

IN THE SUPREME COURT OF OHIO

ORIGINAL

PATRICK B. McCARTHY,)
MARK COLLIN FUGATE, and)
PATRICIA SUSAN McCARTHY,)
)
Plaintiffs-Appellants,)
)
vs.)
)
STERLING CHEMICALS, INC.,)
and RESCAR, INC.,)
)
Defendants-Appellees.)

Case No. 2013-0162

On Appeal from the
Court of Appeals,
First Appellate District of Ohio

First District Court of Appeals
Case Nos. C-110805, C-110856

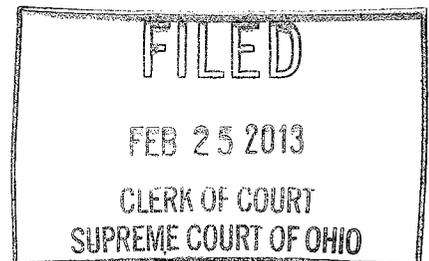
**DEFENDANT-APPELLEE RESCAR, INC.'S MEMORANDUM IN RESPONSE
TO MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS PATRICK B. McCARTHY, MARK COLLIN FUGATE,
AND PATRICIA SUSAN McCARTHY**

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I. STATEMENT IN OPPOSITION TO JURISIDICIION

This is not a case of public or great general interest. This is simply a case where the Appellants failed to file a cross-appeal or raise assignments of error before the Hamilton County Court of Appeals as required by Ohio law when they had the opportunity to do so. There is no dispute that the Appellants waited until the court of appeals had reversed the trial court's grant of a new trial and remanded the case for reinstatement of the defense verdicts before filing a second motion for new trial to raise the same issues that were previously raised in the trial court and that should have been raised on appeal. Not surprisingly, upon appeal of a different trial judge's grant of the second motion for new trial, the court of appeals reversed and properly held that "[t]he second trial judge was without authority to entertain plaintiffs' second new-trial motion because the arguments raised therein had been waived." *McCarthy v. Sterling Chemicals, Inc.*, 1st Dist. Nos. C-110805, C-110856, 2012-Ohio-5211, at ¶16.

There was and is nothing novel, or even unusual, about the court of appeals' decision. If the Appellants believed that the trial judge erred during the trial, including not granting them a new trial on their proffered grounds, it was incumbent upon them to put those assignments of error before the court of appeals when Rescar and Sterling Chemicals appealed the grant of the new trial. The Appellants could not sit back and wait to see what happened on appeal and then start over again in the trial court after the court of appeals ruled against them.

The Appellants' Memorandum in Support of Jurisdiction confuses this Court's functions with those of an intermediate appellate court. The Appellants' articulated propositions of law are nothing more than thinly-disguised assignments of error, which

this Court does not review. Under settled Ohio law, the Appellants were required to raise their assignments of error in the court of appeals, and they did not do so. Nothing in the Appellants' propositions of law changes that reality. The Court should decline jurisdiction.

II. STATEMENT OF THE CASE AND FACTS

On July 5, 2005, Patrick McCarthy was standing atop a railroad tank car at the Kinder Morgan Queen City Terminal transferring liquid plasticizer from the railcar to a storage tank. T.p. 3279-3291. As he pressurized the railcar, the manway assembly separated and he fell 15 feet to the ground, suffering catastrophic injuries. Id. No one else saw the accident happen, only its aftermath, so exactly how it happened will never be known. Id; T.p. 3448-3450.

On October 28, 2005, the Appellants filed suit against a number of parties, only four of which remained in the case at the time the trial began in January of 2009. Those four remaining defendants were Sterling Chemicals, the owner of the railcar in question, Rescar, the company that from time-to-time performed repairs and maintenance on the railcar at the direction of Sterling Chemicals, ACF Industries, LLC ("ACF"), the manufacturer of the railcar, and Texana Tank Car & Manufacturing Ltd. ("Texana"), the maintenance company before Rescar.

