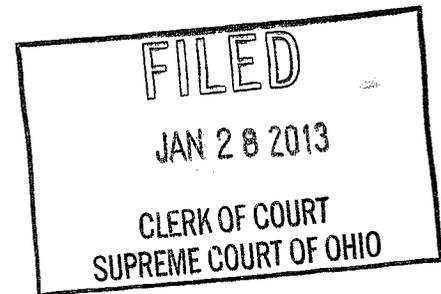
: Case No. **13-0162**  
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: On Appeal from the  
: Court Of Appeals,  
: First Appellate District of Ohio  
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: First District Court of Appeals  
: Case Nos. C-110805, C-110856  
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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS PATRICK B.  
McCARTHY, MARK COLLIN FUGATE, AND PATRICIA SUSAN McCARTHY**

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W.B. Markovits (0018514)  
Paul M. De Marco (0041153), *Counsel of Record*  
Christopher D. Stock (0075443)  
Joseph T. Deters (0012084)  
MARKOVITS, STOCK & DEMARCO, LLC  
119 East Court Street, Suite 530  
Cincinnati, Ohio 45202  
Phone: (513) 651-3700  
Fax: (513) 665-0219  
Email: bmarkovits@msdlegal.com  
Email: pdemarco@msdlegal.com  
Email: cstock@msdlegal.com  
Email: jdeters@msdlegal.com



COUNSEL FOR APPELLANTS, PATRICK B. MCCARTHY, MARK COLLIN FUGATE, AND  
PATRICIA SUSAN McCARTHY

Robert E. Tait (0020884)  
C. William O'Neill (0025955)  
VORYS, SATER, SEYMOUR & PEASE, LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
Phone: (614) 464-6341  
Fax: (614) 719-4994  
Email: [retait@vorys.com](mailto:retait@vorys.com)

Jack C. Brock  
Fred D. Raschke  
MILLS SHIRLEY, LLP  
2228 Mechanic  
P.O. Box 1943  
Galveston, Texas 77553  
Phone: (409) 763-2341  
Fax: (409) 763-2879

COUNSEL FOR APPELLEES STERLING  
CHEMICALS, INC.

Thomas P. Mannion (0062551)  
MANNION & GRAY Co., LPA  
1300 E. Ninth Street, Suite 1625  
Cleveland, Ohio 44114  
Phone: (216) 344-9422  
Fax: (216) 344-9421  
Email: [tmannion@manniongray.com](mailto:tmannion@manniongray.com)

Judd R. Uhl (0071370)  
Katherine L. Kennedy (0079566)  
MANNION & GRAY Co., LPA  
909 Wright Summit Parkway, Suite 230  
Ft. Wright, Kentucky 41011  
Phone: (859) 663-9830  
Fax: (859) 663-9829  
Email: [juhl@manniongray.com](mailto:juhl@manniongray.com)  
Email: [kkennedy@manniongray.com](mailto:kkennedy@manniongray.com)

Robert A. Pitcairn, Jr. (0010293)  
KATZ, TELLER, BRANT & HILD  
255 East Fifth Street, Suite 2400  
Cincinnati, Ohio 45202-4787  
Phone: (513) 977-3477  
Fax: (513) 762-0077  
Email: [rpitcairn@katzteller.com](mailto:rpitcairn@katzteller.com)

COUNSEL FOR APPELLEES RESCAR,  
INC.

Matthew C. O'Connell (0029043)  
Denise A. Dickerson (0064947)  
SUTTER O'CONNELL & FACHIONE  
3600 Erieview Tower  
1301 East 9<sup>th</sup> Street  
Cleveland, Ohio 44114  
Phone: (216) 928-4530  
Fax: (216) 928-4400  
Email: moconnell@sutter-law.com  
Email: ddickerson@sutter-law.com

COUNSEL FOR APPELLEES ACF  
INDUSTRIES, LLC

Joseph W. Borchelt (0075387)  
REMINGER Co., LPA  
525 Vine Street, Suite 1700  
Phone: (513) 721-1311  
Fax: (513) 721-2553  
Email: jborchelt@reminger.com

Scott L. Carey  
Joseph P. Pozen  
Kathleen L. Hartley  
BATES CAREY NICOLAIDES, LLP  
191 North Wacker Drive, Suite 2400  
Chicago, Illinois 60606  
Phone: (312) 762-3100  
Fax: (312) 762-3200  
Email: scarey@bcnlaw.com  
Email: jpozen@bcnlaw.com  
Email: khartley@bcnlaw.com

COUNSEL FOR APPELLEES TEXANA  
TANK CAR & MANUFACTURING, LTD.

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## WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

It is a rare court of appeals opinion that simultaneously undermines two entrenched lines of Supreme Court authority and spawns confusion among appellants, appellees, and courts of appeals. The First District's majority opinion in this case does precisely that. It holds that grounds asserted in a new trial motion *but not specified by the trial court in writing as its reasons for granting that motion* are "fully reviewable on appeal" from the new trial grant and thus are waived unless the appellee raises them via a cross-assignment of error pursuant to R.C. § 2505.22. App. 8a, ¶ 15. This holding undermines almost 50 years of Supreme Court precedents requiring trial courts to state in writing their reasons for granting new trials, and more than 40 years of Supreme Court precedents precluding appellate courts reviewing new trial grants from considering reasons that the trial court did not specify in writing. This holding conflicts not only with decades of this Court's precedents but also with decades of precedents from the other courts of appeals—and even with precedents within the First District itself. If left unresolved, such diametrically opposed approaches to reviewing new trial grants could lead to confusion among appellants, appellees, and courts of appeals every time a trial court grants a new trial on one or some but not all of the new trial grounds in the new trial motion. This Court's intervention is necessary to secure conformity with its precedents and to maintain uniformity among lower courts.

The rule requiring trial courts to specify in writing their reasons for granting new trials, first codified in former R.C. § 2321.17 but now found in Civ.R. 59(A), has been followed by this Court for almost 50 years.<sup>1</sup> When a trial court fails to "specify in writing the grounds upon which such new trial is granted," Civ.R. 59(a), appellate courts in Ohio do not search the record for

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<sup>1</sup> See, e.g., *Price v. McCoy*, 2 Ohio St.2d 131, 207 N.E.2d 236 (1965), paragraph two of the syllabus; *Antal v. Olde Worlde Products, Inc.*, 9 Ohio St.3d 144, 459 N.E.2d 223 (1984), syllabus; *Mannion v. Sandel*, 91 Ohio St.3d 318, 744 N.E.2d 759 (2001). See fn. 2, *post*, for sample decisions in the *Price/Antal/Mannion* line of cases.

grounds that might have supported the new trial grant. Rather, in myriad decisions spanning five decades, courts of appeals have routinely remanded such cases,<sup>2</sup> in recognition of the fact that, absent such specificity by trial courts, appellate courts cannot meaningfully review new trial grants.<sup>3</sup>

The very same reasoning animates the rule precluding appellate courts from considering reasons that the trial court did not specify in writing when granting a new trial motion. In *O'Day v. Webb*, 29 Ohio St.2d 215, 218, 280 N.E.2d 896 (1972), this Court stated that the “immediate question on review of a trial court’s ruling allowing a motion for a new trial is not what the ‘motion is bottomed on,’ but what that court has specified in writing as the cause for which the new trial was allowed ....” Later, in *Pangle v. Joyce*, 76 Ohio St.3d 389, 391, 667 N.E.2d 1202 (1996), fn. 2, the Court specifically declined to consider grounds asserted in the new trial motion but not mentioned in the trial court’s ruling granting that motion because “review of a trial court’s ruling on a motion for new trial is limited to that which the court has specified in writing as the cause for which the new trial was allowed pursuant to Civ.R. 59.” *Id.*, citing *O'Day*.

For at least the past 40 years, the *O'Day/Pangle* limitation and the *Price/Antal/Mannion*

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<sup>2</sup> See, e.g., *Longo v. Nationwide Ins. Co.*, 165 Ohio App.3d 371, 846 N.E.2d 586, 2006-Ohio-750, ¶ 36 (7th Dist.); *Jacobs v. McAllister*, 6th Dist. Nos. L-05-1030, L-05-1073, L-05-1093, 2006-Ohio-123, ¶¶ 50-51; *Stadler v. Earney*, 8th Dist. No. 86040, 2005-Ohio-6720, ¶ 9; *Thornton v. Conrad*, 8th Dist. No. 83538, 2004-Ohio-3472, ¶¶ 48-49; *Rumley v. CESCO, Inc.*, 10th Dist. No. 00AP-1228, 2001 WL 1097864, \*5 (Sept. 20, 2001); *Michaels v. Aden*, 8th Dist. No. 68561, 1995 WL 723303, \*4 (Dec. 7, 1995); *Fowler v. Price*, 7th Dist. No. 93-B-22, 1995 WL 472299, \*1-\*2 (Aug. 9, 1995); *Gedetsis v. Anthony Allega Cement Contractor, Inc.*, 8th Dist. No. 61211, 1992 WL 356388, \*6 (Dec. 3, 1992); *Johnson v. University Hospitals of Cleveland*, 8th Dist. No. 57100, 1990 WL 84293, \*3 (June 21, 1990); *Winson v. Fauth*, 63 Ohio App.3d 738, 741, 580 N.E.2d 44 (9th Dist. 1989); *Allis-Chalmers Credit Corp. v. Majestic Steel Service, Inc.*, 14 Ohio App.3d 325, 326, 471 N.E.2d 519 (8th Dist. 1984); *Giegerich v. Milt Miller Pontiac, Inc.*, 8th Dist. No. 43509, 1981 WL 4688, \*2 (Dec. 17, 1981); *Goode v. Fraley*, 8 Ohio App.2d 23, 24, 220 N.E.2d 372 (10th Dist. 1966); *State v. Williams*, 8 Ohio App.2d 258, 259, 221 N.E.2d 591 (1st Dist. 1966).

