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**IN THE SUPREME COURT OF OHIO**

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| **ROSS J. LINERT, et al.,** | ) | **Supreme Court Case No.** 14-1940 |
| | ) | |
| **Plaintiffs/Appellees,** | ) | **On Appeal from the Mahoning County** |
| | ) | **Court of Appeals, Seventh Appellate** |
| **v.** | ) | **District** |
| | ) | |
| **FORD MOTOR COMPANY,** | ) | **Court of Appeals Case No. 2011 MA** |
| | ) | **00189** |
| **Defendant/Appellant.** | ) | |

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# MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT FORD MOTOR COMPANY

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## I. THIS CASE PRESENTS AN ISSUE OF PUBLIC AND GREAT GENERAL INTEREST

This product liability case arises out of an accident in which a Cadillac travelling at 115 miles per hour slammed into the rear of a Crown Victoria Police Interceptor ("CVPI"). A post-collision fire ensued. After two weeks of trial, the jury returned a verdict in favor of Ford Motor Company ("Ford") on Plaintiffs' design defect, manufacturing defect, and pre-marketing failure to warn claims. The Seventh District Court of Appeals did not disturb that verdict, but held that the trial court erred in failing to instruct the jury on a post-marketing duty to warn theory.

In so holding, the Appellate Court looked not to the governing statute, Ohio Revised Code section 2307.76(A)(2), to determine what "risk" triggers a post-marketing duty to warn, but rather to a definition of "risk" from Black's Law Dictionary, First Pocket Edition (1996) that encompasses all "known dangers." Further, the Appellate Court overlooked the fact that Plaintiffs' pre-marketing and post-marketing failure to warn theories were both based on the same risk—the remote risk of a post-collision fuel-fed fire, known to Ford both before and after sale—and that the jury rejected Plaintiffs' pre-marketing failure to warn theory. In effect, the Appellate Court held that a manufacturer has a post-sale duty to warn about all known dangers, however remote, even though it has no duty to warn of those same "known dangers" before sale.

Even more troubling, the Appellate Court's decision relies not on any evidence of a risk that became known only after sale, but on evidence that Ford made product improvements after sale. This is untenable from a public policy perspective, and not just because of the potential to discourage product improvements:

> [A]n unbounded post-sale duty to warn would impose unacceptable burdens on product sellers. The costs of identifying and communicating with product users years after sale are often daunting. Furthermore, as product designs are developed and improved over time, many risks are reduced or avoided by subsequent design changes. *If every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden*

> *on product sellers would be unacceptably great. . . .* In light of the serious potential for overburdening sellers in this regard, the court should *carefully examine* the circumstances for and against imposing a duty to provide a post-sale warning in a particular case.

Restatement (Third) of Torts: Products Liability, § 10 cmt. a (1998) (emphasis added). The Appellate Court's cursory treatment of this issue does not reflect a "careful examination"; rather, the Appellate Court's opinion reflects virtually no analysis of the relevant facts, the law, or the public policy implications of its decision.

This Court has never addressed the post-marketing duty to warn established by § 2307.76(A)(2), and this case presents the perfect opportunity for this Court to do so. The decision below rested on an understanding of the post-marketing duty to warn that ignored both the statute and the evidence, it would impose an unreasonable and confusing burden upon product manufacturers, and it would have a chilling effect on a manufacturer's efforts to improve its products. Accordingly, this is a case of public and great general interest.

## II. STATEMENT OF THE CASE AND FACTS

On November 11, 2007, Ross Linert, an officer with the Austintown Police Department, was on routine patrol in a 2005 CVPI. At approximately 1 a.m., Adrien Foutz, driving a 1995 Cadillac DeVille, slammed into the rear of Linert's CVPI. Foutz admitted she was speeding and did not brake before striking the rear of the CVPI. Ford's accident reconstruction expert calculated that Foutz's Cadillac was travelling 115 m.p.h. at the time of impact and that the closing speed of the accident was 80 m.p.h. The collision caused massive damage to the CVPI – at its greatest depth, the rear end of the CVPI was crushed nearly five feet. There is no dispute

that accident forces pulled the CVPI's fuel sending unit out of the fuel tank, leaving a hole in the tank.[1] A fire ensued. Linert was able to get out of the CVPI but suffered burn and other injuries.

Plaintiffs alleged that the CVPI was defective in design because of the location of the fuel tank. They also alleged that the CVPI was defectively manufactured because the crimp for attaching the sending unit to the fuel tank was too "short," i.e., that there should have been more metal overlapping the sending unit, resulting in a "longer" crimp. Further, Plaintiffs claimed that Ford should have issued a pre-marketing warning concerning the risk of a post-collision fire and that Ford should have issued a post-marketing warning about the alleged manufacturing defect.

During the two-week trial, the jury heard testimony from 24 witnesses and was presented with nearly 200 exhibits, including documents, videotapes, photographs, component parts, and testing relating to Plaintiffs' theories of liability against Ford. Plaintiffs' fuel system design expert conceded that the CVPI's unique features made it the top-selling police pursuit vehicle. He also agreed that the risk of rear-end collision fires in police vehicles is rare, that a post-collision fire does not mean the fuel system is defective, and, most importantly, that *all vehicles* are subject to possible fuel tank breaches and post-collision fires.

There was no evidence that this general risk was greater for the CVPI. Rather, the jury heard undisputed evidence that Ford subjected the CVPI to rear crash testing at 75 m.p.h. with a 50% overlap between the struck and target vehicles, the most severe crash testing in the industry, and the 2005 CVPI passed the test. When the Chevrolet Impala and Dodge Magnum, other

[1] The sending unit (sometimes described as the sender unit or pump sender), which is part of the fuel tank assembly, delivers fuel to the engine and provides information regarding the amount of fuel in the tank. There is an opening in the fuel tank for the insertion of the sending unit. A steel ring with six threaded connections is crimped around this opening and the sending unit is bolted to the ring, securing the connection between the sending unit and the tank.

volume police pursuit vehicles, were subjected to Ford's 75 m.p.h. rear crash test, their fuel tanks were compromised and leaked their entire contents.

Plaintiffs' manufacturing defect theory relied on an interpretation of Ford's engineering specifications to claim that the crimp overlap on the subject fuel tank was too short. But, as the Appellate Court recognized, Ford's specifications contained no dimensional requirement for crimp overlap. *Linert v. Ford Motor Co.*, 7th Dist. No. 2011 MA 00189, slip. op. at ¶¶ 113-115 (Attachment B). Plaintiffs also relied on evidence that in 2007, after the subject CVPI was sold, Ford engineer Jon Olson asked the plant where the fuel tanks were manufactured to check their manufacturing procedures. The engineers confirmed the tanks manufactured before this project met Ford's specifications, but they refurbished the tooling at the plant (the "crimp tooling project") to increase the amount of crimp, to improve the reliability of the manufacturing process, and potentially to improve performance in certain tests known as "burst tests." However, the "longer" crimp did not affect the burst test results. Moreover, Plaintiffs' expert, Aaron Barklage, admitted there was no evidence that fuel tanks with a longer crimp performed better in accidents. Similarly, there was no evidence that the subject CVPI with the "shorter" crimp would not meet Ford's 75 m.p.h. crash test standard. In fact, there was evidence that shorter crimps were actually stronger.

Plaintiffs' post-marketing warning theory was predicated on the change in Ford's manufacturing process, but they failed to present any evidence of the warning that a reasonable manufacturer would have provided in light of the non-existent risk created by a tank that met Ford's engineering specifications. And Plaintiffs presented no evidence that the lack of a post-marketing warning caused Linert's injuries, i.e., there was no evidence that any post-marketing warning would have caused either Linert or his employer to change their behavior in any way.

The Trial Court provided the jury with extensive instructions on the law but did not provide an instruction on post-marketing duty to warn. After fewer than 90 minutes of deliberation, the jury determined that Plaintiffs had failed to demonstrate that the CVPI was defective under *any* of their theories of liability, returning a verdict in Ford's favor. Among other things, the jury expressly rejected Plaintiffs' claims that the CVPI was defectively manufactured and that the CVPI was defective because of a failure to warn.

