

ORIGINAL

IN THE SUPREME COURT OF OHIO

PATRICK B. McCARTHY, et al., :

Plaintiffs-Appellants, :

v. :

STERLING CHEMICALS, INC., et al., :

Defendants-Appellees. :

Case No. 13-0162

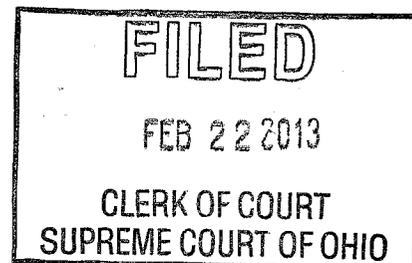
**On Appeal from the Court
of Appeals for the First
Appellate District of Ohio**

**MEMORANDUM OF DEFENDANT- APPELLEE STERLING CHEMICALS, INC.
IN OPPOSITION TO JURISDICTION**

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I. THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

A. The case implicates no new law.

Plaintiffs' tendered appeal presents no issue of public or great general interest, or even one where there is reasonable room for disagreement. Instead, by holding that a successor trial judge "was without authority to entertain plaintiffs' second new-trial motion,"¹ the court of appeals merely applies and reiterates a legal principle that has stood as the foundation of Ohio appellate practice for more than a century -- litigants must present "all questions which existed on the record," *Pollock v. Cohen*, 32 Ohio St. 514, 519 (1877), and the resolution of an appeal bars a party "from later attempting to reopen the case as to all issues which were or could have been presented." *Anderson v. Richards*, 173 Ohio St. 50, 53, 179 N.E.2d 918 (1962). As this Court noted in *Pollock, supra.*, "[t]he time should come, in the history of a cause, when litigation must end," and "[i]f the failing party was allowed to prosecute a new petition in error, on the same record, whenever he imagined he had discovered a new ground of error not previously assigned, litigation would be interminable." 32 Ohio St. at 519.

B. Plaintiffs failure to appeal the trial court's rejection of the grounds advanced in support of their motion for jnov/new trial precluded them from raising them a second time.

After a trial that consumed some fourteen weeks and ended with a unanimous jury verdict for the Defendants, Plaintiffs moved for a jnov/new trial citing seven

¹ *Opinion* of the Court of Appeals for the First Appellate District, Hamilton County, Ohio, dated November 9, 2012 in Case Nos. C-110805 and C-110856 (hereinafter the "Decision") at 9.

separate reasons why they believed that verdict was not justified.² The trial judge, Mallory, J., denied the jnov motion – ruling that there was clearly evidence presented supporting the verdict – and likewise refused to grant a new trial for any of the reasons cited by Plaintiffs. The judge did order a new trial based on what he speculated may have been possible jury confusion.

Defendants appealed numerous matters, including Judge Mallory's new trial order. Conversely, Plaintiffs did nothing. They filed neither a cross-appeal nor cross-assignments of error, even with regard to Judge Mallory's rejection of the arguments they had advanced in support of their new trial/jnov motion. Accordingly, since Plaintiffs raised *none* of the "issues which could have been presented" on appeal, *Anderson v. Richards, supra.*, when the court of appeals reversed the new trial order, and the successor judge complied with the appellate court's mandate to "reinstate the jury verdict and enter judgment accordingly", the case was necessarily concluded with regard to each and all such "issues" as a matter of law. See, *City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 659 N.E.2d 781 (1996).

C. It was the Plaintiffs' failure to appeal, not any artificial limitation on the jurisdiction of the court of appeals, that limited the issues available for review in the first appeal.

Plaintiffs' assertion that the court of appeals' Decision is unprecedented, or that it conflicts with existing Ohio law and somehow broadens the scope of review of a new trial grant,³ misrepresents the import of the Decision. The appellate court did nothing more than affirm the admonition contained in every reported case on the subject – *i.e.*

² Plaintiffs' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a New Trial (T.d. 1055).