<sup>3</sup> *Johnson* at \*3 (“Absent the trial court’s specific reasoning for granting the motion for new trial, this court is precluded from critically reviewing the propriety of the trial court’s decision to grant a new trial.”); *Giegerich* at \*2 (“intelligent review by the appellate court is foreclosed as the record does not reveal the basis upon which the new trial was granted”); *Stadler* at ¶ 9 (“Without this reasoning, we cannot properly review this appeal to determine whether the trial court abused its discretion in granting a new trial.”).

line of cases together have served to ensure meaningful appellate review of new trial grants. When the trial court has not specified its reasons for granting a new trial, it is well settled that the appellate court cannot meaningfully review the new trial grant. Equally well settled, when the trial court has specified its reasons for granting a new trial, *only* the grounds so specified can be meaningfully reviewed on appeal from the new trial grant. New trial grounds not mentioned in the trial court's written order are, therefore, beyond the scope of appellate review. This was, in fact, the exact demarcation line that this Court drew in *Pangle*.<sup>4</sup> Until the First District's latest opinion in this case, no court of appeals has so flagrantly disregarded this Court's limitation.<sup>5</sup>

It is common for parties moving for a new trial to offer multiple grounds. In the instant case, the trial judge's entry granting the new trial motion endorsed one of the Civ.R. 59(A) grounds offered by McCarthy without addressing others, also a common occurrence. If the majority opinion in *McCarthy II* stands, grounds asserted in a new trial motion but not specified by the trial court in writing as its reasons for granting that motion would be "fully reviewable on appeal" from the new trial grant, meaning that the appellee would waive them by not raising them

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<sup>4</sup> *Pangle* at 391, fn. 2 ("review of a trial court's ruling on a motion for new trial is limited to that which the court has specified in writing as the cause for which the new trial was allowed pursuant to Civ.R. 59"); see *Antal*, 9 Ohio St.3d at 146 ("Review by this Court is ordinarily limited to the reasons specified in the trial court's order." (citation omitted)); *Proctor v. Cydrus*, 4th Dist. No. 04CA2758, 2004-Ohio-5901, ¶ 19 ("[B]ecause the Civ.R.[59](A) directive that the trial court put its reasons for granting a new trial in writing is mandatory, we confine our determination regarding whether the trial court abused its discretion to the reasons actually articulated in writing, and do not consider the trial court's oral statements").

<sup>5</sup> We could find only two other courts in 40 years that have failed to adhere to the *O'Day/Pangle* limitation. In neither instance did the appellate court appear to be aware of the limitation. *Carter v. R&B Pizza Co., Inc.*, 7th Dist. No. 06 JE 5, 2008-Ohio-1530, ¶ 26 (upholding a new trial grant "but not for the reasons stated by" the trial court); *Wills v. Boyd*, 2nd Dist. No. CA 6755, 1980 WL 352637 (Nov. 20, 1980) ("Although it does not appear to us that the trial court stated the reason for granting a new trial (mistrial), for the purposes of this review we will assume that the reasons were those stated in Defendants' motion."). In contrast, the First District explicitly acknowledged and followed the *O'Day/Pangle* limitation in the first appeal in this case, only to depart from it in the second. See *McCarthy v. Sterling Chems., Inc.* (hereinafter "*McCarthy I*"), 193 Ohio App.3d 164, 2011-Ohio-887, App. 19a, ¶ 17 (citing *O'Day*: "What the trial court has 'specified in writing as the cause for which the new trial was allowed' defines the scope of appellate review."); see Judge Brogan's dissenting opinion in *McCarthy v. Sterling Chems, Inc.* (hereinafter "*McCarthy II*"), 2012-Ohio-5211, App. 9a, ¶ 19 (noting the same panel's previous adherence to *O'Day*).

via a cross-assignment of error pursuant to R.C. § 2505.22. At the risk of waiver, therefore, every appellee in each such case would be forced to raise by cross-assignment—and the appellate courts, in turn, would be forced to entertain<sup>6</sup>—every ground contained in the new trial motion that the trial court did not address in its order granting the motion. Forcing appellate judges to review new trial grounds that trial judges have not addressed threatens to bog down courts reviewing new trial grants and to turn every such appeal into a plenary appeal, contrary to the limited scope of appellate review defined in *O'Day* and *Pangle* and applied ever since by appellate courts. This decision represents such a dramatic departure from the settled approach to reviewing a common type of new trial grant—where the trial court adopts one or some but not all of the new trial grounds asserted in the new trial motion—that only this Court's intervention can prevent confusion and restore uniformity.

#### STATEMENT OF THE CASE AND FACTS

This case involves a weld that held in place a round metal manway cover sitting atop a railcar. The weld was defective from day one, but those charged with maintaining and inspecting it—defendants Sterling and Rescar—ignored it for years. Then, in May 2002, they changed out a pressure relief valve, which allowed the pressure on the defective weld to increase. On July 5, 2005, the weld failed. The results were catastrophic. The manway cover—in effect, a 167-pound metal disc—shot off the railcar, hurtling over eighty feet in an instant and spraying metal and rubber fragments in every direction. One of these projectiles smashed into 27-year old Patrick McCarthy's head as he was standing on the railcar. It fractured his skull, causing a permanent traumatic brain injury and leaving him in a minimally conscious state.

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<sup>6</sup> If appellees such as McCarthy were required to raise all new trial grounds that the trial court did not address or risk waiving them, a court of appeals logically would be obligated to review those unaddressed new trial grounds, lest the law demand of such appellees a wholly vain act. See *Gerhold v. Papathamasion*, 130 Ohio St. 342, 346, 199 N.E. 353 (1936).

This suit was filed on behalf of Patrick and his minor children (collectively “McCarthy”). During trial, Sterling (the railcar’s owner) and Rescar (which maintained it) did not dispute that the weld was defective or that they had failed to inspect it. Instead, they blamed another defendant, ACF (the railcar’s manufacturer), for the defective weld. The trial court ruled, however, that Sterling and Rescar had substantially and materially altered the railcar by changing out the pressure relief valve, which increased the likelihood the weld would fail, rendering original manufacturer ACF legally and factually blameless. The trial court thus granted ACF’s directed verdict motion midway through trial. Despite McCarthy’s repeated requests, the trial judge, Judge William Mallory, Jr., refused to tell the jury about his ACF ruling or its legal and factual significance. In their closing arguments, counsel for Sterling and Rescar took full advantage of Judge Mallory’s refusal. Over McCarthy’s objections, he allowed them to argue that the primary fault lay with ACF, even though he had found ACF to be faultless and ACF was not on the apportionment form given to the jury. McCarthy argued in vain that not telling the jury about the judge’s ACF ruling left it unable to allocate fault to the proper parties. The jury found none of the remaining defendants at fault<sup>7</sup> and rendered a defense verdict.

McCarthy filed a new trial motion on multiple grounds, including Judge Mallory’s failure to instruct the jury on his legal and factual findings regarding material alteration that led to ACF’s dismissal, and the improper jury argument by defense counsel blaming dismissed ACF.<sup>8</sup> Judge Mallory granted McCarthy’s motion, specifying in writing only one reason for doing so—his self-perceived failure to instruct the jury fully on the common law duty of care. Sterling and Rescar appealed that new trial grant (*McCarthy I*, 1st Dist. Nos. C-090077, C-090082, C-090691, and C-

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<sup>7</sup> The jury also absolved Patrick McCarthy of any fault.

<sup>8</sup> The First District’s opinion refers to these arguments collectively as the “ACF argument.” For the sake of consistency, McCarthy will do the same.

090700). Relying on *Pangle* and *O'Day*, Rescar argued that the scope of review on appeal from a new trial grant was “limited to that which the trial court has specified in writing as the cause for which the new trial was allowed.”<sup>9</sup> Rescar made plain its purpose for reminding the court of appeals that the scope of its review was limited—to prevent it from reaching the ACF argument that McCarthy had raised in the new trial motion but that Judge Mallory had not addressed in his entry granting that motion. Quoting *O'Day* and citing an earlier First District opinion,<sup>10</sup> the 2-1 panel opinion in *McCarthy I* stated, “What the trial court has ‘specified in writing as the cause for which the new trial was allowed’ determines the scope of appellate review.” *McCarthy I*, 2011-Ohio-887, App. 19a, at ¶ 17. Its review thus cabined, the panel in *McCarthy I* focused solely on Judge Mallory’s written reason for granting a new trial—that he had failed to fully instruct the jury on the common law duty of care. Finding this an improper basis for a new trial, the *McCarthy I* panel reversed and remanded the case, instructing the trial court to reinstate the defense verdict and enter judgment. *Id.*, App. 23a-24a, ¶¶ 26-27.

By then, Judge Nadine Allen had replaced Judge Mallory. On remand, she reinstated the defense verdict and entered judgment for Sterling and Rescar. McCarthy then filed another timely new trial motion, this time based solely on the same ACF argument that Judge Mallory’s new trial entry had failed to address. Judge Allen granted McCarthy’s motion, specifically citing Judge Mallory’s failure to instruct the jury on the ruling regarding material alteration that led to ACF’s dismissal, and the improper jury argument by defense counsel blaming dismissed ACF. Addressing the scope of review and relying on *O'Day*, *Pangle*, and *Bellman*, Judge Allen’s order

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<sup>9</sup> See Brief of Appellant Rescar, Inc. in *McCarthy I*, filed April 20, 2010, p. 8; Reply Brief of Appellant Rescar, Inc. in *McCarthy I*, filed July 15, 2010, p. 2.

<sup>10</sup> *Bellman v. Helmsworth*, 1st Dist. Nos. C-780135, 780139, 1979 WL 208686 (June 20, 1979).

stated, “The ACF-related grounds that are the basis for plaintiffs’ current new trial motion were completely outside the scope of the court of appeals’ review of Judge Mallory’s new trial grant.”

Sterling and Rescar appealed again (*McCarthy II*, 1st Dist. Nos. C-110805, C-110856). Having argued in the first appeal that McCarthy was **precluded** from raising the ACF argument because Judge Mallory had not cited it as a reason for granting a new trial, Rescar shifted 180° and joined with Sterling in arguing that McCarthy had actually been **required** to assert the ACF argument in the first appeal, precluding him from doing so in the second appeal. So, although Rescar had argued in *McCarthy I* that the scope of the panel’s review was limited to that which Judge Mallory specified in writing, it completely abandoned that conviction in the second appeal, arguing to the same assigned panel that McCarthy could have raised—and, by implication, that the panel could have entertained—the ACF argument in the first appeal.

In another split decision, the panel in *McCarthy II* reversed Judge Allen’s new trial grant. Relying exclusively on *Nickell v. Gonzalez*, 34 Ohio App.3d 364, 519 N.E.2d 414 (1st Dist. 1986), the majority reasoned that when Judge Mallory failed to address the ACF argument in his written new trial entry, “it was effectively denied and fully reviewable on appeal” in *McCarthy I* via a cross-assignment of error pursuant to R.C. § 2505.22. *McCarthy II*, App. 8a, at ¶ 15. In his dissenting opinion, Judge Brogan noted that in the same panel’s opinion reversing Judge Mallory’s new trial grant in *McCarthy I*, “we specifically stated that our scope of review was confined to what the trial court had ‘specified’ in writing as the cause for which the new trial was allowed, citing the Supreme Court’s opinion in *O’Day* ....” *Id.*, App. 9a-10a, at ¶ 19. Concluding that McCarthy was not required to file a cross-assignment raising the ACF argument and that Judge Allen “was well within her discretion in granting the plaintiffs a new trial,” Judge Brogan stated, “I would affirm the trial court’s grant of a new trial in this matter.” *Id.*, App. 10a, at ¶ 20.