Plaintiffs moved for new trial, which the Trial Court denied on October 19, 2011. Thereafter, Plaintiffs appealed to the Seventh District Court of Appeals, raising 20 assignments of error. The Appellate Court upheld the bulk of the Trial Court's decision. However, citing definitions of "risk" not found in the relevant statute and relying on Plaintiffs' arguments rather than the evidence, the Appellate Court concluded that the jury should have been instructed on Plaintiffs' theory that Ford failed post-sale to warn of the alleged increased risk of fire due to the shorter crimp. *Id.* at ¶¶ 24-25. The Appellate Court relied solely upon the evidence related to Ford's crimp tooling project, *id.* at ¶ 29, even though there was no evidence of an increased risk of fire based upon different crimp sizes, and even though the jury rejected Plaintiffs' manufacturing defect claim based upon the shorter crimp in the subject fuel tank.[2] The Appellate

[2] The Appellate Court's decision relies almost entirely on a selective review of the testimony of a Ford manufacturing engineer, Steve Haskell. While Haskell admitted his belief that the crimp tooling project made the joint stronger and more robust, he clearly stated: "As far as safer, we've been building safe tanks. We don't build anything that's not safe." Moreover, Haskell made clear that an evaluation of differences in crash performance should be based on crash tests. The Appellate Court recognized there was no evidence regarding the effect of crimp length on crash performance, *Linert* at ¶ 111, but it created a potential post-marketing duty to warn that assumed such a difference existed.

Court ordered a new trial, and remanded for further proceedings on Plaintiffs' post-marketing failure to warn claim only.[3]

## III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: A "risk" that triggers a post-marketing duty to warn under Ohio Revised Code § 2307.76 is not merely any "known danger," but must be a risk about which a reasonable manufacturer would warn in light of the likelihood and likely seriousness of harm.**

A product is defective due to inadequate post-marketing warning or instruction if, at a relevant time after it left the manufacturer's control:

> (a) the manufacturer knew or, in the exercise of reasonable care, should have known about *a risk that is associated with the product* and that allegedly caused harm for which the claimant seeks to recover compensatory damages; [and]
>
> (b) the manufacturer failed to provide the post-marketing warning or instruction that *a manufacturer exercising reasonable care would have provided concerning that risk*, in light of *the likelihood that the product would cause harm* of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

Ohio Rev. Code § 2307.76(A)(2) (emphasis added). The statute's plain language makes clear that the mere existence of *some* risk is insufficient to trigger a post-marketing duty to warn. Instead, a post-marketing duty to warn arises only where there is a risk *about which a reasonable manufacturer would have provided a warning in light of the likelihood and seriousness of harm.* Ohio Rev. Code § 2307.76(A)(2)(b); *see also Brown v. McDonald's Corp.*, 101 Ohio App. 3d 294, 300, 655 N.E.2d 440 (1995) (reversing summary judgment on failure-to-warn claim where there was evidence of a quantifiable risk).

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[3] The Appellate court also found that the trial court erred in (1) refusing to admit evidence of a fire suppression system first introduced by Ford after the sale of Plaintiffs' vehicle, and (2) granting summary judgment on Plaintiffs' claim for punitive damages based on its holding that Michigan law applied to this claim. But the Appellate Court remanded solely for further proceedings on Plaintiffs' post-marketing failure to warn claim, and if this Court agrees that that claim is not viable there will be no further proceedings below and these issues will become moot.

In *Temple v. Wean*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977), this Court made clear – even before the statute was passed – that likelihood of the risk is an important consideration in determining post-marketing duty to warn. The *Temple* Court stated that a manufacturer has a duty to warn about a product's "dangerous propensity," *id.* at 325, meaning that any risk requiring a warning must be more than a remote risk. Thus, it has long been an element of Ohio warning law that the *likelihood* that a risk will actually manifest itself dictates in part whether a reasonable manufacturer would warn of it.

The Appellate Court's decision ignores this element, injects ambiguity into the statute, and requires reversal, for two reasons. First, rather than looking to the statute to define "risk," the Appellate Court adopted a definition from the Black's Law Dictionary, which defined "risk" as a "known danger." *Linert* at ¶ 25. Based upon this definition, it concluded that a jury instruction was warranted because Ford failed to warn of a "known risk." *Id.* In defining "risk" under the statute as a "known risk," and holding that any "known risk" triggers a post-marketing duty to warn, the Appellate Court disregarded the statute and broadened the post-marketing duty to warn far beyond what the General Assembly expressly intended. Indeed, such a definition is so broad that it would encompass even open and obvious risks – "known risks" about which manufacturers long have been relieved of warning. Ohio Rev. Code § 2307.76(B). In this case, there was no evidence that the risk for the CVPI was higher than the risk for other police vehicles – indeed, the crash testing demonstrated the opposite. The only evidence that Plaintiffs submitted regarding risk was the generalized risk that a CVPI could catch fire following a severe rear-end collision, a risk that Plaintiffs' own expert agreed is rare, impossible to fully prevent,

and present in all vehicles. *Linert* at ¶ 130. Imposing a duty to warn of such a generalized and remote risk conflicts with both the language of the statute and relevant case law.[4]

Second, the confusion created by the Appellate Court's opinion regarding post-marketing warning claims could also extend to pre-marketing warning claims. The statutory provisions governing pre- and post-marketing warning claims are substantively identical; both require a risk associated with the product about which a reasonable manufacturer would warn, in light of the likelihood of the risk occurring. Ohio Rev. Code § 2307.76(A)(1) and (2). Here, however, the Appellate Court came to contrary conclusions regarding the viability of Plaintiffs' pre- and post-marketing warning claims even though there was no evidence introduced at trial that Ford's knowledge of the risk of post-collision fires was any different post-sale than pre-sale. The Appellate Court correctly held that, with respect to Plaintiffs' *pre*-marketing warning claim based on the CVPI's fuel tank location, the general, rare risk of a post-collision fire "was not a danger that required warning about." *Linert* at ¶ 130. Yet on Plaintiffs' *post*-marketing warning claim, the Appellate Court determined that this same general risk could be sufficient to require a warning. *Id.* at ¶ 25. In essence, the Appellate Court decided that a post-marketing warning may have been required, even though a pre-marketing warning was not required, and even though Ford's knowledge of the relevant risk was precisely the same pre- and post-sale. The Appellate Court's inconsistent approach is contrary to the intended parallel nature of Ohio Revised Code § 2307.76(A)(1) and (2), and it may lead future courts to either treat pre- and post-marketing duty to warn claims differently or to extend the court's erroneous analysis to pre-marketing duty to warn claims.

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[4] While the Appellate Court also cited *Sapp v. Stoney Ridge Truck Tire*, 86 Ohio App. 3d 85, 98, 619 N.E.2d 1172 (1993), which held that a warning is required only for "unreasonable dangers associated with the product," it did not follow this more stringent standard. *See Linert* at ¶ 25.

In summary, the Appellate Court wrongly sought extra-statutory guidance (from a dictionary) on a statute that clearly provided the information it needed to analyze Plaintiffs' assignment of error. As a result, it created ambiguity in Ohio law, expanded the post-marketing duty to warn in Ohio far beyond what the Ohio General Assembly intended, and erroneously reversed a sound decision by the Trial Court. For these reasons, this Court should accept jurisdiction and reverse.

**Proposition of Law No. 2: A product manufacturer's implementation of a post-marketing product improvement does not trigger a post-marketing duty to warn.**

In support of its holding that the jury should have been instructed regarding post-marketing failure to warn, the Appellate Court cited evidence that Ford reviewed and adjusted its manufacturing process, and increased the length of the crimp, after the sale of the subject CVPI. *Linert* at ¶ 29. The Appellate Court erred in assuming that increasing the length of the crimp actually reduced the risk. In fact, "longer," post-project crimps did not perform any better in burst tests, and other evidence showed that "shorter" crimps were stronger. But even if the Appellate Court's assumption was correct, the mere fact that a manufacturer makes a post-marketing product change that improves the safety of the product cannot be sufficient to establish a post-marketing duty to warn. If it were, all manufacturers would have a duty to warn about all product safety improvements to all of their products. This is not the type of warning that any reasonable manufacturer would provide. Indeed, "[i]f every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, *the burden on product sellers would be unacceptably great*." Restatement (Third) of Torts: Products Liability, § 10 cmt. a (1998) (emphasis added).