To say that this was a singular accident is an understatement. Despite retaining some of the world's foremost railroad and railcar experts, none of the parties could point to anything like this happening before in the history of railcars in the United States. T.p. 2827-2828; T.p. 4472; T.p. 9463.

During the jury trial, which lasted more than three months, the Appellants asserted that Rescar was negligent in failing to inspect and flag an allegedly defective weld on the manway assembly and that such negligence proximately caused Mr. McCarthy's injuries. T.p. 1826. Their theory of the accident was that the force of the pressure on the weld caused the manway assembly to blow off and strike Mr. McCarthy, knocking him to the ground. T.p. 1801.

Evidence presented by Rescar and Sterling Chemicals, and, in some instances, by the Appellants' own witnesses, contradicted the Appellants' theory. The only witness near the scene did not see the manway assembly, or any other projectile, strike Mr. McCarthy, and the expert medical witnesses could not state to a reasonable degree of certainty that being struck, as opposed to falling 15 feet to the ground, caused his injuries. T.p. 3448-3451; T.p. 3500-3505; T.p. 2147-2150; T.p. 8851. Rescar and Sterling Chemicals also presented expert testimony that disputed the Appellants' theory on why the manway assembly separated from the railcar. T.p. 9757-9824; T.p. 10097-10098.

At the conclusion of this incredibly thorough trial, both the trial court and the Appellants praised the jury for its patience, attentiveness, promptness and willingness to go above and beyond the call of duty. T.p. 10896; T.p. 11246; T.p. 11375-76. The Appellants' lead counsel volunteered that the Appellants had "truly been blessed by at least no matter what happens in getting a fair trial." T.p. 10867.

However, after the jury unanimously found that Rescar and Sterling Chemicals were not negligent and the trial court entered judgment on the jury's verdict, the Appellants moved for a new trial, claiming that the jury's verdict was against the

manifest weight of the evidence and that the jury must have been confused. T.d. 1055. As one source of claimed jury confusion, the Appellants identified the trial court's treatment of a directed verdict in favor of ACF, calling the issue "[o]ne of the most significant" bases for a new trial.¹ T.d. 1055, at p.4. The Appellants argued that the jury should have been informed of the trial court's findings with respect to ACF, even though the trial court gave the following curative instruction in response to the Appellants' concerns:

I need to give you an instruction that you need to take to heart before we continue any further in this case.

During the closing argument, there was mention of ACF. And this is the Court's instruction: There has been evidence in this case from which you could find that the manway assembly on Car 22507 was defectively manufactured by ACF, but I instruct you, even if you find so, you may not in any degree apportion fault to ACF for the injuries sustained by Mr. McCarthy; do you understand that instruction?

And so when you get the jury instructions, the jury instructions will not – will not refer to ACF at all, and so you're not to consider ACF. Okay. Very good. Thank you. You may continue.

T.p. 11179-11179.

The trial court refused to grant a new trial on any of the grounds asserted by the Appellants, including the ACF argument. Instead, the trial court granted a new trial, sua sponte, based on its belief that the jury "was just not fully informed" because the court "did not make a distinction [in its charge to the jury] that despite the fact that [sic] 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."

T.d. 1069.

¹ The Appellants refer to this argument as the "ACF argument" throughout their Memorandum in Support of Jurisdiction, and Rescar will do likewise.

Rescar and Sterling Chemicals appealed the judgment granting the Appellants a new trial to the Hamilton County Court of Appeals (the "First Appeal").² T.d. 1070; T.d. 1071. In the First Appeal, the Appellants did nothing to preserve any alleged error that occurred in the trial court. They did not file a cross-appeal or cross-assignment of error as to any of the trial court's rulings or decisions. This included the trial court's ruling during the trial on the ACF argument, the trial court's refusal to grant a new trial on that basis, and the trial court's denial of all of the other issues raised in the Appellants' motion for new trial.