On December 20, 2012, the First District panel denied McCarthy's timely motions to certify an inter-district conflict and to grant *en banc* reconsideration.

## LEGAL ARGUMENT

Proposition of Law No. 1: Review of a new trial grant is limited to what the trial court has specified in writing as its reason(s) for granting the new trial motion pursuant to Civ.R. 59(A). Thus, a ground asserted in a new trial motion is not reviewable on appeal from a new trial grant unless the trial court specified that ground in writing as a reason for granting the new trial motion.

In granting a new trial motion, a court must “specify in writing the grounds upon which such new trial is granted.” Civ.R. 59(A). In *Pangle, O’Day*, and a string of court of appeals decisions, the scope of review of a new trial grant has been expressly and unequivocally limited to what the trial court “specified in writing as the cause for which the new trial was allowed.” See *Giegerich*, 1981 WL 4688, at \*1 (upon grant of a new trial, trial court must specify reasons in writing, and “the scope of review on appeal is circumscribed by the grounds so specified”); *Allis-Chalmers Credit Corp.*, 14 Ohio App. 3d at 326 (same); *Bellman*, 1979 WL 208686, at \*1 (same); *Weber v. Kinnen*, 1st Dist. No. C-100801, 2011-Ohio-6718, ¶ 11 (same); *McCarthy I*, 2011-Ohio-887, App. 19a, at ¶ 17 (same).

*O’Day, Pangle, Giegerich, Allis-Chalmers, Bellman, and Weber* all reflect a limitation on the scope of appellate review that is unique to appeals from new trial grants and is itself a departure from normal appellate practice. Normally an appellate court can adopt a proper ground for affirming an order that was preserved below and raised on appeal. But confining the scope of reviewing a new trial grant to the ground specified in writing by the trial judge means that an appellate court may not consider or adopt any alternative ground for affirming a new trial grant.

These were the precedents upon which McCarthy relied in refraining from raising the ACF argument in the first appeal as an alternative ground for affirming Judge Mallory's new trial grant. The majority opinion in the instant case disregarded these precedents, however, holding that the

scope of appellate review is not limited to what was specified in writing as the reason for the new trial, but includes all of the other reasons that were asserted in the new trial motion, whether addressed by the trial court in writing or not. App. 8a, ¶ 15. In *McCarthy II*, the majority implicitly disregards these precedents, including its own adherence to them in *McCarthy I*, holding instead that the scope of review in the first appeal was *not* limited to what Judge Mallory specified in writing as his reason for granting a new trial, but rather included all of the other reasons that McCarthy had offered but Judge Mallory had not addressed in writing, which the majority deemed “effectively denied and fully reviewable on appeal” from Judge Mallory’s new trial grant. The sole basis for the majority opinion’s departure from the *O’Day/Pangle* limitation was dicta from *Nickell v. Gonzalez*, a 26-year old First District case decided after *O’Day* but before this Court in *Pangle* applied *O’Day’s* limitation to a situation (such as this) where the new trial motion offered multiple grounds but the trial judge’s new trial entry adopted only one of them.

The tortuous procedural history of *Nickell* is not analogous to that found in this case. This is an abbreviated rendition of the relevant procedural history of *Nickell*: (1) Plaintiffs sued doctor; defense verdict at trial. (2) JNOV and new trial requested by plaintiffs (three grounds raised); JNOV granted on informed consent; new trial granted on damages; trial court entry did not mention other new trial grounds argued by plaintiffs. (At this point, a defense appeal from the new trial grant was dismissed as premature. In 1981, when the appeal was dismissed, R.C. § 2505.02, which now allows appeals from new trial grants, was not yet in effect. It became effective July 22, 1998.) (3) Second jury trial; defense verdict again. (4) Plaintiffs moved for JNOV or new trial; JNOV and new trial *denied*. (5) First proper appeal; held, first JNOV and new trial were abuse of discretion; first verdict reinstated. (6) This Court affirmed. (7) Plaintiffs filed third motion for JNOV or new trial, raising grounds not addressed in first appeal; motion denied. (8) Second appeal; held, new trial grounds asserted by plaintiffs were reviewable when case was

first properly appealed, *i.e.*, following the first denial of new trial (see #4 above); therefore, grounds waived.

The critical difference between *Nickell* and this case is that the first appeal in *Nickell* followed the **denial** of a new trial, by which time the plaintiffs had raised every new trial ground they intended to raise and the trial court had rebuffed them. Unlike a new trial grant, which under Civ.R. 59(A) requires that the trial court “specify in writing the grounds upon which such new trial is granted,” a denial of a new trial does not require a written opinion addressing all arguments raised in the new trial motion and allows for plenary review of all such arguments.<sup>11</sup> As such, the court of appeals in *Nickell* properly held the plaintiffs in that case had to raise all grounds for reversal on appeal following a denial of a new trial. There was no barrier to the *Nickell* plaintiffs seeking review of each such ground in their appeal from the new trial denial (#5 above). In other words, the *O’Day/Pangle* limitation on the scope of review for new trial grants was not implicated in *Nickell*, given that the plaintiffs there failed to raise all reviewable new trial grounds following the new trial denial. This is why the *Nickell* language concerning review of new trial grants, mentioned by the majority in *McCarthy II*, constitutes dicta. The same result would have obtained in *Nickell*—*i.e.*, dismissal for failure to raise grounds at the time of the first proper appeal—even if those new trial grounds were not held to be “implicitly denied” and “merged” into the trial court’s decision granting a new trial (#2 above), because all grounds for a new trial were reviewable in the first appeal following the **denial** of a new trial. Thus, the First District’s reference in *Nickell* to what could be asserted on appeal from a new trial grant was unnecessary for the resolution of *Nickell*—a classic example of dicta. See *Gissiner v. Cincinnati*, 1st Dist. No. C-070536, 2008-Ohio-3161, at ¶ 15.

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<sup>11</sup> *Schneider v. First Nat. Supermarkets*, 8th Dist. No. 70226, 1996 WL 695631, \*3 (Dec. 5, 1996).

The dicta from *Nickell* that the majority opinion in this case relies upon—*i.e.*, when a trial court specifies in writing a reason for a new trial grant, the arguments left unaddressed are “effectively denied”—is also contrary to common understanding and to the actual practice of the trial judge in this case. As noted above, Civ.R. 59(A) specifies that a trial court granting a new trial must state a reason in writing. Where, as here, a party raises multiple grounds for a new trial, the fact that a trial judge selects one as a stated basis does not mean he or she rejects the others—it simply means he or she has followed the requirement of Civ.R. 59(A) and stated *a* basis (presumably what he considered the best basis) in writing. This is illustrated by Judge Mallory’s new trial entry, which (a) specified one reason for granting a new trial, (b) rejected one other reason offered by McCarthy, but (c) did not address several other reasons offered by him, including the ACF argument.

If, as the First District’s majority opinion states, all new trial arguments not specified by the trial court in writing as the reason(s) for granting a new trial are considered “implicitly denied” and thus are immediately reviewable, then the *O’Day/Pangle* limitation, followed scrupulously in *Giegerich*, *Allis-Chalmers*, *Bellman*, *Weber*, and *McCarthy I*, has been rendered meaningless, opening up every appeal of a new trial grant to plenary rather than limited review. On the other hand, if *O’Day*, *Pangle*, and these court of appeals decisions correctly state the controlling rule of law, then McCarthy could not have raised the ACF argument—or any other argument that Judge Mallory’s written entry left unaddressed—in the first appeal (*McCarthy I*), and the majority’s basis for disposing of McCarthy’s appeal in *McCarthy II* is incorrect.

Where there is such conflict among appellate courts on the proper scope of review, there inevitably will be confusion and uncertainty for any party defending a new trial grant on appeal. Should an appellee in such a case confine his arguments in support of the new trial grant to those grounds accepted in writing by the trial judge, as *O’Day*, *Pangle*, *Giegerich*, *Allis-Chalmers*,

*Bellman, Weber, and McCarthy I* all dictate? Or should that appellee raise every conceivable alternative basis for the new trial grant, despite the fact that those grounds were never addressed by the trial judge, as *McCarthy II* now instructs? The path forward for appellees in this situation is not at all clear, hence the critical need for this Court to intervene and restore uniformity.

Proposition of Law No. 2: Because the scope of appellate review adopted by the court of appeals reflects a new rule of law not foreshadowed by prior decisions of this Court or the court of appeals and would lead to an inequitable result if applied to this case, it must be applied prospectively.

There can be no gainsaying the stark conflict between the previously settled law limiting the scope of appellate review of a new trial grant to the reason(s) specified in writing by the trial court, and the new rule adopted by the court of appeals in this case, which broadens the scope of appellate review of a new trial grant to include not only what was specified in writing by the trial court but also all other reasons not specified in writing and therefore “implicitly denied.” To make matters worse, the majority’s opinion in *McCarthy II* applies this new rule *retrospectively*. There actually are two levels of retrospective application at work here. The majority adopts a new scope of review in *McCarthy II* and then projects it onto an already completed appeal (*McCarthy I*). In actuality, the opinion in *McCarthy II* does not concern the scope of review of *Judge Allen’s* new trial grant. Rather, it retrospectively redefines the scope of review of *Judge Mallory’s* new trial grant, holding that the ACF argument was “fully reviewable” in the first appeal because it was “implicitly” denied by Judge Mallory. The majority thus reverses Judge Allen’s new trial grant based on waiver.

The general rule is that court decisions apply retrospectively “unless a party has contract rights or vested rights under the prior decision.” *DiCenzo v. A–Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132, paragraph one of the syllabus. But in certain circumstances, a decision can be applied *prospectively*. *Beaver Excav. Co. v. Testa*, 2012-Ohio-5776, ¶ 42. “An Ohio court has discretion to apply its decision only prospectively after weighing

the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision, and (3) whether retroactive application of the decision causes an inequitable result.” *Id.* (citations omitted).