Manufacturers should be encouraged to undertake process improvements and make existing products better, not punished for doing so by a rule that triggers a post-marketing duty to

warn, regardless of the risk (or lack thereof) associated with the original design and regardless of the change or improvement's effect on the level of risk associated with the product. The Appellate Court's decision creates such a rule and should be reversed.

**Proposition of Law No. 3: A trial court does not abuse its discretion in refusing to instruct the jury on a claim where the party fails to present evidence on one or more elements of the claim.**

It is well settled that "the trial court will not instruct the jury where there is no evidence to support an issue." *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 591, 575 N.E.2d 828 (1991); *see also Groob v. KeyBank*, 108 Ohio St. 3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, at ¶¶ 46-47, 55-56 (reversing appellate court; trial court properly declined to instruct the jury where the plaintiff failed to introduce evidence on the elements of the claim). "The decision as to whether the evidence supports the giving of a particular instruction is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion." *Davis v. Johnson Controls Battery Group, Inc.*, 6th Dist. No. L-08-1065, 2009-Ohio-2159, at ¶ 40 (citing *State v. Wolons*, 44 Ohio St. 3d 64, 68, 541 N.E.2d 443 (1989)).

In *Tracy v. Merrell Dow Pharm.*, 58 Ohio St. 3d 147, 569 N.E.2d 875 (1991), this Court set forth the standard for abuse of discretion review, holding that an "[a]buse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* at 152; *see also State ex rel. Duncan v. Village of Middlefield*, 120 Ohio St. 3d 313, 2008-Ohio-6200, 898 N.E.2d 952, at ¶ 27; *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St. 3d 254, 256, 662 N.E.2d 1 (1996). A reviewing court applying an abuse of discretion standard may not substitute its judgment for that of the trial court. *Id.*

An appellate court errs when, under an abuse of discretion review, it fails to give due deference to the trial court's ruling. *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 2004-

Ohio-5847, 817 N.E.2d 59, at ¶¶ 11-12. In *Wilson*, this Court reversed and reinstated the trial court's decision where the appellate court failed to apply the abuse of discretion standard and "[r]ather than analyzing whether the trial court's decision was so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias, the appellate court held merely that the trial court 'erred.'" *Id.* (internal quotation marks and citation omitted). The same result is warranted here.

The Trial Court was well within its discretion in deciding not to instruct the jury on post-marketing duty to warn. Plaintiffs' claim suffered from multiple failures of proof:

- Plaintiffs did not propose the warning they claim should have been provided;
- there was no evidence of the warning a reasonable manufacturer would have given concerning the risk in light of the likelihood of the risk causing harm;
- there was no evidence that any vehicle manufacturer provides a warning about the risk of post-collision fire; and
- Plaintiffs failed to demonstrate that an allegedly sufficient warning would have prevented Linert's injuries by changing Linert's or Austintown's behavior.

In reversing, the Appellate Court did not acknowledge any of these missing elements of proof. Instead, it focused solely upon the crimp tooling project, which, as demonstrated above, does not evidence knowledge by Ford that the prior version of the product presented a risk about which a reasonable manufacturer would warn, in light of the likelihood of the risk occurring. But even if it did, the lack of evidence on other essential elements of Plaintiffs' claim demonstrates that the Trial Court's decision was anything but "unreasonable, arbitrary or unconscionable." The Appellate Court clearly deviated from the proper standard of review and substituted its own judgment for that of the Trial Court, as perhaps best demonstrated by its holding, forbidden by

this Court on an abuse of discretion review, that the Trial Court merely "*erred* in refusing to instruct the jury" on the post-marketing warning claim. *Linert* at ¶ 29 (emphasis added).

The decision below thus stands for the proposition that a party is entitled to a jury instruction even when it has failed to come forward with evidence on required elements of its claim. This Court should now take the opportunity to make clear that a jury instruction may only be given on a claim if there is evidence at trial going to all elements of the claim.

**Proposition of Law No. 4: An alleged error during a trial only warrants reversal of the jury's verdict if the error is prejudicial.**

It also should be well settled that an appellate court "will not presume the presence of prejudice" from an error during trial. *Hayward v. Summa Health Sys./Akron City Hosp.*, 139 Ohio St. 3d 238, 2014-Ohio-1913, 11 N.E.3d 243, at ¶ 26. Thus, even if it concludes that a trial court abused its discretion in failing to give a requested jury instruction or in admitting or excluding evidence, an appellate court cannot reverse unless it also concludes that the complaining party was prejudiced. *Kokitka v. Ford Motor Co.*, 73 Ohio St. 3d 89, 93, 652 N.E.2d 671 (1995) (jury instruction); *Rigby*, 58 Ohio St. 3d at 272 (citing Ohio R. Civ. P. 61) (admission or exclusion of evidence). Prejudice means that a party's substantial rights have been materially affected. *Kokitka*, 73 Ohio St. 3d at 93. The reviewing court must find based on the record (1) an error (2) that prejudiced the complaining party to a sufficient degree to warrant a new trial, i.e., that without the error the jury likely would have reached a different verdict. *Hayward*, 2014-Ohio-1913 at ¶¶ 25-26.

The Appellate Court never considered whether Plaintiffs were prejudiced by the lack of an instruction on post-marketing duty to warn. They were not, for at least three reasons. First, Plaintiffs' post-marketing duty to warn claim was based upon Ford's alleged failure to warn, post-sale, of the potential for a manufacturing defect, i.e., a crimp that was too short. But the

jury rejected this theory, eliminating the premise on which this claim was based. While Plaintiffs argued below, and the Appellate Court agreed, that their post-marketing warning claim was based on a "risk" that did not have to rise to the level of a "defect," this argument is merely semantics. The relevant risk is the risk created by a crimp that is too short; by finding that there was no manufacturing defect, the jury necessarily found that the crimp was not too short. Second, to the extent that Plaintiffs' post-marketing theory was based on failure to warn of the more general, remote risk of a post-collision fire, the jury rejected that claim as well when it rejected Plaintiffs' pre-marketing failure to warn theory, so Plaintiffs could not have been prejudiced. *See Peffer v. Cleveland Clinic Found.*, 8th Dist. No. 94356, 2011-Ohio-450, at ¶ 57 (erroneous instruction on proximate cause could not have prejudiced plaintiffs because the jury never reached proximate cause); *Brophey v. Adm'r, Bureau of Workers' Comp.*, 7th Dist. No. 07 MA 24, 2008-Ohio-646, at ¶ 13 (error in a jury instruction "is rendered harmless if the jury's response to interrogatories shows that it was not necessary to reach a decision related to the erroneous instruction."). Finally, as set forth above, Plaintiffs also failed to present evidence to support the remaining elements of the claim, including a proposed warning and proximate cause, so the claim would have failed in any event.

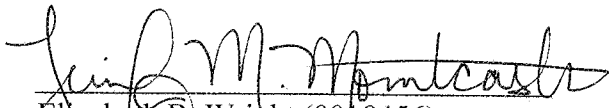
Having heard all the evidence regarding tank location and tank manufacturing and Ford's knowledge of the general risk of fire after severe rear-end collisions, the jury determined that the CVPI was not defective in design, manufacture, or due to failure to warn of the remote risk of a post-collision fire. There simply is no indication that the jury would have reached a different conclusion if instructed on a post-marketing warning claim or if it heard evidence about Ford's fire suppression system. The Court should clarify that there must be prejudice from a failure to

give a jury instruction or the decision to exclude (or admit) evidence, and reverse the decision below for that reason.

## IV. CONCLUSION

For the foregoing reasons, Appellant Ford Motor Company respectfully requests that this Court accept jurisdiction, reverse the Seventh District Court of Appeals' decision, and remand for entry of judgment consistent with the October 19, 2011 Judgment Entry Denying Motion For New Trial of the Common Pleas Court of Mahoning County.