³ Plaintiffs' Memorandum in Support of Jurisdiction ("Plaintiffs' Memo") at 8-9.

that a party sits on his hands only at his peril. If an appellee seeks review of an issue not otherwise raised by the appellant, it is *his* obligation to bring that issue before the court of appeals. Where, as here, the party does nothing, and adopts the risky strategy of raising none of the arguments that "could have been fully litigated in a first appeal", *Waddell v. Frasure*, No. 08 CA 3215, 2008-Ohio-5183, ¶¶12-14 (4th App. Dist. 2008), he must live with the consequences. See *Blackwell v. International Union, United Auto Workers Local No. 1250*, 21 Ohio App.3d 110, 112, 487 N.E.2d 334 (8th App. Dist. 1984).

Plaintiffs continue to inexplicably argue that the well-settled principle, grounded in *Civ. Rule 59(A)* -- that appellate review of the grant of a new trial "is limited to that which the court has specified in writing as the cause for which the new trial was allowed", *Pangle v. Joyce* 76 Ohio St.3d 389, 391, 667 N.E.2d 1202 (1996) fn. 2 -- means that a *litigant/appellee* is somehow precluded from raising the trial court's rejection of alternative grounds for new trial through cross-appeal or cross assignment of error. *Pangle* holds no such thing, and Plaintiffs cannot cite a single case supporting this curious position. Moreover, if one were to adopt Plaintiffs' unsupported argument, a case like that presented here -- where Plaintiffs advanced seven different grounds for new trial -- could conceivably require seven separate appeals. Finally, even assuming, *arguendo*, that Plaintiffs somehow believed this preposterous notion, it still does not explain why they failed to raise the issue for which they now seek review by simply appealing the denial of their motion for jnov.

In its Decision below, the court of appeals did nothing more than hold Plaintiffs to the same standard applied to any other Ohio litigant. Plaintiffs' appeal presents no issue of public or great general interest, and this Court should refuse jurisdiction.

II. STATEMENT OF THE CASE AND RELEVANT FACTS

A. The accident in this case could never be explained.

On July 5, 2005 Plaintiff Patrick McCarthy ("McCarthy") was severely injured when the manway assembly on the railroad tank car that he was in the process of unloading under pressure suddenly and unexpectedly separated from the car causing him to fall some twelve feet to the pavement below. Although subsequent investigation revealed a broken weld on the steel ring that held the assembly in place, the precise reason why the weld separated on that particular day has never been determined. Likewise, although both Plaintiffs' and Defendants' evidence established that the involved weld had not been constructed by the railcar manufacturer, ACF Industries, LLC ("ACF"), in accordance with required specifications: 1) no similar accident had ever occurred in the history of railroad tank cars; 2) this tank car and its identical "sister cars" (with the same design and the same "defective weld") operated for over 31 years prior to the accident without any reported problems; and 3) there was no sign of a "fatigue failure" or any other indication that, before the day of accident the itself, the weld was in any different condition than when the tank car was originally built by ACF in 1974.

B. The involved railcar had been properly certified and inspected, and had never required significant repair.

Despite Plaintiffs' suggestion that the car's owner, Sterling Chemicals, Inc. ("Sterling"), or its maintenance contractor, Rescar, Inc. ("Rescar") somehow acknowledged wrongdoing, Plaintiffs could not dispute that the involved tank car had

received all required inspections and certifications on a timely basis, had never required any significant repairs, and had undergone preventative maintenance after every use. The only noteworthy work ever performed on the railcar was the replacement or "change-out" of its pressure relief valve ("PRV") in May, 2000. The PRV replacement, which was simultaneously done to all of Sterling's ACF-manufactured vehicles, resulted from a change in the federal law governing tank cars and was mandated by the Association of American Railroads ("AAR") for any and all such cars traveling in interstate commerce. Although Plaintiffs argued that Sterling's/Rescar's replacement of the PRV constituted negligence, the jury specifically found otherwise.⁴