Accordingly, as required by Ohio law, the court of appeals reviewed the assignments of error presented by Rescar and Sterling Chemicals not by searching the record below for error that might have supported the grant of a new trial, but by limiting its review to what the trial court "specified in writing as the cause for which the new trial was allowed." See *O'Day v. Webb*, 29 Ohio St.2d 215, 218, 280 N.E.2d 896 (1972); *Pangle v. Joyce*, 76 Ohio St.3d 389, 667 N.E.2d 1202, at fn. 2 (1996); *McCarthy v. Sterling Chemicals, Inc.*, 193 Ohio App.3d 164, 2011-Ohio-887, 951 N.E.2d 441, at ¶17. Conducting that review only, because the Appellants assigned no other error, the court correctly held that "[t]he trial court erred in granting a motion for a new trial on the basis of jury confusion, where the trial court had given verbatim the complaining party's requested instruction, the court's instruction had correctly stated the applicable law, and there was no evidence that the jury had been confused by the court's instruction." *McCarthy*, 2011-Ohio-887, syllabus at ¶3.

² Although Rescar and Sterling Chemicals appealed separately, the appeals were consolidated and will be referred to jointly in this Memorandum.

Because the Appellants did not take the appropriate and available steps to place other alleged errors before the court of appeals, the court of appeals' inquiry ceased after it concluded that Rescar's and Sterling Chemicals' assignments of error were well taken. Having no assignments of error by the Appellants to review, the court of appeals reversed the trial court's grant of a new trial and remanded the case to the trial court with instructions to reinstate the defense verdicts and enter judgment accordingly. *Id.*, at ¶28.

At that point, if the Appellants believed the decision in the First Appeal was erroneous, they could have sought review in this Court. They did not. Instead, they filed a second motion for new trial, this time in front of a newly-appointed judge, making the same arguments that the original trial judge rejected when he announced his own basis for granting the new trial (i.e., the duty of care instruction). T.d. 1083. As they had in their first new trial motion, the Appellants in their second new trial motion advanced the ACF argument. *Id.* The second time around, however, the newly-appointed judge – a judge not present at any stage of the three-month trial to observe whether the absence of ACF after the directed verdict confused the jury – granted a new trial on that basis.³ T.d. 1097. Rescar and Sterling Chemicals again timely appealed (the "Second Appeal"). T.d. 1096; T.d. 1097; T.d. 1098.

³ It bears noting that the decision to grant the Appellants' second new trial motion was inherently speculative as written, with the trial court acknowledging that the lack of jury instructions "could have substantially confused the jury to speculate that ACF admitted liability and may have settled the case; or that ACF absconded from the trial to escape liability, as explanation for their absence from trial." T.d. 1094 (emphasis added). The decision was not based on any evidence whatsoever that the jury was actually confused on this point.

The issue in the Second Appeal was largely jurisdictional. Rescar and Sterling Chemicals argued, as they do here, that the Appellants waived the grounds they sought to present in the second motion for new trial by not assigning as error in the First Appeal the trial court's allegedly erroneous rejection of those grounds. In response, the Appellants claimed that this Court's holding in *O'Day* and *Pangle* prevented review of anything other than the grounds specified by the trial court in writing as the basis for granting a new trial.

The appellate court in the Second Appeal correctly determined that nothing in *O'Day*, *Pangle* or their progeny prevented the Appellants from raising their own assignments of error in the First Appeal.⁴ *McCarthy*, 2012-Ohio-5211, at ¶¶15-16. This decision rested on foundational legal principles of the merger of interlocutory rulings into final orders and the waiver of any later challenge to those rulings if not assigned as error at the first opportunity to do so on appeal. *Id.* These venerable principles predate *O'Day* and *Pangle* and were undisturbed by either decision.

Further, the matter upon which the Appellants now seek this Court's review is purely hypothetical and entirely of their own making. The Appellants are essentially asking the Court to decide what would happen if they had chosen to assign as error in the First Appeal the rulings and decisions of the trial court, and the court of appeals had refused to hear those assignments of error because of the scope of review expressed in *O'Day* and *Pangle*. Those are not the facts before this Court.