Respectfully Submitted,



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STATE OF OHIO )
)
MAHONING COUNTY ) SS:

IN THE COURT OF APPEALS OF OHIO

SEVENTH DISTRICT

CLERK OF COURTS
MAHONING COUNTY, OHIO
SEP 25 2014
FILED
ANTHONY VINO, CLERK

ROSS J. LINERT ET AL., )
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PLAINTIFFS-APPELLANTS, )
)
V. ) CASE NO. 11 MA 189
)
ADRIEN FOUTZ, ET AL., ) JUDGMENT ENTRY
)
DEFENDANTS-APPELLEES. )

For the reasons stated in the opinion rendered herein, appellants' third, fourth, fifth, sixth, seventh, eighth, ninth and eleventh assignments of error are found to be without merit and are overruled. Appellants' first and second assignments of error are found to be with merit in part and are sustained. Appellant's tenth assignment of error also has merit. It is the final judgment and order of this Court that the judgment of the Common Pleas Court of Mahoning County, Ohio, is affirmed in part and is reversed as to the post-marketing failure to warn claim. The matter is remanded to the trial court for further proceedings on this claim only. The judgment of the Common Pleas Court of Mahoning County granting summary judgment to Ford on appellants' punitive damages claim is also reversed. Ohio law applies to appellants' punitive damages claim. On remand, the trial court is to consider Ohio law when determining whether appellants may present evidence of punitive damages. The judgment is affirmed in all other respects.

Each party to bear their costs.

Gene Donofrio

Joseph J. Vukovich

Mary DeGenaro

JUDGES.

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EXHIBIT
A

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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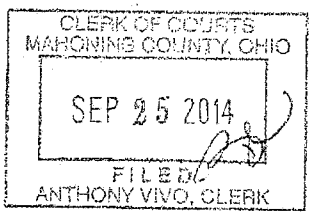
| ROSS J. LINERT ET AL., | ) | |
| | ) | |
| PLAINTIFFS-APPELLANTS, | ) | |
| | ) | CASE NO. 11 MA 189 |
| V. | ) | |
| | ) | OPINION |
| ADRIEN FOUTZ, ET AL., | ) | |
| | ) | |
| DEFENDANTS-APPELLEES. | ) | |

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 2008CV3554

JUDGMENT: Affirmed in part
Reversed and remanded in part




JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 25, 2014

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MEMO

EXHIBIT
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DONOFRIO, J.

**{¶1}** Plaintiffs-appellants, Ross and Brenda Linert, appeal from a Mahoning County Common Pleas Court judgment finding in favor of defendant-appellee, Ford Motor Company, on appellants' product liability and loss of consortium claims, following a jury trial.

**{¶2}** Ross Linert was an Austintown Township Police officer from March 1992, until November 11, 2007. On that day, while driving a 2005 Ford Crown Victoria Police Interceptor (CVPI), Linert was involved in a traffic accident with Adrien Foutz. Linert was travelling at approximately 35 miles per hour (mph). Foutz was travelling at over 100 mph in a Cadillac DeVille when she rear-ended Linert's CVPI.

**{¶3}** The accident caused the CVPI's fuel sending unit to separate from the fuel tank. This resulted in a fire. Linert suffered severe burn injuries to approximately 30 percent of his body.

**{¶4}** Appellants filed a lawsuit against Ford and Foutz. They raised claims against Foutz for negligence and loss of consortium. They raised claims against Ford for product liability, actual malice, and loss of consortium. As to the product liability claim, appellants claimed design defect, manufacturing defect, and failure to warn. These claims centered on the allegation that the fuel tank design, location of the fuel tank in the vehicle, and/or manufacture of the fuel tank was defective and that Ford failed to warn Linert of the defects.

**{¶5}** Prior to trial, the trial court granted Ford's motion for summary judgment on the issue of punitive damages. The court found that Michigan law controlled the issue of punitive damages and barred recovery of such damages.

**{¶6}** The matter proceeded to a two-week jury trial on July 11, 2011. Appellants settled with Foutz just prior to trial. The jury returned a verdict in favor of Ford on all remaining claims. Appellants filed a motion for a new trial, which the trial court denied.

**{¶7}** Appellants filed a timely notice of appeal on November 10, 2011.

**{¶8}** Appellants now raise 11 assignments of error, the first of which states:

THE JURY INSTRUCTIONS GIVEN WERE INCOMPLETE, INCORRECT AND MISLEADING SUCH THAT THE JURY WAS NEVER GIVEN OHIO LAW THAT SUPPORTED A VERDICT FOR THE PLAINTIFF ON THE EVIDENCE BEFORE THEM.

**{¶9}** The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Sicklesmith v. Chester Hoist*, 169 Ohio App.3d 470, 2006-Ohio-6137, 863 N.E.2d 677, ¶62 (7th Dist.). Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶10}** When specific portions of a trial court's instructions are at issue, an appellate court must review the instructions as a whole. *Rinehart v. Maiorano*, 76 Ohio App.3d 413, 418, 602 N.E.2d 340 (6th Dist.1991). We will not consider a single jury instruction in isolation. *State v. Jalowiec*, 91 Ohio St.3d 220, 231, 744 N.E.2d 163 (2001).

**{¶11}** The jury charge should be a plain, distinct, and unambiguous statement of the law as applicable to the case by the evidence presented. *Marshall v. Gibson*, 19 Ohio St.3d 10, 12, 482 N.E.2d 583 (1985). "An inadequate jury instruction that misleads the jury constitutes reversible error." *Groob v. Key Bank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶32.

**{¶12}** Appellants raised objections to all of the issues with the jury instructions that they now take issue with. The trial court overruled their objections. Appellants assert eight separate errors here. We will address them in turn.

**{¶13}** First, appellants argue the trial court failed to properly instruct the jury that the CVPI could be defective because it deviated from Ford's performance standards and instead improperly instructed the jury that appellants' manufacturing defect claim failed unless they proved a deviation from design specifications.

**{¶14}** Appellants' manufacturing defect claim was based on R.C. 2307.74, which provides in pertinent part: "A product is defective in manufacture or

construction if, when it left the control of its manufacturer, it deviated in a material way from the design specifications, formula, *or performance standards* of the manufacturer." (Emphasis added.) The trial court's instruction as to manufacturing defect was as follows:

> Specifically, plaintiffs claim that the crimp overlap used to keep the sending unit attached to the '05 Ford Crown Victoria Police Interceptor's fuel tank failed to meet Ford's design specifications. In order for Plaintiffs to recover against Ford on their manufacturing defect claim, they must prove by a preponderance of the evidence that, one, at the time the '05 Ford Crown Victoria Police Interceptor left Ford's control, the fuel tank deviated in a material way from, A, Ford's design specifications, or, B, otherwise identical units manufactured to the same design specifications; two, that the defect existed at the time the '05 Ford Crown Victoria Police Interceptor left Ford's control; and three, that the defect was the direct and proximate cause of Mr. Linert's injuries.

(Tr. 2627).

**{¶15}** Appellants argue that the performance standards language was critical in this case because there was ample evidence that the CVPI, as manufactured, failed to meet the applicable performance standards, specifically the 75-mph crash testing performed by Ford. They contend that by failing to instruct the jury that a manufacturing defect existed if the CVPI deviated from Ford's performance standards, the trial court improperly narrowed the scope of the jury's inquiry to Ford's design specifications only.

**{¶16}** In reviewing whether sufficient evidence was presented to warrant submitting an issue to a jury, we must determine whether the record contains evidence from which reasonable minds could reach the conclusion sought by the instruction. *Brophey v. Admr. Bureau of Workers' Comp.*, 7th Dist. No. 07-MA-24,

2008-Ohio-646, ¶13.