The first criterion for prospective application is met, as nothing foreshadowed the majority’s dramatic departure from settled law. There is no question that the majority’s holding is contrary to every prior apposite decision by this Court and the First District.<sup>12</sup> Indeed, as Judge Brogan pointed out in dissenting from the majority’s opinion, the very same First District panel recognized in its earlier opinion in this case that the scope of review on appeal is limited to what the trial judge specified in writing as his reason for granting a new trial.<sup>13</sup>

Moreover, until this case, no Ohio court since *O’Day* had ever identified a vehicle by which the prevailing party on a new trial motion could obtain immediate appellate review of any ground(s) not specified by the trial judge in writing as his reason(s) for granting the new trial. In this case, the majority for the first time identified that vehicle—*i.e.*, a cross-assignment of error under R.C. § 2505.22 in the other party’s appeal from the new trial grant.<sup>14</sup> The majority states that plaintiffs “had the option to raise the ‘ACF argument’ in an R.C. 2505.02 assignment of error” in the first appeal. *McCarthy II*, App. 8a, ¶15. This cannot be squared with *O’Day* and *Pangle*.

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<sup>12</sup> As discussed above, the majority improperly expanded, and then relied on, *Nickell*. *Nickell* involved an appeal from the denial, not the grant, of a new trial; and, as a result, the scope of review there was not dispositive, and *Nickell*’s passing reference to the scope of review of new trial grants was dicta.

<sup>13</sup> *McCarthy II*, App. 9a-10a, at ¶ 19 (Brogan, J. dissenting) (“In our prior opinion reversing the trial court’s grant of a new trial we specifically stated that our scope of review was confined to what the trial court had ‘specified’ in writing as the cause for which the new trial was allowed, citing the Ohio Supreme Court’s opinion in *O’Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972).”); *McCarthy I*, App. 19a, at ¶ 17.

<sup>14</sup> The two cases cited by the majority as support for this proposition are inapposite, in that neither dealt with the limited scope of review of a new trial grant. See *McCarthy II*, App. 8a-9a, at ¶ 15, citing *Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034, at ¶ 35 (2d Dist.) and *Brothers v. Morrone-O’Keefe Dev. Co., LLC*, 10th Dist No. 06AP-713, 2007-Ohio-1942, at ¶ 37.

The third criterion for prospective application also is met. Plaintiffs would have raised the ACF argument in the first appeal as a ground for affirmance *if* the panel could have entertained that argument and affirmed on that basis. Plaintiffs had every incentive to raise that argument in *McCarthy I*; the only reason they did not was the *O’Day/Pangle* limitation. Even Rescar admonished the panel in *McCarthy I* to follow *O’Day* and *Pangle* in this case—that is until *McCarthy II*, when it became expedient for Rescar to make the opposite argument.<sup>15</sup> Applying the majority’s new rule retrospectively deprives Patrick McCarthy and his family of a new trial, their last chance to secure compensation for the traumatic brain injury he suffered as a result of the admitted failure of Sterling and Rescar to inspect the pivotal weld. It also rewards Rescar for its 180° shift—arguing in *McCarthy I* that *O’Day* and *Pangle* prevented McCarthy from raising the ACF argument as an alternative ground for affirmance of Judge Mallory’s new trial grant, then opportunistically arguing in *McCarthy II* that McCarthy waived it by not raising it in *McCarthy I*.

If the *O’Day/Pangle* limitation stands for anything, it is that in an appeal from a new trial grant, only the new trial grounds specified in writing as the reasons for the grant are within the scope of review. A rule that requires the appellee in such an appeal to raise cross-assignments asserting new trial grounds that the trial judge did not accept inevitably renders the *O’Day/Pangle* limitation meaningless. If this new rule is to survive, the *O’Day/Pangle* limitation cannot; if the *O’Day/Pangle* limitation is to survive, this new rule cannot. However this ultimately is resolved, it is fundamentally unfair to McCarthy to *retrospectively* apply a rule incompatible with *O’Day*

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<sup>15</sup> Compare Brief of Appellant Rescar, Inc. in *McCarthy I*, filed April 20, 2010, p. 8 (citing *O’Day*, *Pangle*, and *Bellman* for the proposition that the panel must “confine its review to the reasons stated by the trial court in its entry granting the new trial”) and Reply Brief of Appellant Rescar, Inc. in *McCarthy I*, filed July 15, 2010, p. 2 (citing *O’Day* and *Pangle* and stating “[p]laintiffs concede, as they must, that this Court may only review ‘what the [trial] court has specified in writing as the cause for which the new trial was allowed’”) with Brief of Appellant Rescar, Inc. in *McCarthy II*, filed April 6, 2012, pp. 10-12 (ignoring *O’Day*, *Pangle*, and *Bellman*, and citing *Nickell* to negate the argument that appellate review on the first appeal was limited to the stated reason for the grant of a new trial).

and *Pangle*. Until *O'Day* and *Pangle* are overruled, cross-assignments raising alternative new trial grounds to prevent reversals should remain outside the scope of appellate review *of new trial grants*. If the Court wishes to discard the *O'Day/Pangle* limitation and usher in plenary review in appeals from new trial grants, it should do so explicitly and, to prevent unfairness, *prospectively*.<sup>16</sup>

### CONCLUSION

For the above reasons, McCarthy respectfully requests that this Court accept jurisdiction and reverse the First District's opinion, or at least hold that it is to be applied prospectively.

Respectfully submitted,



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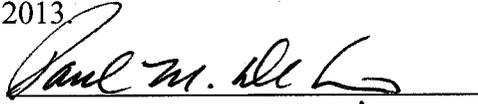
W.B. Markovits (0018514)  
Paul M. De Marco (0041153), *Counsel of Record*  
Christopher D. Stock (0075443)  
Joseph T. Deters (0012084)  
MARKOVITS, STOCK & DEMARCO, LLC  
*Counsel for Patrick B. McCarthy, Mark Collin  
Fugate, and Patricia Susan McCarthy*

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<sup>16</sup> The Florida Supreme Court confronted this exact situation almost 40 years ago. In 1936, that court issued an opinion in *Gulf Coast Title Co. v. Walters*, 125 Fla. 427, 170 So. 130 (1936), which established the same rule that this Court later did in *O'Day*: the reason for a grant of a new trial must be specified in writing, and the scope of appellate review of such a grant is limited to the reason specified. In the 1970's, following the repeal of a Florida statute prohibiting cross-assignments of error in interlocutory appeals, including appeals from new trial grants, Florida appellate courts were required to determine how to square a cross-assignment of error with the limitation of *Gulf Coast*. The Florida courts' solution was to order that cross-assignments of error on new trial grants be stricken as incompatible with *Gulf Coast's* restricted scope of review. See *Osteen v. Seaboard Coast Line Railroad Company*, 283 So.2d 379 (Fla. 1st DCA 1973); *Dorr-Oliver, Incorporated v. Parnell*, 334 So.2d 629 (Fla. 2d DCA 1976); *Royal Castle Systems, Inc. v. Fields*, 354 So.2d 947 (Fla. 3d DCA 1978). In *Bowen v. Willard*, 340 So.2d 110, 112 (Fla. 1976), the Florida Supreme Court overruled *Gulf Coast*, allowing plenary review of a new trial grant via cross-assignments of error. That court prospectively applied the new scope of review and the new cross-assignment procedure.

**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by electronic mail to counsel for appellees on January 28, 2013.

A handwritten signature in black ink, appearing to read "Paul M. De Marco", written over a horizontal line.

Paul M. De Marco (0041153)

*Counsel for Appellants, Patrick B. McCarthy,  
Mark Collin Fugate and Patricia Susan McCarthy*

# APPENDIX

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

**FILED**  
COURT OF APPEALS

NOV 09 2012

TRACY WINKLER  
CLERK OF COURTS  
HAMILTON COUNTY

PATRICK B. McCARTHY, :

APPEAL NOS. C-110805

MARK COLLIN FUGATE, :

C-110856

TRIAL NO. A-0509144

and :

OPINION.

PATRICIA SUSAN McCARTHY, :

PRESENTED TO THE CLERK  
OF COURTS FOR FILING

Plaintiffs-Appellees, :

vs. :

NOV 09 2012

STERLING CHEMICALS, INC., :

COURT OF APPEALS

and :

RESCAR, INC., :

Defendants-Appellants, :

and :



D99868334

ACF INDUSTRIES, LLC, :

and :

TEXANA TANK CAR &  
MANUFACTURING, LTD., :

Defendants-Appellees, :

and :

BASF CORPORATION et al., :

Defendants, :

vs. :

KINDER MORGAN LIQUIDS  
TERMINALS, LLC, :

Third-Party Defendant. :

TRACY WINKLER  
CLERK OF COURTS  
HAMILTON COUNTY, OH

2012 NOV -9 A 9:01

FILED

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: November 9, 2012

*Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, D. Arthur Rabourn, Joseph T. Deters, Louise M. Roselle, W.B. Markovits, Paul M. De Marco, and Christopher D. Stock, for Plaintiffs-Appellees,*

*Vorys, Sater, Seymour and Pease LLP, Robert E. Tait, and C. William O'Neill, and Mills Shirley LLP, Jack C. Brock, and Fred D. Raschke, for Defendant-Appellant Sterling Chemicals, Inc.,*

*Katz, Teller, Brant & Hild and Robert A. Pitcairn, Jr., and Mannion & Gray Co., L.P.A., Thomas P. Mannion, Judd R. Uhl, and Katherine L. Kennedy, for Defendant-Appellant Rescar, Inc.,*

*Sutter O'Connell Co., Matthew C. O'Connell and Denise A. Dickerson, for Defendant-Appellee ACF Industries, LLC,*

*Reminger Co., LPA, and Joseph W. Borchelt, and Bates Carey Nicolaidis, LLP, Scott L. Carey, Joseph P. Pozen, and Kathleen L. Hartley, for Defendant-Appellee Texana Tank Car & Manufacturing, Ltd.*

Please note: This case has been removed from the accelerated calendar.

**WOLFF, Presiding Judge.**

{¶1} Plaintiff-appellee Patrick McCarthy, an employee of third-party defendant Kinder Morgan Liquids Terminals, LLC (“Kinder Morgan”), was injured on July 5, 2005, while transferring a liquid from a pressurized railroad tank car owned by defendant-appellant Sterling Chemicals, Inc. (“Sterling”), to a Kinder Morgan storage tank. McCarthy was standing on the top of the railcar when the manway assembly separated from the car. McCarthy was struck by the manway assembly and fell 15 feet to the ground. McCarthy and his two minor children filed suit against various defendants, including railcar-owner Sterling, railcar-manufacturer defendant-appellee ACF Industries, LLC (“ACF”), defendant-appellant Rescar, Inc. (“Rescar”), which had been hired by Sterling to maintain its fleet of railroad cars, and defendant-appellee Texana Tank Car & Manufacturing, Ltd. (“Texana”), which had formerly maintained the railcar. Various defendants filed third-party complaints against McCarthy’s employer, Kinder Morgan.