⁴ In addition to the Appellants having the option to file a cross-assignment of error under R.C. 2505.22, Rescar and Sterling Chemicals also argued in the Second Appeal that the Appellants could have cross-appealed under Civ.R. 3(C).

III. RESPONSE TO THE APPELLANTS' PROPOSITIONS OF LAW

Before addressing the propositions of law on their merits, it must be reiterated that the propositions themselves are inherently flawed. They are, in reality, case-specific assignments of error.

Proposition of Law No. 1 does not address or even acknowledge an appellant's responsibility to place errors believed to have occurred at trial before the court of appeals in connection with an appeal. In omitting that fundamental principle, it does not accurately reflect the procedural posture of this case or correctly address the holding in the Second Appeal. The Appellants simply want a second bite at the apple.

Proposition of Law No. 2 is emblematic of a problem that pervades the entire Memorandum in Support of Jurisdiction in that it does not even purport to concern an issue of public or great general interest. Rather, it is a vehicle – related solely to the facts of this case – to allow the Appellants to avoid the consequences of their failure to assign error in the First Appeal. Neither of the propositions presented by the Appellants warrants the Court's review as a matter of public or great general interest.

Rescar's Position on the Appellants' Proposition of Law No. 1:

When an appellant assigns as error the grant of a new trial, the appellate court reviewing that assignment of error 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). Grounds asserted in a new trial motion, but rejected or refused by the trial court, are reviewable on appeal if the appellee places them before the appellate court by way of a cross-appeal or cross-assignment of error, and may not be relitigated on remand after the grant of a new trial is reversed and the verdicts are reinstated.

The Appellants imagine a conflict between the court of appeals' reliance upon *O'Day* to set the scope of review in connection with the First Appeal and its decision in the Second Appeal, but that conflict simply does not exist.

To begin with, this Court's decisions in *Price v. McCoy*, 2 Ohio St.2d 131, 207 N.E.2d 236 (1965), *Antal v. Olde Worlde Products, Inc.*, 9 Ohio St.3d 144, 459 N.E.2d 236 (1984), and *Mannion v. Sandel*, 91 Ohio St.3d 318, 744 N.E.2d 759 (2001), speak to trial courts that have granted new trials, requiring them to specify in writing the grounds upon which they have granted a new trial. This requirement is premised on the undeniable fact that meaningful appellate review may be frustrated or even impossible if the specific grounds that led to the grant of the new trial are not clearly specified by the trial court. *Antal*, 9 Ohio St.3d at 145-146.

Likewise, the holdings in *O'Day* and *Pangle* speak to courts, not litigants – specifically, to appellate courts reviewing the grant of a new trial. By providing in *O'Day* and *Pangle* that the review of a 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, the Court furthered the objective of ensuring meaningful review of new trial grants.

Nothing in either line of cases speaks to litigants, much less excuses them from their obligation to assign error on an appeal from a final judgment if they believe the trial court erred. That the First Appeal in this case created the obligation for the Appellants to assign error is beyond dispute. As Rescar and Sterling Chemicals argued in the Second Appeal, all of the interlocutory rulings at trial, including the propriety of the instruction to the jury on the absence of ACF and the use of that argument by the Appellants as grounds for a new trial motion, were immediately appealable based on the trial court's September 4, 2009 entry. See, e.g., *Deutsche Bank Nat'l Trust Co. v. Pawlowicz*, 6th Dist. No. F-11-011, 2012-Ohio-4991, at ¶15 (holding that “under Ohio case law, when a final judgment has been entered terminating an entire case, all prior

interlocutory orders merge into the final judgment and are appealable at that time.”); *Beatley v. Knisley*, 183 Ohio App.3d 356, 2009-Ohio-2229, 917 N.E.2d 280, at ¶19 (finding that “[i]nterlocutory orders merge into the final judgment, and thus, an appeal from a final judgment allows an appellant to challenge both the final judgment and any interlocutory orders merged with it.”).