**{¶17}** In support of their argument, appellants point to the testimony of Richard Cupka, the former leader of the Crown Victoria Interceptor Technical Task Force. Cupka testified that Ford designed and tested the 2005 CVPI to withstand a 75-mph crash with a rear offset of 50 percent to the left by a 3,400-pound midsized vehicle with no punctures to the fuel tank and with no gas leakage. (Tr. 1640-1641). And he stated that Ford advertises this fact on its website and in its brochure. (Tr. 1640; Ex. 682). Cupka explained that a 50 percent offset crash is where the right-hand fender would hit at about the middle of the trunk. (Tr. 1642). Cupka opined that any deformation to the fuel tank would be more severe in an offset crash as opposed to an inline crash, where both vehicles were perfectly lined up. (Tr. 1642).

**{¶18}** But as Ford points out, the testimony demonstrated that Linert's accident did not occur under the same circumstances as the aforementioned crash test. Firstly, Linert's CVPI was not stopped at the time of collision; it was travelling at approximately 35 mph. (Tr. 2040). Secondly, the Cadillac driven by Foutz weighed significantly more than the 3,400-pound midsize vehicle used in the crash test; the Cadillac weighed approximately 4,100 pounds. (Tr. 2042). And thirdly, the Cadillac struck Linert's CVPI at almost a 100 percent overlap, as opposed to the crash test's 50 percent overlap. (Tr. 786).

**{¶19}** Given the fact that the accident occurred under different circumstance than the crash test, the trial court did not err in determining not to instruct the jury that the CVPI was defective if it deviated from Ford's performance standards. There was no evidence that had Linert's CVPI undergone the identical crash test that it would have failed.

**{¶20}** Therefore, appellants' first issue under their first assignment of error lacks merit.

**{¶21}** Second, appellants argue the trial court failed to properly instruct the jury that the CVPI could be defective due to inadequate post-marketing warning or instruction.

**{¶22}** Appellants' claim for inadequate warning was based on R.C. 2307.76(A). This statute provides that a product is defective due to inadequate warning at the time of marketing if, when it left the manufacturer's control, the manufacturer (1) knew or should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages and (2) failed to provide the warning a manufacturer exercising reasonable care would have provided concerning that risk. R.C. 2307.76(A)(1). It also provides a claim for inadequate post-marketing warning which provides that a product is defective due to inadequate post-marketing warning if, at a relevant time after it left the control of its manufacturer, the manufacturer (1) knew or should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages and (2) failed to provide the post-marketing warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk. R.C. 2307.67(A)(2).

**{¶23}** The trial court's jury instruction on failure to warn only stated the elements for inadequate warning at the time of marketing. (Tr. 2629-2630). The court did not instruct the jury on inadequate post-marketing warning.

**{¶24}** Appellants argue the post-marketing duty to warn language was important because without it the jury would ignore the evidence of Ford's post-sale knowledge of the increased risk of fire in the CVPI and/or insufficient crimp on the sender ring and that Ford failed to provide any post-marketing warning or instruction, even though a reasonable manufacturer would have. They assert there was extensive evidence that Ford determined CVPI tanks were being manufactured with insufficient crimp and undertook a Crimp Improvement Project to correct the issue. Yet Ford never passed this information on to the police community. And appellants assert the applicable statute does not require the plaintiff to prove a defect, only a risk. Appellants contend that by failing to instruct the jury on post-marketing warning or instruction, the trial court improperly narrowed the scope of the jury's inquiry to

Ford's pre-sale knowledge only.

**{¶25}** Just because the jury found the CVPI was not defective in manufacture does not mean that appellants' failure to warn claim must fail. A failure to warn claim involves failure to warn of a "risk," not a failure to warn of a "defect." The two terms are not the same. A "manufacturing defect" is "an imperfection in a product that departs from its intended design even though all possible care was exercised in its assembly and marketing." Black's Law Dictionary 174 (Pocket Ed.1996). A "risk," however, is "a known danger to which a person assents, thus foreclosing recovery for injuries suffered." Black's Law Dictionary 554 (Pocket Ed.1996). In a strict products liability case for failure to warn, "the failure to warn of unreasonable dangers associated with the product constitutes the defect." *Sapp v. Stoney Ridge Truck Tire*, 86 Ohio App.3d 85, 619 N.E.2d 1172 (6th Dist. 1993). In this case then, Ford's failure to warn of a known risk associated with the CVPI's fuel tank could constitute a defect. Thus, a jury instruction on post-marketing failure to warn was warranted regardless of the jury's finding on appellant's manufacturing defect.

**{¶26}** Additionally, appellants presented evidence on their post-marketing failure to warn claim. Appellants point to the following evidence in support.

**{¶27}** Ford undertook a Crimp Improvement Project in 2007, to improve the crimp on the sender ring attached to the fuel tank. The tank in Linert's CVPI was manufactured in May 2005. (Tr. 870).

**{¶28}** Steven Haskell, a manufacturing process engineer on the fuel tank assembly line for Ford, testified on the subject. Haskell stated that in January 2007, the design analysis engineer, Jon Olson, approached him to see if there was anything they could do to improve the crimp joint. (Tr. 653-654). Olson testified he had been informed of some "real-world incidents" involving sender unit dislodgements. (Tr. 2254-2255). Haskell proposed to "refurbish the crimp tooling to provide a robust crimp." (Tr. 659). Out of these discussions came the "Crimp Improvement Project." (Tr. 653-654; 2254). Haskell testified Ford was ultimately able to get "more metal folded over the top of the sender ring," approximately a

millimeter to a millimeter and a half. (Tr. 662). Haskell stated that the crimp improvement went into effect in October 2007. (Tr. 662). Prior to that time, Haskell believed the crimp overlap to be approximately three to three-and-a-half millimeters. (Tr. 662-663). Haskell stated that the increase in the crimp overlap made the union of the sender unit and the fuel tank stronger and more robust and, therefore, more crashworthy. (Tr. 663-665).

**{¶29}** Thus, appellants did present evidence to the jury that (1) Ford knew of some incidents of sender unit dislodgements, (2) Ford looked into this issue, and (3) the result was the Crimp Improvement Project whereby Ford increased the crimp on the sender unit, which resulted in a stronger, more robust union of the sender unit to the fuel tank and a more crashworthy vehicle. This was adequate evidence to put appellants' post-marketing failure to warn claim before the jury. Thus, trial court erred in refusing to instruct the jury as to this claim.

**{¶30}** Therefore, appellants' second issue under their first assignment of error has merit.

**{¶31}** Third, appellants argue the trial court failed to instruct the jury that a lack of a TIG weld in place of the crimp on the tank sender ring was a potential design defect.

**{¶32}** Appellants' claim for design defect included several defects, including defective design due to the lack of a TIG weld attaching the sender ring to the fuel tank. As to design defect, the trial court instructed the jury only on appellants' claim that the CVPI was defective in design because of the location of the fuel tank. (Tr. 2619). The court chose not to include an instruction that the lack of TIG welding was a potential design defect.

**{¶33}** Appellants argue they presented evidence that the failure to TIG weld the sender ring to the fuel tank was a design defect. Therefore, they contend the trial court erred by failing to instruct the jury that they could find a design defect based on Ford's failure to TIG weld the sender ring.

**{¶34}** Appellants rely on a few statements by their expert Dr. Eberhardt, a

mechanical engineer and accident re-constructionist, to support their claim here:

> Q You yourself, have you formulated any opinions as to any potential alternative designs for the sender unit itself, for the sender ring attachment?
>
> A Yes, there are alternatives.
>
> Q And what in your opinion is one of those alternatives?
>
> A Well, certainly one of the alternatives is a different kind of locking arrangement, which has been used previously. I think I would point more to other fastening methods. And there could be changes in design. Certainly a smaller ring would have less force. The opportunities of the capabilities of welding, particularly TIG type welding or plug TIG type welding, there are any number of ways. But certainly meeting a large enough crimp is also an approach to this. But as an alternative, there are alternate methods.
>
> Q In your opinion, would a TIG weld on a sending unit be a safer alternative design for this particular attaching mechanism?
>
> A I think it likely would be. I think it's a method that could be tested, and it would be proven in testing or would have to be perhaps perfected in testing.
>
> Q And you haven't did [sic.] that analysis; correct?
>
> A I haven't done that, no.

(Tr. 905-906).