{¶2} The trial court granted summary judgment in favor of Kinder Morgan, determining that there was no genuine issue of material fact as to whether Kinder Morgan had committed an intentional tort against McCarthy, and therefore, that Kinder Morgan was not liable for damages. On appeal, this court affirmed the summary judgment in favor of Kinder Morgan.

{¶3} The case proceeded to a jury trial. After plaintiffs’ case-in-chief, the trial court granted directed verdicts for ACF and Texana, ruling that a May 2000 “change out” of the railcar’s original 35-psi pressure-relief valve for a 75-psi valve constituted a substantial and material alteration of the railcar that relieved ACF and Texana of any liability.

{¶4} The jury unanimously found in favor of Sterling and Rescar. Plaintiffs moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court granted plaintiffs' motion for a new trial. The court stated that it had granted the motion for a new trial because the court believed that, in instructing the jury, it had not adequately explained that duties arising under "regulations and statutes" did not "trump" the duties arising under "common law," and that the jury had not been "fully informed" by the court's instructions regarding the relationship between the duty of ordinary care owed to McCarthy by Sterling and Rescar and the duties that arose from statutes and regulations governing the industry. Sterling and Rescar appealed the trial court's granting of the motion for a new trial.

{¶5} This court reversed the judgment of the trial court granting a new trial, holding that the jury had been properly instructed, and that there was no evidence of jury confusion. The order of remand instructed the trial court to reinstate the defense verdict. Plaintiffs did not appeal this court's decision to the Ohio Supreme Court.

{¶6} On remand, a different trial judge reinstated the defense verdict. Plaintiffs filed a "cautionary appeal," and Rescar filed a cross-appeal from the trial court's entry reinstating the defense verdict. Plaintiffs also filed with the trial court another motion for a new trial. Pursuant to App.R. 4(B)(2), we remanded the case to the trial court to rule on the new-trial motion. The appeals were subsequently dismissed.

{¶7} On remand, defendants argued that the court had no jurisdiction to entertain plaintiffs' second new-trial motion. The trial court rejected that argument because (1) this court had remanded the case under App.R. 4(B)(2) "explicitly" for

the trial court to rule on the second new-trial motion, and (2) the grounds asserted in the second new-trial motion had not been addressed by this court in the prior appeal. The trial court granted plaintiffs' second new-trial motion, citing Civ.R. 59(A)(1) (irregularity of the proceedings had prevented a fair trial) and Civ.R. 59(A)(9) (an error of law had occurred at trial and had been brought to the trial court's attention). The court at trial had held that ACF, the manufacturer of the railcar, could not be held liable for damages because the valve switch-out constituted a material alteration of the railcar. In granting plaintiffs' second new-trial motion, the court determined that the original trial judge had not adequately explained its ruling to the jury, and that, therefore, the jury "could have" been confused about why ACF was no longer in the case. The trial court further determined that the possible jury confusion was compounded by the defendants' closing arguments referring to ACF being "at fault" for a defective weld. The court found that the original trial judge's failure to give an adequate curative instruction might have "constitute[d] a failure to fairly and accurately inform the jury." Plaintiffs had raised the "ACF argument" in the original motion for a new trial, but the original trial judge had not addressed that ground in its entry granting the new trial.

{¶8} Sterling and Rescar have appealed the trial court's judgment granting plaintiffs' second new-trial motion. Sterling's first assignment of error and Rescar's first and second assignments of error allege that the trial court erred in granting the motion. Sterling and Rescar argue that plaintiffs waived "the ACF argument" by failing to raise it by cross-assignment of error in the appeal from the first judgment granting a new trial, and that, therefore, the trial court had no authority to entertain, much less grant, plaintiffs' second new-trial motion on that ground.

{¶9} App.R. 3(C)(2) provides that a cross-appeal is not required where an appellee seeks to defend a trial court's judgment "on a ground other than that relied on by the trial court," but does not seek to "change the judgment or order." Plaintiffs did not waive the "ACF argument" by failing to file a cross-appeal in the appeal from the first judgment granting a new trial, because plaintiffs were not seeking to change the trial court's judgment, only to preserve it.

{¶10} "App.R. 3(C)(2) allows an appellee to support the trial court's judgment on grounds the trial court rejected." *The Cincinnati Gas & Electric Co. v. Joseph Chevrolet*, 153 Ohio App.3d 95, 2003-Ohio-1367, 791 N.E.2d 1016, ¶ 12 (1st Dist.). R.C. 2505.22 provides that when a final order or judgment is appealed, the appellee may file assignments of error to prevent reversal of the trial court's judgment. Plaintiffs did not file an R.C. 2505.22 assignment of error based on the "ACF argument" to prevent reversal in the first appeal. In fact, plaintiffs did not file any R.C. 2505.22 assignments of error in the first appeal.

{¶11} In *Nickell v. Gonzalez*, 34 Ohio App.3d 364, 519 N.E.2d 414 (1st Dist.1986), this court held that where plaintiffs had lost at trial and had filed a motion for judgment notwithstanding the verdict and/or a new trial on several grounds, and the trial court had granted the motion on only one ground, not reaching the other grounds, after the final order was entered, the grounds not reached by the trial court were merged into the final order and were reviewable on appeal. Plaintiffs' failure to raise the issues on direct appeal thus precluded plaintiffs from asserting them in a second new-trial motion filed after the Ohio Supreme Court had affirmed a judgment for the defendant.

{¶12} Donna Nickell and her husband had filed a lawsuit against Dr. Luis Gonzalez for injuries she alleged had been caused by a surgical procedure performed

by Gonzalez. The case was tried to a jury solely on the issue of informed consent. After a jury verdict in favor of Gonzalez, the Nickells filed a motion for judgment notwithstanding the verdict and/or a new trial, raising three grounds for relief. The trial court granted the motion on the ground that it should have directed a verdict for the Nickells on the issue of informed consent, and the court ordered a new trial on the issue of damages. The second trial also resulted in a verdict in favor of Gonzalez, with the jury holding that the Nickells had suffered no damages. The Nickells filed a second motion for judgment notwithstanding the verdict and/or a new trial, based on alleged errors in the second trial. The trial court denied the motion, and the parties appealed. On appeal, this court held that the trial court had abused its discretion in granting the first motion and ordering a new trial, and we reinstated the first jury verdict in favor of Gonzalez. This court's decision was affirmed by the Ohio Supreme Court.

{¶13} The Nickells then filed a third motion in the trial court for judgment notwithstanding the verdict and/or a new trial. The motion included the two grounds raised by the Nickells, but not ruled on by the trial court, in the first motion, and the motion asserted a new ground not previously raised. Gonzalez filed a motion to strike and for Civ.R. 11 sanctions. The trial court denied the Nickells' motion and Gonzalez's request for sanctions, and granted Gonzalez's motion to strike. All parties appealed.

{¶14} On appeal, the Nickells argued that they were entitled to raise the two grounds asserted in the first motion, but not ruled upon by the trial court. The Nickells argued that because the two grounds had not been specifically ruled on by the trial court, they had had no opportunity for appellate review of those claims. We disagreed, holding that when the trial court had failed to specifically rule on those

grounds, they had been effectively denied and had been “fully reviewable on appeal.” *Nickell*, 34 Ohio App.3d at 367, 519 N.E.2d 414. We further held that the trial court had been without jurisdiction to entertain the motion because the grounds had been waived earlier when not asserted in the first appeal. We noted that the Rules of Civil Procedure “are to be construed and applied to eliminate delay and all impediments to the expeditious administration of justice.” *Id.* We pointed out that a rule allowing the Nickells to raise those grounds “would create a circularity of actions, undermine the necessary finality of judgments, and create needless extra costs for litigants.” *Id.*

{¶15} In the case sub judice, the first trial judge granted plaintiffs’ motion for a new trial on the ground that the court’s insufficient statement of the law regarding the “duties” owed by defendants to McCarthy, along with its inadequate instructions about those “duties,” had confused the jury. Plaintiffs had raised the “ACF argument” in their first new-trial motion, but the first trial judge had not specifically addressed that issue. When the first trial judge failed to rule on that ground, it was effectively denied and fully reviewable on appeal. *See id.* at 367. Sterling and Rescar appealed that judgment. On appeal, plaintiffs did not raise any assignments of error pursuant to R.C. 2505.22 to prevent reversal of the trial court’s judgment. If plaintiffs wanted to allege that the trial court should have granted their motion for a new trial on the basis of the “ACF argument,” they should have done so by asserting that ground in an R.C. 2505.22 assignment of error in the first appeal. *See Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034, ¶ 35 (2d Dist.). Plaintiffs had the option to raise the “ACF argument” in an R.C. 2505.22 assignment of error, but plaintiffs did not file any R.C. 2505.22 assignments of error for this court to consider in the first appeal. Plaintiffs may not now rely on the “ACF argument” because it could have been raised and fully pursued

in the first appeal. *See Brothers v. Morrone-O'Keefe Dev. Co., LLC*, 10th Dist. No. 06AP-713, 2007-Ohio-1942, ¶ 37. By failing to raise the "ACF argument" by an R.C. 2505.22 assignment of error in the first appeal, plaintiffs have waived it. *See Nickell*, 34 Ohio App.3d at 367, 519 N.E.2d 414.

{¶16} The grounds raised in the first new-trial motion were reviewable in the first appeal. Any grounds not asserted in the first motion were not timely raised. *See id.* The second trial judge was without authority to entertain plaintiffs' second new-trial motion because the arguments raised therein had been waived. *See id.* Sterling's first assignment of error and Rescar's first and second assignments of error are sustained.

{¶17} Rescar's and Sterling's remaining assignments of error raise errors that allegedly occurred during trial, which are not now ripe for review. Therefore, we do not address them.

{¶18} The judgment of the trial court is reversed, and this cause is remanded with instructions to reinstate the jury verdict in favor of Sterling and Rescar and to enter judgment accordingly.

Judgment reversed and cause remanded.

**GORMAN, J., concurs.**  
**BROGAN, J., dissents.**

JUDGE WILLIAM H. WOLFF, JR., retired, of the Second Appellate District, JUDGE JAMES A. BROGAN, retired, of the Second Appellate District, and JUDGE ROBERT H. GORMAN, retired, of the First Appellate District, sitting by assignment.