C. A nearly four month trial resulted in a unanimous verdict for Sterling and Rescar.

Plaintiffs sued multiple defendants in the Common Pleas Court of Hamilton County, and the case proceeded to trial in January, 2009, against four entities: Sterling, Rescar, ACF, and Texana Tank Car and Manufacturing, Ltd. ("Texana"). During the ensuing two months, Plaintiffs called twenty-one witnesses in an attempt to establish their case. At the close of the Plaintiffs' evidence, the trial judge granted directed verdicts in favor of ACF and Texana, finding that Plaintiffs had failed to establish a cognizable claim against either of those Defendants. With regard to ACF, Judge Mallory ruled that, even construing the evidence presented most strongly in favor of Plaintiffs' products (strict) liability claim, reasonable minds could only conclude that the replacement of the PRV represented a "substantial and material alteration" of the tank

⁴ In the first appeal of this case, *McCarthy v. Sterling Chems., Inc.*, 193 Ohio App.3d 164, ¶¶ 25, 26, 2011-Ohio-887 (2011) (hereinafter "*McCarthy I*") - not further appealed by Plaintiffs - the appellate court specifically found that the jury had been properly instructed on this issue and that it was not confused.

car, such that ACF could not be held legally responsible to Plaintiffs for the 1974 manufacturing defect under Ohio's products liability law. Following their dismissal and by agreement of all parties,⁵ the judge instructed the jury that they were to draw no inferences from the absence of the two dismissed Defendants.

Testimony continued in the case until May 4-5, 2009, when the jury heard closing arguments and received the instructions of law. After two days of deliberations, the jury rendered a unanimous verdict in favor of both Sterling and Rescar, *specifically answering Interrogatories that Plaintiffs had failed to prove that either remaining Defendant was negligent in connection with McCarthy's injuries*. Plaintiffs then moved for Judgment Notwithstanding the Verdict or, in the Alternative, a New Trial, citing seven separate reasons why they believed the verdict was not justified. Judge Mallory agreed with **none** of Plaintiffs' claims, denying the motion for jnov and refusing to adopt any of Plaintiffs' seven cited grounds as a basis for a new trial. Nevertheless, and despite his having given to the jury the precise instructions requested by Plaintiffs on both 1) the duty of ordinary care, and 2) the increased duty implicated by federal statutes and regulations, the judge decided to order a new trial due to what he speculated may have been possible jury confusion over the court's instruction on the issue of Sterling's and Rescar's alleged negligence.

D. Plaintiffs failed to appeal the denial of their jnov motion, the trial court's rejection of their tendered grounds for new trial, or any other issue.

Defendants prosecuted timely appeals raising a number of assignments of error. Conversely, Plaintiffs neither filed a cross-appeal nor raised any cross-assignments of error, even from Judge Mallory's denial of the lion's share of their post-trial motion. On

⁵ including Plaintiffs' lead counsel, Mr. Chesley, (T.p. 7122-7123).

February 25, 2011, after comprehensive briefing and oral argument, the First District Court of Appeals held that the trial court's instructions of law were proper, and that under any standard of review, "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*".⁶ The case was remanded to the trial court "to reinstate the jury verdict in favor of Sterling and Rescar and to enter judgment accordingly".⁷ Plaintiffs did not attempt a further appeal to this Court, and an agreed *Judgment Entry on Remand* was filed on April 29, 2011 terminating the case.

E. After the entry of final judgment, Plaintiffs attempted to reassert one of the previously rejected (and not appealed) grounds for new trial with the successor judge.