**{¶35}** Dr. Eberhardt testified he performed no analysis of a TIG weld design and that the method would have to be tested. Dr. Eberhardt's TIG weld theory is speculation, not evidence. Thus, there was no evidence that a TIG weld would have prevented Linert's injuries and a jury instruction on the TIG weld was not warranted.

**{¶36}** Therefore, appellants' third issue under their first assignment of error lacks merit.

**{¶37}** Fourth, appellants argue the jury instructions improperly used the federal regulations as "limitations" and "constraints" on Ford's ability to build a safer vehicle rather than as minimum standards.

**{¶38}** The court instructed the jury:

> A Federal Motor Vehicle Safety Standard is a *minimum standard* for motor vehicle performance as set forth in Instruction Number 22. Conformity with any Federal Motor Vehicle Safety Standard is just one factor to consider when determining the foreseeable risks of the design of the product. Such evidence, however, is not conclusive that a product is defective.
>
> Design defect, compliance with Federal Motor Vehicle Safety Standards. Applicable Federal Motor Vehicle Safety Standards imposed specific *limitations* and *requirements* on the design and performance of the fuel tank of the '05 Ford Crown Victoria Police Interceptor. * * *
>
> Ford could not legally sell a passenger vehicle that did not meet the requirements of the Federal Motor Vehicle Safety Standards. In determining whether the fuel system of the '05 Ford Crown Victoria Police Interceptor was defective, you must take into account any such regulatory *constraints* that you find were imposed on Ford's ability to design the fuel system differently.

(Tr. 2624-2625; Emphasis added.)

**{¶39}** Appellants contend that this instruction could have misled the jury into thinking that compliance with federal regulations might excuse an otherwise defective product. They assert there was no evidence that federal regulations prevented Ford from altering or avoiding the defects they claimed.

**{¶40}** We have held that even if the trial court erroneously instructs the jury with respect to an issue, the error is harmless if the jury's responses to

interrogatories show it was not necessary to reach a decision related to the erroneous instruction. *Brophey*, 2008-Ohio-646, ¶13. Here, in response to Interrogatory 1, the jury found that Linert failed to prove by a preponderance of the evidence that when the CVPI left Ford's control there was a practical and technically feasible alternative design for the fuel tank location that would have prevented his injuries. This was the first element of appellants' design defect claim. Because the jury found appellants did not meet the first element of their design defect claim, they never moved on to reach the issue of foreseeable risks with the design, which is the focus of the instruction at issue.

**{¶41}** Furthermore, appellants fail to consider the first paragraph quoted above where the court instructed the jury that the Federal Motor Vehicle Safety Standard is a minimum standard for motor vehicle performance and that conformity with any Federal Motor Vehicle Safety Standard is just one factor to consider when determining the foreseeable risks of the design of the product. We must construe jury instructions as a whole. In doing so, the court properly conveyed the message to the jury that Federal Motor Vehicle Safety Standards are only a minimum standard and that these standards were but one factor to weigh in reaching their decision.

**{¶42}** Therefore, appellants' fourth issue under their first assignment of error lacks merit.

**{¶43}** Fifth, appellants argue that the jury instructions improperly included an interrogatory as to whether they believed there was a "practical and technically feasible alternative design as to fuel tank location." (Interrogatory 1). Appellants argue this interrogatory was redundant because the existence of such an alternative design was an element of their design defect claim. They claim they were prejudiced by the interrogatory because it required the jury, in order to find in appellants' favor, to make the same finding twice.

**{¶44}** A trial court must submit properly drafted interrogatories to the jury. *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St.3d 611, 613, 635 N.E.2d 310 (1994). But the court retains discretion to reject interrogatories that are inappropriate in form

or content. *Id.* "A court may reject a proposed interrogatory that is ambiguous, confusing, redundant, or otherwise legally objectionable." *Id.* citing, *Ramage v. Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97, 592 N.E.2d 828 (1992), paragraph three of the syllabus.

**{¶45}** Interrogatory 1 asked whether Linert proved "by preponderance of the evidence that, when the 2005 Crown Victoria Police Interceptor left Ford's control, there was a practical and technically feasible alternative design for the fuel tank location that would have prevented his injuries?" The jury found he did not. And R.C. 2307.75(F) provides:

> A product is not defective in design or formulation if, at the time the product left the control of its manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover compensatory damages without substantially impairing the usefulness or intended purpose of the product.

Interrogatory 1 tracks the language of the statute and, therefore, is a correct statement of the law.

**{¶46}** Furthermore, the trial court did not abuse its discretion in submitting Interrogatory 1 to the jury. Interrogatory 1 presented a clear question going to one of the elements of appellants' design defect claim and asked the jury whether appellants met that element.

**{¶47}** Therefore, appellants' fifth issue under their first assignment of error lacks merit.

**{¶48}** Sixth, appellants argue that Instruction 29 erroneously required the jury to evaluate whether Linert would have acted in the same manner had Ford given a proper warning when, under the law, it is presumed that a proper warning would have been read and heeded.

**{¶49}** Instruction 29 stated in part:

> In determining whether an inadequate instruction proximately caused Mr. Linert's injuries, you should consider whether Mr. Linert would have acted in the same manner had a proper instruction been given. If he would have acted in the same manner in light of a proper instruction, the inadequate instruction cannot be said to be a proximate cause of his injuries.

(Tr. 2632-2633).

**{¶50}** Appellants argue that under Ohio law there is a presumption that an adequate warning will be heeded. Citing, *McConnell v. Cosco, Inc.*, 238 F.Supp.2d 970, 978 (S.D.Ohio 2003); *Hisrich v. Volvo*, 226 F.3d 445, 451 (6th Cir.2000).

**{¶51}** In this case, Interrogatory 6 asked: "Has Plaintiff, Ross J. Linert proven by a preponderance of the evidence that the Defendant, Ford's product was defective for failure to warn or failure to adequately warn?" The jury answered, "no."

**{¶52}** Thus, whether the trial court's instruction regarding whether Linert would have acted in the same manner had Ford given a proper warning was erroneous or is not relevant here. The jury never reached this issue because it found appellants did not prove that Ford failed to warn in this case.

**{¶53}** Therefore, appellants' sixth issue under their first assignment of error lacks merit.

**{¶54}** Seventh, appellants argue the jury instructions failed to properly instruct on proximate cause by suggesting there could only be one proximate cause of injury, by repeatedly using the undefined term "direct cause," and by emphasizing proximate cause through needless repetition.

**{¶55}** Instruction 26 required the jury to find, as the third element of appellants' manufacturing defect claim, "that the defect was *the* direct and proximate cause of Mr. Linert's injuries." (Tr. 2627; Emphasis added.)

**{¶56}** Appellants assert that by suggesting to the jury that Ford had to be the only proximate cause of Linert's injuries, Instruction 26 made it impossible for the jury to find in appellants' favor on its manufacturing defect claim. This is because the

case involved not only an allegedly defective product, but also a drunk driver travelling at a high rate of speed who crashed into Linert. Thus, appellants claim the instruction should have been worded so that the jury understood there could be more than one proximate cause.

**{¶57}** Additionally, appellants claim the trial court should not have used the word "direct" cause. They point out that the court did not define the term "direct" and it left the jury with the impression that they had to find that a defect with the CVPI was both the direct cause and the proximate cause of Linert's injuries, which is not required by R.C. 2307.73, et seq.

**{¶58}** And appellants assert the trial court singled out proximate cause by repeating this element as to each claim instead of instructing on it once and then telling the jury that it applied to each claim.

**{¶59}** The jury never reached the issue of proximate cause. So, once again, appellants cannot show prejudice resulting from the instructions on proximate cause. In Interrogatory 1, the jury found that appellants did not prove by a preponderance of the evidence that when the CVPI left Ford's control there was a practical and technically feasible alternative design for the fuel tank location that would have prevented Linert's injuries. In Interrogatory 4, the jury found appellants did not prove by a preponderance of the evidence that Ford's product was defective in manufacture. And in Interrogatory 6, the jury found appellants did not prove by a preponderance of the evidence that Ford's product was defective for failure to warn or failure to adequately warn. Given these findings, the jury never moved on to the proximate cause question.