**BROGAN, J., dissenting.**

{¶19} I must respectfully dissent from the majority opinion. In our prior opinion reversing the trial court's grant of a new trial we specifically stated that our scope of review was confined to what the trial court had "specified" in writing as the

cause for which the new trial was allowed, citing the Ohio Supreme Court's opinion in *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972). The trial court had specified inadequate jury instructions as the basis for the new trial decision, and we found the court had erred.

{¶20} App.R. 3(C)(2) "allows" an appellee to support the trial court's judgment on grounds the trial court rejected. *The Cincinnati Gas & Electric Co. v. Joseph Chevrolet*, 153 Ohio App.3d 95, 2003-Ohio-1367, 791 N.E.2d 1016 (1st Dist.). R.C. 2505.22 provides the appellee "may" file assignments of error to prevent reversal of the trial court's judgment. Neither the rule nor the statute require that an appellee file cross-assignments to preserve a judgment. Judge Gorman in the prior opinion and the trial judge both concluded that the evidence produced at trial demonstrated someone was negligent in causing Patrick McCarthy's severe injuries. Judge Nadine Allen was well within her discretion in granting the plaintiffs a new trial. She found that the plaintiffs had been denied a fair trial when the trial judge refused to inform the jury that he had dismissed ACF as a defendant because he concluded that ACF was legally blameless, and in permitting defendant's counsel to improperly argue that ACF was primarily at fault for Patrick McCarthy's injuries. I would affirm the trial court's grant of a new trial in this matter.

Please note:

The court has recorded its own entry this date.

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

PATRICK B. McCARTHY, : APPEAL NOS. C-110805  
MARK COLLIN FUGATE, : C-110856  
and : TRIAL NO. A-0509144  
PATRICIA SUSAN McCARTHY, : *JUDGMENT ENTRY.*  
Plaintiffs-Appellees, :  
vs. :  
STERLING CHEMICALS, INC., :  
and :  
RESCAR, INC., :  
Defendants-Appellants, :  
and :  
ACF INDUSTRIES, LLC, :  
and :  
TEXANA TANK CAR & :  
MANUFACTURING, LTD., :  
Defendants-Appellees, :  
and :  
BASF CORPORATION et al., :  
Defendants, :  
vs. :  
KINDER MORGAN LIQUIDS :  
TERMINALS, LLC, :  
Third-Party Defendant. :

**ENTERED**  
NOV 09 2012



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

**To the clerk:**

**Enter upon the journal of the court on November 9, 2012 per order of the court.**

By: Robert H. Gorman  
Acting Presiding Judge *MJC*

ENTERED  
NOV 09 2012

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

McCARTHY et al., : APPEAL NOS. C-090077  
 : C-090082  
 Appellees, : C-090691  
 : C-090700  
 : TRIAL NO. A-0509144  
 v. :  
 : *DECISION.*  
 STERLING CHEMICALS, INC., et al., :  
 :  
 Appellants.

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in C-090077 and C-090082; Reversed and Cause  
Remanded in C-090691 and C-090700

Date of Judgment Entry on Appeal: February 25, 2011

Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, D. Arthur Rabourn, Joseph T. Deters, Louise M. Roselle, W.B. Markovits, Paul M. De Marco, and Christopher D. Stock, for appellees.

Vorys, Sater, Seymour and Pease L.L.P., Robert E. Tait, and C. William O'Neill; and Mills Shirley L.L.P., Jack C. Brock, and Fred D. Raschke, for appellant Sterling Chemicals, Inc.

Katz, Teller, Brant & Hild, Robert A. Pitcairn Jr., Laura A. Hinegardner, and Matthew A. Rich, for appellant Rescar, Inc.

Sutter O'Connell & Farchione, Matthew C. O'Connell, Denise A. Dickerson, and Mallory R. Sander, for appellee ACF Industries, L.L.C.

Reminger & Reminger Co., L.P.A., and Joseph W. Borchelt; and Bates & Carey L.L.P., Scott L. Carey, Joseph P. Pozen, and Kathleen L. Hartley, for appellee Texana Tank Car & Manufacturing, Ltd.

Frost Brown Todd, L.L.C., and Matthew C. Blickensderfer, for third-party appellee Kinder Morgan Liquids Terminals, L.L.C.

**WOLFF, JUDGE.**

{¶ 1} Plaintiff-appellee Patrick McCarthy, an employee of third-party defendant-appellee Kinder Morgan Liquids Terminals, L.L.C. (“Kinder Morgan”), was injured on July 5, 2005, while transferring a liquid from a pressurized railroad tank car owned by defendant-appellant Sterling Chemicals, Inc. (“Sterling”) to a Kinder Morgan storage tank. McCarthy was standing on the top of the railcar when the manway assembly separated from the car. McCarthy was struck by the manway assembly and fell 15 feet to the ground. McCarthy and his two minor children filed suit against various defendants including railcar owner Sterling, railcar manufacturer defendant-appellee ACF Industries, L.L.C. (“ACF”), defendant-appellant Rescar, Inc. (“Rescar”), which had been hired by Sterling to maintain its fleet of railroad cars, and defendant-appellee Texana Tank Car & Manufacturing, Ltd. (“Texana”), which had formerly maintained the railcar. Various defendants filed third-party complaints against McCarthy’s employer, Kinder Morgan.

{¶ 2} The trial court granted summary judgment in favor of Kinder Morgan, determining that there was no genuine issue of material fact as to whether Kinder Morgan had committed an intentional tort against McCarthy and, therefore, that Kinder Morgan was not liable for damages. The court further determined that even though it was not liable for damages, Kinder Morgan would appear on the jury’s apportionment form pursuant to R.C. 2307.23(A)(2), which requires that the jury determine the “percentage of tortious conduct that proximately caused the injury \* \* \* that is attributable to each person from whom the plaintiff does not seek recovery.” The court’s judgment entry contained a certification pursuant to Civ.R. 54(B) that there was no just reason for delay. Rescar and

Sterling appealed the granting of summary judgment in favor of Kinder Morgan in the cases numbered C-090077 and C-090082 respectively.

{¶ 3} The case proceeded to a jury trial. After the plaintiffs' case-in-chief, the trial court granted directed verdicts for ACF and Texana, ruling that a May 2000 "change out" of the railcar's original 35-psi pressure-relief valve for a 75-psi valve constituted a substantial and material alteration of the railcar that relieved ACF and Texana of any liability.

{¶ 4} The trial court instructed the jury that McCarthy had the burden to prove by a preponderance of the evidence that Sterling and/or Rescar had been negligent and that the negligence had proximately caused McCarthy's injuries. The court also instructed the jury that to apportion fault to McCarthy and/or Kinder Morgan, it had to find by a preponderance of the evidence that McCarthy and/or Kinder Morgan had been negligent and that the negligence had proximately caused McCarthy's injuries.

{¶ 5} The court further instructed the jury, "The defendants are required to use ordinary care to discover and avoid danger. The plaintiffs claim that the defendants failed to use ordinary care in maintaining, inspecting, and/or repairing a tank car. As discussed above, ordinary care is the care that a reasonably careful person would use under the circumstances. In considering this, you must decide what the facts and circumstances were, then you must decide whether the defendants used ordinary care. If the defendants did not use ordinary care, they were negligent; if the defendants used ordinary care, they were not negligent."

{¶ 6} In instructing the jury about the effect of "industry regulations," the trial court stated, "Since the defendants' alleged negligence involves matters not within common knowledge, the parties introduced administrative laws, industry standards for organizations such as the American Association of Railroads and the American Welding Society. You may

consider these materials in determining what duty, if any, the defendants owed to the plaintiffs in this case, and whether or not the defendants breached this duty.”

{¶ 7} The trial court instructed the jury that in assessing negligence, it was to “consider the defendants’ own internal procedures” in determining the duty owed to the plaintiffs. The court told the jury that “[w]hen a defendant has disregarded rules that it has established to govern the conduct of its own employees, evidence of those rules may be used against the defendant to establish the correct standard of care. The content of such rules may also indicate knowledge of the risks involved and the precautions that may be necessary.”

{¶ 8} The court explained the general verdict form, the interrogatories, the apportionment-of-fault form, and the damages form, which were given to the jury as a multipage document. Page four of the document referred to “non-party” Kinder Morgan. The court explained that if the jury found by a preponderance of the evidence that Kinder Morgan’s actions were a proximate cause of McCarthy’s injuries, it had to determine a “percentage of fault” to assign to Kinder Morgan.

{¶ 9} After the jury began deliberations, it returned with a question about the forms, asking, “How do we move forward from page (6) if we place the greater percentage of blame towards Kinder Morgan.” Page six contained the apportionment-of-fault form. The court instructed the jury that it was to “continue to move through the document.” The jury also requested the testimony of the “witness or Kinder Morgan employee who testified Patrick would have been written up for unloading procedure used.” The jury subsequently returned with requests for the testimony of a certain witness who had testified concerning Kinder Morgan’s practices and procedures, a Kinder Morgan tank-car inspection checklist,

Kinder Morgan's unloading procedures, and Kinder Morgan's unloading-training procedures.

{¶ 10} The jury unanimously found in favor of Sterling and Rescar. The jury interrogatories indicated that the jury had found no negligence on the part of Sterling, Rescar, McCarthy, or Kinder Morgan. Plaintiffs moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court granted plaintiffs' motion for a new trial. The court stated that it had granted the motion for a new trial because the court believed that in instructing the jury, it had not adequately explained that duties arising under "regulations and statutes" did not "trump" the duties arising under "common law." The court added that it believed that the jury had not been "fully informed" by the court's instructions regarding the relationship between the duty of ordinary care owed to McCarthy by Sterling and Rescar and the duties that arose from statutes and regulations governing the industry. Sterling and Rescar have appealed the trial court's granting of the motion for a new trial in the cases numbered C-090691 and C-090700 respectively.

{¶ 11} In the appeals numbered C-090077 and C-090082, Rescar and Sterling each raise one assignment of error, asserting that the trial court erred in granting Kinder Morgan's motion for summary judgment.

{¶ 12} Summary judgment is appropriate when, with the evidence construed most strongly in favor of the nonmoving party, the evidence shows that there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made.<sup>1</sup>

{¶ 13} R.C. 2745.01(A) states, "In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting

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<sup>1</sup> Civ.R. 56(C).

from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” Pursuant to R.C. 2745.01(B), “ ‘substantially certain’ means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.”<sup>2</sup>

{¶ 14} Sterling and Rescar argue that Kinder Morgan failed to provide fall protection for McCarthy, failed to adequately train and supervise McCarthy, and exposed McCarthy to a substantial risk of injury by requiring him to work on top of the railcar. Those alleged failures do not rise to the level of intent or deliberate intent to cause injury required by R.C. 2745.01. Sterling admits in its brief that it “has never claimed that Kinder Morgan deliberately intended to harm Mr. McCarthy.” And Rescar does not point to any evidence that Kinder Morgan intended to injure McCarthy.