The consequences of the Appellants’ decision not to assign error in the First Appeal are clear, and they are inescapable. A litigant may not raise arguments on remand that were available to be appealed, but were not appealed, in a first appeal. *Blackwell v. Int’l Union, United Auto Workers Local No. 1250*, 21 Ohio App.3d 110, 112, 487 N.E.2d 334 (1984) (holding that parties have a duty to raise all defenses in a first appeal and to demonstrate their validity from the evidence in the record or else the appellate court’s ruling on the first appeal becomes the law of the case); *Handel v. White*, 9th Dist. No. 21716, 2004-Ohio-1588, at ¶¶6, 8-9 (holding that a litigant may not rely upon “arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal.”); *State v. Hultz*, 9th Dist. No. 07CA0043, 2008-Ohio-4153, at ¶5 (concluding because “litigants are not permitted to make new arguments to the trial court on remand that were raised or could have been raised on the first appeal, [a]ll questions which existed on the record, and could have been considered on the first petition in error, must ever afterward be treated as settled by the first adjudication of a reviewing court.”).

Rescar and Sterling Chemicals argued that these foundational principles were no less applicable to orders granting a new trial under Civ. R. 59(A). The court of appeals in the Second Appeal agreed, citing *Nickell v. Gonzalez*, 34 Ohio App.3d 364, 519

N.E.2d 414 (1996), in which the Hamilton County Court of Appeals held:

When a plaintiff obtains an unfavorable result in a trial and files a motion for judgment n.o.v. 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 in a motion filed after the Ohio Supreme Court has affirmed a judgment in the defendant's favor.

Nickell, 34 Ohio App.3d 364, syllabus at 1.⁵

Thus, the Appellants' failure to seek appellate review of the ACF argument in the First Appeal meant that the Appellants could not raise that argument by filing a second new trial motion on remand. See, e.g., *Singleton v. Singleton*, 95 Ohio App.3d 467, 470-471, 642 N.E.2d 708 (1994) (holding that "upon remand to a trial court following an appeal, the trial court is without authority to extend or vary the mandate given," and concluding that, in those instances, "a trial court is obliged to accept all issues previously adjudicated as finally settled.").

There is no dispute that the trial court's refusal to grant a new trial on the basis of the ACF argument merged into the final judgment, was fully appealable at that time, and must have been assigned as error by the Appellants to prevent that argument from being waived in further proceedings. Moreover, there is no issue of public or great general interest implicated by the Appellants being held to the consequences of the

⁵ As they did in the Second Appeal, the Appellants continue to argue that *Nickell* is distinguishable because it involved a denial of a new trial and, therefore, that this statement from *Nickell* is mere dicta. This argument is mistaken, as *Nickell* involved not the denial of a new trial motion, but rather the failure of the Nickells, who had benefited by the grant of a new trial, to assign error in connection with the appeal of that new trial grant, thereby leading to a waiver of arguments that could have been raised, but were not, in the first appeal. In that regard, *Nickell* is directly on point.

decision not to assign error in the First Appeal. The Court should decline to entertain the Appellants' Proposition of Law No. 1.

Rescar's Position on the Appellants' Proposition of Law No. 2:

An appellant's decision to ignore foundational principles of merger, waiver and the law of the case in not assigning error in connection with an appeal carries foreseeable consequences under the decisions of this Court and other Ohio courts, and there is nothing inequitable or improper in applying those principles to foreclose serial motions for new trials.

Contrary to the Appellants' claims, there was no "new rule of law" announced by the court of appeals in the Second Appeal. Rescar's and Sterling Chemicals' arguments that the Appellants waived any error that may have occurred at trial by failing to assign error in the First Appeal were by no means novel. As set forth above, they rested on principles of merger of interlocutory rulings into final appealable orders and waiver of issues not raised on appeal, as well as the law of the case doctrine. All of these concepts are well-settled under Ohio law.⁶ To say that the court of appeals' decision in the Second Appeal was not foreshadowed by Ohio law is simply not correct.