Despite this apparent end to the case, Plaintiffs filed a second Motion for New Trial, reasserting an argument previously rejected by Judge Mallory and not appealed – that, even though at the time Plaintiffs specifically agreed to the instruction given by the court, the judge should nevertheless have somehow informed the jury "of the factual and legal determination the trial court had made that led it to dismiss ACF, the manufacturer of the defective weld, at the close of plaintiffs' case." Defendants opposed this recycled motion on three separate grounds: 1) that any further motion practice was beyond the scope of the court of appeals' remand; 2) that Plaintiffs were precluded from reasserting the previously rejected grounds for a new trial a second time following an appeal; and 3) that the asserted grounds were, in any event, without merit. Notwithstanding these clear legal impediments, however, Judge Nadine Allen, who had

⁶ *McCarthy I* at ¶ 26, (emphasis added).

⁷ *Id.*

observed none of the trial and without any apparent review of the record, granted Plaintiffs' motion, suggesting that the dismissal of ACF at the close of Plaintiffs' case constituted such an unprecedented event that it may have caused the jury to "speculate" that ACF had "settled" or "absconded to escape liability."⁸ Judge Allen cited no Ohio authority to support her conclusion, and offered no explanation either why she believed that she had jurisdiction to entertain Plaintiffs' renewed motion or, even if her suspicions were correct, how such "speculation" could have legally impacted the jury's ultimate determination that neither Sterling nor Rescar were negligent in connection with McCarthy's injuries.

F. The Court of Appeals correctly held that Plaintiffs had their chance to seek a review of the trial court's actions at the time of the first appeal in the case and, having failed to avail themselves of that opportunity, they were not entitled to "a second bite at the apple."

Defendants appealed Judge Allen's decision arguing, *inter alia*, 1) that two separate prongs of the law of the case doctrine precluded a second consideration of the new trial motion, and 2) that Judge Mallory's original rejection of Plaintiffs' argument was correct because Plaintiffs' claims had no support in the record of the case. On November 9, 2012, the court of appeals issued the Decision here involved, holding that "[t]he second trial judge was without authority to entertain plaintiffs' second new trial motion because the arguments raised therein had been waived".⁹ Plaintiffs' separate Motions to Certify a Conflict and for a Rehearing En Banc were denied, and they now seek a further review by this Court.

⁸ New Trial Decision at *2.

⁹ Decision at 9.

III. ARGUMENT WITH REGARD TO PLAINTIFFS'-APPELLANTS' PROPOSED PROPOSITIONS OF LAW

Plaintiffs' 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.

Answer: If a litigant wishes the court of appeals to review an action of the trial court, he has the obligation to bring that issue before the appellate court.

In an attempt to further prolong what has now been a nearly four-year appellate process, Plaintiffs both mischaracterize the Decision below and, in their *Proposition of Law No 1*, suggest an artificial limitation to the jurisdiction of a court of appeals that is supported nowhere in Ohio law. Sterling has no quarrel with the numerous authorities cited by Plaintiffs that apply the provisions of *Civ. Rule 59(A)* requiring a trial judge to "specify in writing the grounds upon which . . . a new trial is granted". However, to the extent that the second sentence of the tendered *Proposition* is meant to suggest that these same authorities somehow **preclude** a litigant from separately appealing other rejected new-trial grounds, Plaintiffs' argument is contrary to over a century of well-established law and inconsistent with this Court's long established policy that, to the extent possible, all issues should be settled by a single appeal.

A. A litigant is obligated to raise all issues that could be raised in an appeal.

Plaintiffs do not dispute, because they cannot dispute, the basic principle that an appellate ruling in a case settles all issues that were raised in the appeal and *all issues that could have been raised in the appeal*. Instead, they advance the curious argument, citing *Pangle, supra.* and *O'Day v. Webb*, 29 Ohio St.2d 215,218, 280 N.E.2d 896 (1972), that even though Judge Mallory rejected the very same grounds for a new trial

that now form the basis of their recycled motion, they should not be subject to this "law of the case" rule because they were *legally prohibited* from appealing those "rejected" grounds at the time of the first appeal. *Pangle* and *O'Day* advise no such thing. The proscriptions contained in those cases, and the myriad others cited by Plaintiffs, apply to the *court*, not the litigants. In short, none of the authorities which Plaintiffs' cite even remotely support this argument.