{¶ 15} Construing all the evidence in a light most favorable to Sterling and Rescar, we hold that the record contains nothing to demonstrate that Kinder Morgan committed a tortious act with the intent to injure McCarthy or that it acted with deliberate intent to cause McCarthy to suffer an injury. The record before us compels the conclusion under R.C. 2745.01 that there is no genuine issue of material fact and that Kinder Morgan was entitled to judgment as a matter of law. The assignments of error are overruled, and the judgment of the trial court is affirmed, in the appeals numbered C-090077 and C-090082.

{¶ 16} Sterling’s first assignment of error in the appeal numbered C-090691 and Rescar’s first assignment of error in the appeal numbered C-090700 assert that the trial court erred in granting McCarthy’s motion for a new trial.

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<sup>2</sup> R.C. 2745.01 was upheld as constitutional by the Ohio Supreme Court in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066.

{¶ 17} We must first determine whether the trial court’s decision to grant a new trial is to be reviewed de novo as a matter of law or under an abuse-of-discretion standard. Civ.R. 59 provides that the trial court may grant a new trial for an “[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application”<sup>3</sup> or “in the sound discretion of the court for good cause shown.”<sup>4</sup> What the trial court has “specified in writing as the cause for which the new trial was allowed” determines the scope of appellate review.<sup>5</sup> “Where a trial court is authorized to grant a new trial for a reason which requires the exercise of a sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court. Where a new trial is granted by a trial court, for reasons which involve no exercise of discretion but only a decision on a question of law, the order granting a new trial may be reversed upon the basis of a showing that the decision was erroneous as a matter of law.”<sup>6</sup>

{¶ 18} In the judgment entry granting the motion for a new trial in this case, the trial court stated, “And so, under the Rules of Civil Procedure 59, the court can grant a new trial if the court finds that there was an error of law, among other things. This court believes, and it’s based on a number of things. It’s based upon, first of all, the fact as I sit throughout this hearing that this case was inundated by both statutes, regulations, AAR, Welding Society regulations, administrative laws, that most of these documents and regulations went to the jury for their consideration. It is my finding that those duties do not replace or trump those duties that arise at law. \* \* \* I don’t characterize this as a misstatement of law, but as a lack of a complete and thorough explanation of what the law is in this case. \* \* \* I think that this court should have said that there are duties that rise at

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<sup>3</sup> Civ.R. 59(A)(9).

<sup>4</sup> Civ.R. 59(A).

<sup>5</sup> See *O’Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896; *Bellman v. Helmsworth* (June 20, 1979), 1st Dist. Nos. C-780135 and C-780139, 1979 WL 208686.

<sup>6</sup> See *Rhode v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, paragraphs one and two of the syllabus.

law that prevail regardless of whether an industry is regulated or not. And that you are to consider, as jurors, those duties that rise at law in conjunction with any duties that may or may not arise in any industry, but those duties that arise at law are not supplanted by the duties that rise from the self-policing or the federal regulation of a[n] industry unless those laws specifically say so. And that wasn't said in this case. \* \* \* In looking at the charge, I agree that the court discussed issues of ordinary care and discussed issues of the federal regulations and administrative laws and standards. But this court did not make a distinction that despite the fact that [this] is a highly regulated industry that those regulations do not take precedence over the duty of ordinary care that is imposed upon anyone who's engaged in activities such as this. And so, for that reason, this court will grant a new trial. \* \* \* [T]his court feels that there should have been a distinction, should have been a lengthy and proper explanation as to those duties that arise at law as they compare to duties that arise by way of statutes and regulations, and how those duties interact with one another and how those duties – one doesn't trump the other. \* \* \* I wrote this jury charge based upon OJI [the Ohio Jury Instructions] and based upon the suggestions of both sides of the case. But let me say for purposes of this case that this court considers OJI as the road map that the court used to tailor jury instructions, but jury instructions have to be tailored for each and every case, especially a case that is as long and complicated as this one. And I think that OJI serves as the basic road map, but I think sometimes courts need to go further based upon case law, based upon on each case on its own and not violate the law, but yet give an instruction that gives a jury a clear understanding of what the law is and how these laws relate to one another. I just don't think that was done in this case.”

{¶ 19} In *Bellman v. Helmsworth*,<sup>7</sup> Mae Rita Bellman sued her deceased husband's doctor, J. A. Helmsworth, for medical malpractice. After the jury had returned a verdict in

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<sup>7</sup> *Bellman v. Helmsworth*, 1979 WL 208686.

favor of Helmsworth, Bellman filed a motion for a new trial on the basis that the trial court's jury instruction on informed consent was erroneous and that she was "entitled to a directed verdict on this subject." The trial court granted a new trial because it believed that even though the jury instruction on informed consent was "technically correct," a more detailed instruction on informed consent might have allowed the jury to determine "that informed consent was lacking in this case." The court determined that while the instruction was "technically correct," it did not sufficiently "amplify the standard that the jury could use to determine the answer to this issue."

{¶ 20} On appeal, this court stated that the *Bellman* trial court's conclusion that the jury instruction, although "technically correct," was insufficient as a matter of law to a degree that prejudiced Bellman was tantamount to a determination that while the informed-consent charge may have been a correct statement of the law in a different factual context, in the factual context presented it was not a correct statement of the law and, as a result, may have influenced the jury to find against Bellman "in a way that a more comprehensive instruction may not have done." This court, citing *O'Day v. Webb*,<sup>8</sup> noted that instructing the jury was a mandatory, nondiscretionary duty of the trial court and that questions relating to the failure of the court to discharge that duty were questions of law, not of fact. Therefore, this court held, the trial court's decision to grant a new trial had to be reviewed *de novo* to determine whether it was erroneous as a matter of law.

{¶ 21} In the case sub judice, the trial court determined that even though its jury instructions on negligence, ordinary care, and duty were correct, it should have given a more detailed instruction on the relationship between the duties that arose under the industry regulations and the duty of ordinary care under "common law." The court believed that it should have instructed the jury more clearly that the duties that arose under the

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<sup>8</sup> See *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896.

industry regulations did not “trump” the “common law” duty to exercise reasonable care. The court appeared to say, as did the trial court in *Bellman*, that the instruction given, although correct, was an insufficient statement of the law in the factual context of the case. Therefore, pursuant to *Bellman*, the trial court’s decision must be reviewed de novo to determine whether it was erroneous as a matter of law.

{¶ 22} The parties have cited *Nance v. Akron City Hosp.*<sup>9</sup> Nance’s executor sued Akron Radiology and Dr. Syed Ali for medical malpractice. The trial court instructed the jury that it had to consider whether the doctor’s negligence was “the” proximate cause of Nance’s death. In response to a question from the jury, the court again instructed the jury that it had to consider whether the doctor’s negligence was “the” proximate cause of Nance’s death. The jury returned a verdict for the defendants. Nance moved for a new trial on the basis that the trial court’s instructions had confused the jury about whether the defendants’ negligence had to be “the” proximate cause or “a” proximate cause of Nance’s death. The trial court stated that it was granting the motion (1) based upon the failure of the jury instructions “as a whole” to “fairly and accurately state the law to be applied,” and (2) in the exercise of the court’s discretion because the court concluded that even if the instructions were legally correct, they may have misled the jury and placed undue emphasis on the issue of whether the doctor’s negligence was the sole proximate cause of Nance’s death.

{¶ 23} On appeal, the Ninth Appellate District noted that the trial court had stated that it was granting the motion for a new trial on a question of law as well as in the court’s sound discretion. The court pointed out the distinction between granting the motion for a new trial on the basis that the jury instructions as a whole failed to fairly and accurately state the law to be applied in the case, which the appellate court characterized as a question of law, and granting the motion in the trial court’s sound discretion on the basis that the

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<sup>9</sup> *Nance v. Akron City Hosp.* (May 23, 2001), 9th Dist. No. C.A. 20112, 2001 WL 542323.

instructions, although correct, may have misled the jury by placing undue emphasis on the issue of whether the doctor's negligence was the sole proximate cause of the injuries. The appellate court stated that the jury's question showed that it had been confused by the court's instructions. The court had compounded that confusion by its answer to the jury's question. The appellate court upheld the granting of the motion for a new trial, holding that in light of the jury confusion demonstrated in the record, the trial court had not abused its discretion.

{¶ 24} *Nance* is distinguishable from the case sub judice because the confusion on the part of the *Nance* jury was clearly demonstrated in the record. In other words, in *Nance* the record demonstrated that there was good cause for the granting of a new trial, something not present in this case.

{¶ 25} In the judgment entry granting the motion for a new trial in this case, the trial court stated, "And so, under the Rules of Civil Procedure 59, the court can grant a new trial if the court finds that there was an error of law, among other things." This indicates that the trial court granted the motion under Civ.R. 59(A)(9), which provides that the court may grant a new trial on an "[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application."

{¶ 26} *Bellman* requires us to apply the erroneous-as-a-matter-of-law standard to the facts in this case. The record shows that three and a half volumes of the transcript of the proceedings were devoted to argument about and discussion of the jury instructions. The trial court gave verbatim McCarthy's requested instructions on negligence, ordinary care, and duty. The court's jury instructions correctly stated the applicable law, including the relationship between the duty to use ordinary care and the duties imposed by industry regulations. There is no indication in the record that the jury was confused by the court's

instructions. From the beginning of the deliberations, the jury appeared to focus on Kinder Morgan as the negligent party. The only evidence of jury confusion in the record is the jury's confusion about how to fill out the apportionment form as to "non-party" Kinder Morgan. In short, there is nothing in the record to support the trial court's determination that the jury was confused about the court's instructions on the duty of care, except that a defense verdict was apparently unexpected.<sup>10</sup>

{¶ 27} If it is assumed, as the dissent argues, that the abuse-of-discretion standard set forth in the "catch-all" provision of Civ.R. 59 is applicable in this case, the record does not demonstrate good cause for a new trial because there is absolutely no indication that the jury was confused by the court's instructions. The assignments of error are sustained.

{¶ 28} The remaining assignments of error raised by Sterling and Rescar are made moot by our disposition of the first assignments of error. The judgment of the trial court is reversed in the appeals numbered C-090691 and C-090700, and the cause is remanded to the trial court with instructions to reinstate the jury verdict in favor of Sterling and Rescar and to enter judgment accordingly. The trial court's judgment is affirmed in the appeals numbered C-090077 and C-090082.