Moreover, the holdings of *O'Day* and *Pangle* are not rendered meaningless, as the Appellants contend, by allowing an appellee to raise cross-assignments of error or

⁶ This is especially true of the proposition that the law of the case doctrine prevents litigants from rehashing in subsequent proceedings claimed errors that were available to be pursued, but were not, in connection with a first appeal. The law of the case doctrine dates back to 1924, when the Court decided *Gohman v. City of St. Bernard*, 111 Ohio St. 726, 730-732, 146 N.E. 291 (1924), and the Court has repeatedly applied the doctrine to foreclose a party from taking advantage of or later assigning as error issues that could have been, but were not, assigned as error in a prior appeal. See *Beifuss v. Westerville Board of Education*, 37 Ohio St.3d 187, 191, 525 N.E.2d 20 (1988); *City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 659 N.E.2d 781 (1996) (holding that "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.").

to cross-appeal in support of the result at trial or to prevent error alleged to have occurred at trial from becoming the law of the case on remand. The underlying basis for the rule announced by the Court in *O'Day* and *Pangle* was to ensure that appellate courts would have clear grounds to review when determining whether a trial court erred or abused its discretion in granting a new trial. The Court in *O'Day* and *Pangle* never indicated, and there is nothing in Ohio law to suggest, that in addressing appellate courts so as to ensure meaningful appellate review of new trial grants, the Court was excusing parties benefited by the grant of a new trial from the responsibility to raise errors on appeal or absolving them from the consequences of failing to do so.

The Appellants have not pointed to a single Ohio case holding that the scope of review in *O'Day* and *Pangle* prevents the prevailing party on a motion for new trial from assigning error to secure appellate review of issues on which the prevailing party believes the trial court erred. Had the Appellants done so here, the court of appeals would have been required to address Rescar and Sterling's assignments of error as well as those raised by the Appellants. But they instead did nothing. Because the decision in the Second Appeal was the foreseeable outcome dictated by Ohio law, there are no fairness concerns as to the application of the decision to the Appellants, and the Court should not accept jurisdiction based on the Appellants' Proposition of Law No. 2.

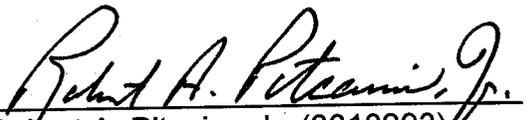
IV. CONCLUSION

Not only are the Appellants urging this Court to create bad law, that law would be bad policy. Allowing litigants in an appeal of the grant of a new trial to withhold errors they believe the trial court committed only to deploy those errors on remand as grounds for a second, or even third or fourth, motion for new trial would lead to serial,

piecemeal appeals, thereby undermining important efficiency and finality objectives. The Appellants point to no rule or case law that endorses or even suggests support for this flawed theory.

There is simply no reason why this Court should consider departing from the straightforward application of longstanding principles of merger and waiver to review an argument that the Appellants failed to preserve for review in the First Appeal. Because the Court reviews matters of public or great general interest, not assignments of error of interest only to parties disappointed with the outcome of a particular dispute, the Court should not exercise jurisdiction.

Respectfully submitted,


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The undersigned certifies that a copy of the foregoing Defendant-Appellee Rescar, Inc.'s Memorandum in Response to Memorandum in Support of Jurisdiction was served upon the following counsel by electronic mail this 25th day of February, 2013:

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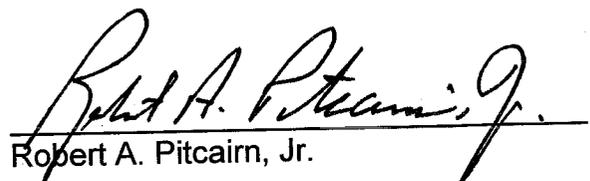
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