The legal proposition followed by the court of appeals below has been the law of Ohio for over a century. *Pollock v. Cohen, supra.*; *City of Hubbard ex rel. Creed v. Saline, supra.* ("the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal"); *Charles A. Burton, Inc. v. Durkee*, 162 Ohio St. 433, 438, 123 N.E.2d 432 (1954) (the doctrine of law of the case provides that a "final judgment of an appellate court in . . . the first trial of an action is conclusive in the . . . second trial of an action as to every issue which was or might have been presented and determined in the former instance"). For whatever reason, despite a lengthy trial that was both complicated and, at times contentious, Plaintiffs chose to raise none of the issues that could have been presented on the first appeal, including Judge Mallory's rejection of their new-trial/jnov grounds. The inevitable consequence of that decision was to forever foreclose any further review of those arguments.

B. Those issues include the rejected grounds for JNOV and/or new trial.

Nickell v. Gonzalez, 34 Ohio App.3d 364, 519 N.E.2d 414 (1st App. Dist. 1986), *appeal denied*, No. 87-346 (Ohio Sup. Ct. 1987), which has been the law of the First District for over twenty-five years and which was cited with approval by the court below, involved the precise situation here at issue. In *Nickell* the court unequivocally held that:

[w]hen a plaintiff . . . files a motion for judgment nov and/or a new trial on several grounds and the trial court grants the motion on only one of the grounds but does not reach the others, after a final order is entered, *the grounds not reached are merged into the final order and are reviewable on appeal. Failure to raise the issues on direct appeal precludes the plaintiff from asserting them for a second time . . .*

34 Ohio App.3d at 364 (emphasis added). The governing principle of *Nickell*, repeatedly articulated by this Court,¹⁰ is one of judicial finality – a logical end to every litigation. In this case it was Plaintiffs' obligation to raise any and all issues that they felt were worthy of appeal, including their alternative bases for a new trial/jnov that Judge Mallory refused to adopt.

Plaintiffs continue to mischaracterize the holding in *Nickell* as “dicta” and claim a non-existent distinction between the situation in that case and the one presented here. In the court of appeals' Decision here under consideration, Judge Wolff explains in great detail the similarities between the cases, and why the court's holding in *Nickell* is fully supportive of the ultimate determination in this case. *Inter alia*, he comments that, as in the case *sub judice*, because the new trial grounds advanced by the Nickell's on which the trial court had failed to specifically rule were “fully reviewable on appeal,” . . . “a rule allowing (a party) to raise those grounds (at a later date) would create a circularity of actions, undermine the necessary finality of judgments, and create needless extra costs for litigants.”¹¹

C. The Decision below has nothing to do with the scope of review of a new trial order. It merely reiterates the duty of a litigant to preserve all issues on appeal.

¹⁰ *C.f. City of Hubbard ex rel. Creed v. Sauline, supra.; Charles A. Burton, Inc. v. Durkee, supra.*

¹¹ Decision at 8-9.

Plaintiffs' assertion that the appealed Decision somehow expands the scope of review of a new trial order in opposition to *Pangle* and *O'Day*¹² likewise fails to withstand scrutiny. On the contrary, the court of appeals here expressly follows those cases, this same panel specifically citing *Pangle* and commenting in *McCarthy I* that "[w]hat the trial court has 'specified in writing as the cause for which the new trial was allowed' determines the scope of review."¹³ Plaintiffs' argument thus represents nothing more than a thinly-veiled attempt to create an issue where none exists.

Finally, Plaintiffs' suggestion that permitting "appellate judges to review, (among the other issues raised by the parties), new trial grounds that trial judges have not addressed threatens to bog down the courts"¹⁴ borders on nonsensical. As noted previously, if Plaintiffs were correct that litigants are *prohibited* from alternatively raising such issues, a case like that presented here – where Plaintiffs advanced seven different grounds for new trial – could conceivably necessitate **seven separate appeals**. Obviously, that has never been to law of Ohio. Plaintiffs' appeal does not implicate any change or clarification of law, and should present no issue of interest to this Court.