**{¶60}** Therefore, appellants' seventh issue under their first assignment of error lacks merit.

**{¶61}** Eighth and finally, appellants argue the jury instructions unnecessarily emphasized their burden of proof by repeating "preponderance of the evidence" 22 times in 71 pages of instructions. They claim material prejudice as a result.

**{¶62}** This case dealt with many complex issues and several different claims.

The court explained the elements of the claims. It instructed the jury numerous times regarding preponderance of the evidence. But this was a correct statement of the law. The court never used the phrase incorrectly nor did it ever indicate that appellants' burden of proof was anything else. Nothing in the court's instructions implies that appellants' burden of proof was greater than proof by a preponderance of the evidence.

**{¶63}** Moreover, appellants seem to argue that using the "preponderance of the evidence" phrase 22 times was prejudicial. But the court used this phrase seven out of those 22 times simply in defining what it meant in less than two pages of instructions. (Tr. 2603-2604). Thus, the court used the phrase just 15 other times in 69 pages of instructions. This was not unreasonable or prejudicial given the length of the instructions.

**{¶64}** Therefore, appellants' eighth issue under their first assignment of error lacks merit.

**{¶65}** In sum, appellants' second issue for review, dealing with the trial court's failure to give a jury instruction on post-marketing failure to warn, has merit. Therefore, appellants' first assignment of error has merit as it pertains to that issue.

**{¶66}** Appellants' second assignment of error states:

> THE TRIAL COURT ERRED IN INCLUDING AND EXCLUDING CERTAIN EVIDENCE AT TRIAL TO THE PREJUDICE OF THE PLAINTIFFS.

**{¶67}** In this assignment of error, appellants take issue with three evidentiary rulings.

**{¶68}** The decision to admit or exclude evidence rests in the trial court's sound discretion and we will not reverse its decision absent an abuse of that discretion. *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 437, 715 N.E.2d 546 (1999).

**{¶69}** "Relevant evidence" is evidence that has a tendency to make the

existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. Generally, all relevant evidence is admissible. Evid.R. 402.

**{¶70}** First, appellants argue the trial court erred in overruling their objection to the admission of the National Highway Traffic Safety Administration (NHTSA), Office of Defects (ODI) report. (D.Ex. 154).

**{¶71}** The NHTSA report detailed an investigation into "fuel leaks following rear impact crashes in MY [model year] 1992-2001 Ford Crown Victoria, Lincoln Town Car and Mercury Marquis vehicles." The investigation was opened "following reports from several law enforcement organizations regarding the potential for fuel leaks and fires in Crown Victoria Police Interceptor (CVPI) following rear impact crashes" and in response to a technical service bulletin issued by Ford. The report made several findings: (1) the subject vehicles met the federal motor vehicle safety standard for fuel system integrity; (2) almost all of the post-crash fuel leaks occurred in very high-speed incidents with crash energies far exceeding those generated by the safety standard test; (3) no single factor contributed to the post-crash fuel leaks in the CVPIs; and (4) there have been numerous high-energy rear crashes in CVPIs with little or no fuel loss. Based on these findings, the report indicated that the ODI closed the investigation but would continue to monitor the vehicles' performance.

**{¶72}** Appellants assert the report did not reference the 2005 CVPI and, therefore, it was irrelevant. They further contend the NHTSA ODI investigation was irrelevant because NHTSA's decision to close the CVPI investigation is not a governmental finding that the CVPI is not defective. Because the report is not a finding of "no defect," appellants contend it was not proper impeachment material because it did not contradict anything the witness had said. By admitting the report, appellants argue, the court invited the jury to believe that a government agency had determined the CVPI to be safe when it had not.

**{¶73}** The NHTSA report was not admitted into evidence but was used by Ford's counsel to cross examine appellants' expert, Mark Arndt, an engineer who

specializes in the investigation of motor vehicle crashes. (Tr. 1454-1471).

**{¶74}** On direct examination, Arndt testified that part of the foundation for his opinions in this case was based on his review of rear impact crashes of the CVPI, including crashes that occurred in the mid-1990's and later. (Tr. 1403-1404). He opined that in 50-mph crash tests the fuel tank would start to get damaged and pushed forward. (Tr. 1405). And in 75-mph crash tests the fuel tank gets crushed from the front and the back due to its location in the primary crush zone. (Tr. 1405). Additionally, Arndt presented a database he compiled of incidents involving Ford vehicles with vertical behind-the-axle tanks involved in rear impact collisions where there was either fuel leakage or a fire. (Tr. 1423-1427; P.Ex. 681). Arndt's database included vehicles from 1980 through 2005. (P.Ex. 681).

**{¶75}** Based on Arndt's direct testimony, he opened the door for Ford to cross examine him using a report studying model years 1992 to 2001. These model years were reviewed by Arndt and helped to form the basis of his expert opinion. These model years were also admitted into evidence and presented to the jury in the form of Arndt's database of similar incidents. Thus, appellants opened the door to using information regarding model years other than 2005.

**{¶76}** Additionally, there was no testimony or suggestion that the NHTSA report was a governmental finding of "no defect." Arndt simply agreed that the report stated that based on its findings, ODI closed the investigation but would continue to monitor the performance of the vehicles. (Tr. 1471). The words "no defect" were never used.

**{¶77}** Thus, the trial court did not abuse its discretion in allowing Ford to cross examine Arndt using the NHTSA ODI report.

**{¶78}** Second, appellants contend the trial court improperly excluded a March 4, 2002 letter from Arizona Attorney General Janet Napolitano to Ford's president and CEO, expressing her concern regarding the safety of CVPIs for use by Arizona law enforcement officers. (P.Ex. 707). The letter requested, in part, that Ford initiate a series of 75-mph crash tests to determine the CVPI's performance under real world

law enforcement conditions. (P.Ex. 707).

**{¶79}** Appellants state they offered the letter to show that Ford knew about Arizona's complaints about the CVPI's rear collision fires and to shed light on Ford's "true reason" for adopting the 75-mph crash testing.

**{¶80}** Appellants sought to introduce the letter in order to show Ford had notice that roadways have speed limits of up to 75 mph, that it should be anticipated that impacts at 75 mph will occur, and that the CVPIs should not catch fire. (Tr. 64). They argued the letter proved Ford was put on notice that these circumstances were foreseeable. (Tr. 71). In response, Ford argued the letter was hearsay and was drafted by a plaintiff's lawyer.

**{¶81}** In excluding the letter, the court inquired of appellants' counsel why they needed Janet Napolitano to put Ford on notice that vehicles travel at 75 mph and that accidents occur at this speed. (Tr. 71). It pointed out that this should be known by "the man on the street." (Tr. 71).

**{¶82}** The trial court acted within its discretion in excluding the letter. The court thought the reason put forth by appellants as to why they wanted to introduce the letter was common knowledge.

**{¶83}** Additionally, as Ford points out, appellants put forth evidence that Ford adopted the 75-mph crash test. (Tr. 1636-1641). And the reason Ford selected 75 mph was because it focused on the situation where a police cruiser is pulled over to the side of a highway and those vehicles on the highway are typically travelling at 70 to 75 mph. (Tr. 1638). Additionally, there was testimony that the state of Arizona had been critical of Ford police cars and Napolitano had invited Ford to work in a collaborative effort to come up with some solutions regarding fuel system integrity. (Tr. 1646-1647). Thus, appellants were able to present most of the same information to the jury that they had hoped to do with Napolitano's letter.

**{¶84}** Thus, the trial court did not abuse its discretion in excluding Napolitano's letter.

**{¶85}** Third, appellants contend the trial court improperly excluded evidence

that, subsequent to the sale of the subject CVPI, Ford offered a fire suppression system on the CVPIs. They claim this was evidence Ford was aware of the risk of fire and was taking action to reduce the risk on future CVPIs but ignored its post-marketing duty to warn those like Linert who were already driving a CVPI.