Judgment accordingly.

BROGAN, P.J., concurs.

GORMAN, J., concurs in part and dissents in part.

JAMES A. BROGAN, J., retired, of the Second Appellate District, WILLIAM H. WOLFF JR., J., retired, of the Second Appellate District, and ROBERT H. GORMAN, J., retired, of the First Appellate District, sitting by assignment.

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<sup>10</sup> Although the trial court stated that it was not granting the motion for a new trial based on the evidence or on the jury's verdict for the defense, the court expressed its "surprise" at the verdict.

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**GORMAN, JUDGE**, concurring in part and dissenting in part.

{¶ 29} I concur in the majority's decision and judgment affirming the trial court's judgment in favor of Kinder Morgan in the appeals numbered C-090077 and C-090082; however, I respectfully dissent from the majority opinion as it relates to the appeals numbered C-090691 and C-090700.

{¶ 30} The latter appeals question the degree of deference a reviewing court should give to a trial court's exercise of discretion when it orders a new trial under the authority of Civ.R. 59(A).

{¶ 31} In addition to the rule's enumerated range of choices, Civ.R. 59(A) further states, "[A] new trial may also be granted in the sound discretion of the court for good cause shown."

{¶ 32} When the trial court correctly instructs the jury, its decision to grant a new trial may be based not only on an error of law, but also upon its sound discretion.<sup>11</sup> While the instructions in this case were legally correct, the trial court could have found in its discretion that the verdict had resulted in a manifest injustice if the jury was confused.<sup>12</sup> The question then is whether a reasonable basis exists in the record to demonstrate the jury's confusion.

{¶ 33} Unlike the standard of review involving an error of law, which allows de novo review of the trial court's judgment, the standard of abuse of discretion entitles the trial court to the highest level of deference. When a trial court grants a new trial in the exercise of its sound discretion, the order may be reversed by a reviewing court only when the appellant demonstrates that the trial court abused its discretion.<sup>13</sup>

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<sup>11</sup> *Nance v. Akron City Hosp.*, 2001 WL 542323.

<sup>12</sup> *Id.*

<sup>13</sup> *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320, 423 N.E.2d 856.

{¶ 34} An abuse of discretion connotes more than an error of law; it implies an attitude on the part of the trial court that “is unreasonable, arbitrary or unconscionable.”<sup>14</sup> In applying this standard, a reviewing court does not have the freedom to substitute its judgment for that of the trial court.<sup>15</sup> Therefore, if the trial court’s exercise of discretion exhibits a sound reasoning process, a reviewing court should not disturb the judgment or order.<sup>16</sup>

{¶ 35} Admittedly, the trial court failed to articulate that its decision to grant the motion for a new trial was a matter of discretion. Notwithstanding this omission, the trial court’s intent to exercise its discretion is clear from the following justification for its action: “[I]n all the years I have been on the bench I have never made a decision to upset the decision of a jury. In this case I am doing it because I believe that it is the fair and just thing to do.”

{¶ 36} Conceding that its instructions were “legally correct,” the trial court reasoned that the jury had been misled because the instructions failed to adequately explain that the duties specified in the industry regulations and federal statutes did not “trump” the duty of ordinary care under the common law. The court said, “I don’t characterize this as a misstatement of law, but as a lack of complete and thorough explanation of what the law is in this case. I only say that only because of how much and how well this industry is regulated. And I believe that without that being pointed out that because of just the sheer amount of regulation of this industry, it foreshadowed this jury’s consideration of what the law is as we, as attorneys, know as the common law. I don’t think it would have been proper for the Court to say these duties arise at common law, but I think that this Court should have said that these are duties that rise at law that prevail regardless of whether the industry is regulated or not.”

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<sup>14</sup> *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

<sup>15</sup> *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

<sup>16</sup> See *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597. See *Bowden v. Annenberg*, 1st Dist. No. C-040499, 2005-Ohio-6515, at ¶49.

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{¶ 37} The trial court did not wait until after the verdict to express its apprehension about juror confusion. During the trial, it expressed concern that the jury might have been confused about the common law and the statutory or regulatory duties. The court said to Sterling’s counsel, “You guys went further and gave this jury the impression that your duties only arose from the statute and regulations of this industry and you hit the jury hard with that.”

{¶ 38} The trial court’s broad discretion to grant a new trial is essential “ ‘ “to fulfill [its] function of maintaining general supervision over litigation to guard against miscarriages of justice which sometimes occur at the hands of juries.” ’ ”<sup>17</sup>

{¶ 39} In arriving at its decision on a motion for a new trial, the trial court should be entitled to consider all pertinent circumstances.<sup>18</sup> The reviewing court should not selectively reject circumstances that the trial court said it had considered in reaching its decision. Unlike the review of documents, which an appellate court can interpret just as well as the trial court, a trial court has a better opportunity to grasp the atmosphere of the trial. This is not to suggest that the trial court’s action is unreviewable. The record must demonstrate a basis for the trial court’s action. And in this case, the evidence provides that basis.

{¶ 40} After the verdict, the trial court, apparently on reflection, concluded that the cause of McCarthy’s injuries had to be negligence. Its belief that the instructions had left the jury ill-equipped to assess fault is corroborated by the jury’s answers to the interrogatories. The jury stated that no one, including McCarthy, had been negligent. According to the jury, no one was at fault. But all the experts had agreed that the weld on the ring, the primary means by which the manway assembly was secured to the pressurized railcar, did not meet specifications and was defective. Neither Sterling, the owner, or Rescar, the maintenance contractor, had ever

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<sup>17</sup> *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320, 423 N.E.2d 856, quoting *Rohde v. Farmer*, 23 Ohio St.2d at 93, 262 N.E.2d 685, quoting *Holland v. Brown* (1964), 15 Utah 2d 422, 426, 394 P.2d 77.

<sup>18</sup> *Nance v. Akron City Hosp.*, 2001 WL 542323, citing *Koch v. Rist* (2000), 89 Ohio St.3d 250, 252, 730 N.E.2d 963.

inspected the weld. It was also undisputed that the railcar had been designed and manufactured with a 35-psi pressure-relief valve that would activate if the pressure in the railcar exceeded 35 psi. But in 2000, Sterling and Rescar changed out the 35-psi relief valve for a 75-psi relief valve on tank cars that had been manufactured before October 1, 1997. Although increasing the pressure was permissible under federal regulations, there was expert evidence that the added pressure had compromised the safety of the railcar and had likely contributed to McCarthy's injuries.

{¶ 41} Sterling and Rescar now contend that contrary to the trial court's belief, the jury could reasonably have found that McCarthy's injuries had not been caused by negligence. This argument, however, is inconsistent with their trial strategy. In closing arguments, their counsel accused AFC, the manufacturer, and/or Kinder Morgan, McCarthy's employer, and even McCarthy himself, of negligently causing McCarthy's catastrophic injuries.

{¶ 42} To establish reversible error, Sterling and Rescar have the burden to demonstrate that the trial court abused its discretion. The wisdom of its decision to set aside the jury's verdict may be debatable in this case, but a difference of opinion is not the test for an abuse of discretion. The trial court's explanation for granting the motion for a new trial demonstrates a rational thought process instead of a mindless reflex. Therefore, it was not arbitrary. Furthermore, the justification for its focus on the jury's confusion due to a lack of all the appropriate tools to properly assess negligence reflects a sound reasoning process.

{¶ 43} The majority relies on our decision in *Bellman*, 1979 WL 208686, holding that the standard of review involves an error of law and not an abuse of discretion when the instructions are correct and the trial court's reason for granting the motion for a new trial is

grounded on the adequacy of the instructions. If *Bellman* is correct, I would agree with the majority, but in my view the holding in *Bellman* is the result of a faulty analysis.

{¶ 44} In *Bellman*, after the jury returned a defense verdict in a medical-malpractice case, the trial court granted a new trial, observing that its instruction on informed consent, while technically correct, should have been more detailed. In rejecting abuse of discretion as an appropriate standard of review, this court compared the standard of review for jury instructions to the standard of review for a directed verdict. A motion for a directed verdict under Civ.R. 50(A)(4), however, is limited exclusively to considerations of sufficiency of the evidence and poses, therefore, a question of law.<sup>19</sup> In *Bellman*, this court wrongly reasoned that, like a directed verdict, the trial court's duty to instruct the jury is a mandatory, nondiscretionary duty that involves a question of law. If *Bellman* is the rule, when the jury instructions are correct, the trial court does not have discretion to grant a new trial even if the trial court determines that the jury had become confused and that the verdict was a miscarriage of justice.

{¶ 45} Sterling and Rescar contend that review of the instructions is precluded because of McCarthy's failure to object. Civ.R. 51(A) states, "No party may assign as error the giving or the failure to give any instruction unless [he] objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of [his] objection." This rule originated in the common law when complaints against judgments were in the form of semicriminal proceedings against judges. Fairness dictated that the judge was entitled to notice of the claimed error and an opportunity to correct it.<sup>20</sup> Accordingly, except for plain error and subject-matter jurisdiction, errors cannot be raised for the first time on appeal.

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<sup>19</sup> See *O'Day v. Webb*, 29 Ohio St.2d at 219, 280 N.E.2d 896.

<sup>20</sup> See *Sunderland, Improvement of Appellate Procedure (1940)*, 26 Iowa L.Rev. 3.

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{¶ 46} Civ.R. 51(A) has no application to this case. As an appellee, McCarthy does not assign error. The issue in this appeal is whether the trial court abused its discretion in granting a new trial—not whether objections to the jury instructions were preserved for appellate review.

{¶ 47} I would affirm the judgment of the trial court in the appeals numbered C-090691 and C-090700.

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

PATRICK B. MCCARTHY, et al.,

APPEAL NO. C-110805  
C-110856  
TRIAL NO. A-0509144

Appellees,

vs.

ENTRY OVERRULING APPELLEES'  
MOTION FOR REHEARING EN BANC

STERLING CHEMICALS, INC., et al.,

**ENTERED**

DEC 20 2012

Appellants.

This cause came on to be considered upon the motion of the appellees for en banc consideration under App.R. 26(A)(2). The Court also considered the memorandum in opposition filed by appellant, Rescar, Inc., the combined memorandum in opposition filed by appellant, Sterling Chemicals, Inc., and the appellees' reply.

The Court finds that the motion is not well taken and is overruled.

WOLFF, P.J., BROGAN, J., and GORMAN, J.

**To the clerk:**

Enter upon the journal of the court on DEC 20 2012 per order of the court.

By:

*Robert H. Gorman*  
Acting Presiding Judge / *RG*

(Copies sent to all counsel)



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