Plaintiffs' 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.

Answer: The court of appeals Decision creates no new law. It does nothing more than apply the well-settled principle that a litigant must raise all grounds for appeal or forever waive those arguments.

¹² Plaintiffs' Memo at 8-9, 12.

¹³ 193 Ohio App.3d 164 at ¶ 17.

¹⁴ Plaintiffs' Memo at 4

Plaintiffs' *Proposition No. 2* is not so much a statement of law as a plea for this Court to somehow relieve them of the consequences of their actions in failing to timely appeal, or otherwise bring to the appellate court's attention, any of the arguments raised in their motion for jnov and new trial. It represents no basis for a review by this Court.

A. The appellate court's ability to review alternative grounds for a new trial was not limited by the law, but rather by Plaintiffs' failure to raise those issues.

Plaintiffs' claim that they were legally prohibited from appealing the rejected alternative new-trial arguments is supported by not a single reported case. Conversely, as discussed more fully above, the court of appeals holding that a party must raise all appealable issues or waive the right to do so is grounded in over a century of Ohio law. A litigant has an obligation to bring before the appellate court any and all issues concerning which he seeks review. In the case *sub judice*, if the Plaintiffs wished the court of appeals to consider their alternative bases for a jnov/new trial that Judge Mallory refused to adopt, they should have raised them through cross-appeal and/or cross assignments of error. Their failure to do so resulted in those arguments being waived as a matter of law.

B. The Decision creates no confusion or uncertainty.

Finally, Plaintiffs' protestation that this Decision "creates uncertainty for any party defending a new trial grant on appeal"¹⁵ simply ignores reality. The "law of the case" doctrine has been the bedrock of Ohio law since at least 1877. Specifically with regard to new trial motions, the holding in *Nickell* and similar cases that when a party moves for a new trial on several grounds, "the grounds not reached are merged into the final order

¹⁵ *Id.* at 11-12.

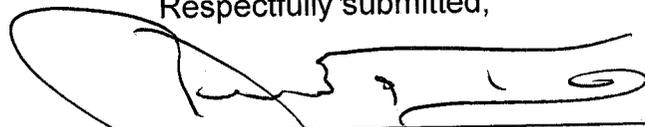
and are reviewable on appeal," has been the law of the First District since at least 1996. The court of appeals Decision merely reiterates and applies these well-settled legal principles to the facts of this case.

IV. CONCLUSION

In their attempted appeal herein, Plaintiffs are not only asking this Court to excuse their inaction, but to create a baseless exception to Ohio appellate practice that is neither justified nor desirable. By design or otherwise, during the first appeal of this case Plaintiffs chose not to raise any of their proffered arguments for new trial/jnov that were rejected by Judge Mallory, preferring instead to "place all of their eggs in one basket," and assume that the new trial order would be affirmed. The law is clear that, in making that choice, in taking that risk, Plaintiffs forever waived the right to pursue any of those alternative arguments.

Plaintiffs' appeal, in opposition to well-settled law and designed only to rescue them from the consequences of their actions, thus fails to reach the threshold requirement for this Court to assume jurisdiction. The case presents no issue of public or great general interest, and Plaintiffs' tendered appeal should be refused.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Civ. R. 5(B)(2)(c), the undersigned hereby certifies that a true and correct copy of the foregoing was served upon:

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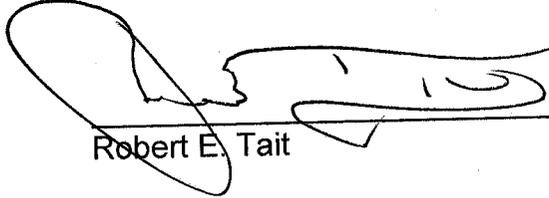
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