**{¶86}** Appellants sought to introduce testimony through the deposition of Richard Cupka, Jr., the former leader of the CVPI Technical Task Force, that Ford designed and put in place a fire suppression system on CVPIs, which it started to design before Linert's accident and which became available after Linert's accident. They wanted to introduce this testimony for two purposes: (1) to show the 2005 CVPI was defectively designed because it did not include a fire suppression system; and (2) to show Ford knew of the risk of fire in the CVPIs. (Tr. 1628-1629). The court excluded this testimony because appellants could not provide any expert testimony as to proximate cause, i.e., if a fire suppression system would have been in Linert's CVPI, it would have prevented the fire and his injuries. (Tr. 1632).

**{¶87}** Appellants admitted they did not have an expert who would testify that if Linert's CVPI had contained a fire suppression system, his injuries would have been prevented. (Tr. 93, 95, 1630-1631).

**{¶88}** The trial court may have had a reasonable basis on which it excluded appellants' testimony on the fire suppression system. If appellants could not offer any proof that a fire suppression system would have prevented Linert's injuries, then testimony regarding a fire suppression system would be irrelevant. Evidence that is not relevant is not admissible. Evid.R. 402.

**{¶89}** But the trial court failed to consider the other purpose for which appellants offered the evidence of the fire suppression system, which was to show that Ford had notice of a potential fire risk in the CVPI. This knowledge was an element of appellants' failure to warn claim and post-marketing warning claims. To prevail on either of those claims, appellants had to prove that Ford knew or should have known about a risk that associated with the CVPI that allegedly caused Linert's burn injuries. R.C. 2307.67(A).

**{¶90}** Cupka stated in his deposition that the Technical Task Force was formed in 2002. (Cupka dep. 10-11). He stated the Technical Task Force developed the fire suppression system "as an additional safety measure in the event of a high-speed high-energy rear crash" to reduce the likelihood of injury to police officers. (Cupka dep. 10, 16). Cupka also stated they were performing crash tests on the fire suppression system in 2004. (Cupka dep. 46-47).

**{¶91}** Evidence of Ford's pursuit of the fire suppression system as early as 2002, was relevant to appellants' failure to warn claims. As appellants assert, this evidence could demonstrate that Ford was cognizant of the risk of fires in high-speed, high-energy, rear-impact crashes. This evidence was relevant for this purpose. Relevant evidence is generally admissible. Evid.R. 402.

**{¶92}** Because the fire suppression evidence was relevant and because it went directly to one of the elements appellants had to prove, the trial court abused its discretion in excluding this evidence.

**{¶93}** Based on the above discussion, appellants' second assignment of error has merit as it relates to evidence of the fire suppression system.

**{¶94}** Appellants' third assignment of error states:

> THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS TO PLAINTIFFS' MANUFACTURING DEFECT CLAIM AND ITS INADEQUATE WARNING CLAIM.

**{¶95}** Appellants argue here that the jury's verdict was against the manifest weight of the evidence as to its manufacturing defect claim and its inadequate warning claim. They do not assert that the jury's verdict in favor of Ford on their design defect claim was against the weight of the evidence.

**{¶96}** Judgments supported by some competent, credible evidence going to all the material elements of the case must not be reversed, as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. See, also, *Gerijo, Inc. v. Fairfield*, 70 Ohio

St.3d 223, 226, 638 N.E.2d 533 (1994). Reviewing courts must oblige every reasonable presumption in favor of the lower court's judgment and finding of facts. *Gerijo*, 70 Ohio St.3d at 226, 638 N.E.2d 533, (citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77 [1984]). In the event the evidence is susceptible to more than one interpretation, we must construe it consistently with the lower court's judgment. *Id.* In addition, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *Kalain v. Smith*, 25 Ohio St.3d 157, 162, 495 N.E.2d 572 (1986).

**{¶97}** As to the manufacturing defect claim, appellants contend there was no legitimate factual dispute that the crimp overlap at issue degraded and changed over time, specifically they assert the crimp overlap in Linert's CVPI had much less overlap than Ford originally planned. For support, appellants point to Ford's Engineering Specifications (P.Ex. 111) and to their experts' testimony that tanks manufactured during the timeframe of Linert's CVPI had significantly less overlap than the Engineering Specifications called for.

**{¶98}** Additionally, appellants assert that it was clear from the accident that the fuel tank in Linert's CVPI deviated from the performance standards applicable to the vehicle (even though the trial court declined to give a jury instruction on this issue). Appellants point to repeated testimony about the 75-mph crash test. And they note that the closing speed in the accident here did not exceed 75 mph. Appellants argue that if Linert's CVPI had not deviated from the 75-mph performance standard, he would not have suffered the burns that he did.

**{¶99}** In order to prove their manufacturing defect claim, appellants had to prove that (1) the CVPI was defective in manufacture, (2) the defect was the proximate cause of the harm for which they sought to recover compensatory damages, and (3) Ford "designed, formulated, produced, constructed, created, assembled, or rebuilt" the CVPI that was the cause of Linert's harm. R.C. 2307.73(A). Pursuant to R.C. 2307.74:

A product is defective in manufacture or construction if, when it left the

> control of its manufacturer, it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer, or from otherwise identical units manufactured to the same design specifications, formula, or performance standards. A product may be defective in manufacture or construction as described in this section even though its manufacturer exercised all possible care in its manufacture or construction.

**{¶100}** We must examine the evidence in order to determine whether the jury's verdict was supported by competent, credible evidence.

**{¶101}** Appellants' first argument as to the manufacturing defect claim is that the evidence was clear that Linert's fuel tank did not meet Ford's specification set out in Plaintiff's Exhibit 111.

**{¶102}** Plaintiff's Exhibit 111 is a document produced by Ford titled "Engineering Specification" (Specification) for the fuel tank and sender attachment in the 2005 CVPI. The Specification requires that the unit is assembled so that the (1) entire perimeter is crimped and (2) the crimp does "not exceed boss height." The Specification does not include a dimensional requirement for the crimp overlap.

**{¶103}** Ford design analysis engineer, Jon Olson, testified that there is no specific dimensional requirement for the crimp. (Tr. 2174). He stated the Specification requires that the crimp not exceed the boss height. (Tr. 2176). And he stated the other requirement is that the crimp must be around the entire perimeter. (Tr. 2174). Olson stated that on May 2, 2005, the day Linert's tank was manufactured, the manufacturing process that included daily checks and end-of-the-line tests was in place. (Tr. 2199-2200). He testified that the tanks that left production that day met Ford's dimensional and tolerance requirements and specifications. (Tr. 2200).

**{¶104}** Appellants' accident reconstruction expert, Dr. Allen Eberhardt, testified that because the drawing on the Specification did not include dimensions, he used the drawing to calculate the minimum crimp overlap. (Tr. 888-890). Dr.

Eberhardt testified that, according to his calculations, the Specification required at least a 4.5 millimeter overlap. (Tr. 899-890).

**{¶105}** Another of appellants' experts, mechanical engineer Gary Johnson, testified that when a drawing does not give a specific value, an engineer uses known dimensions to calculate the value he or she is looking for. (Tr. 710). Johnson examined the Ford drawing that did not contain a value for the crimp overlap. (Tr. 707-710; P.Ex. 642). In making the calculation in this case, Johnson determined that the crimp overlap on Ford's drawing was 4.3 millimeters. (Tr. 711).

**{¶106}** Ford points out that both Dr. Eberhardt and Johnson conceded that the Specification did not contain a dimensional requirement for the crimp overlap. (Tr. 926, 709). Additionally, Olson disagreed with Dr. Eberhardt's calculations, noting that "scaling" the drawing was in violation of Ford's drafting and design standard. (Tr. 1707, 1710-1711).

**{¶107}** Appellants also presented evidence that other tanks manufactured during the same time frame as Linert's CVPI had much less crimp overlap. Linert's tank was manufactured on May 2, 2005. (Tr. 871). Aaron Barklage, an engineer specializing in failure analysis, performed x-rays of various fuel tanks in order to measure the crimp overlap on the sender units. The tanks that Barklage x-rayed and measured could be broken into three categories.

**{¶108}** First, the tanks manufactured before 2005, had the following crimp overlaps: 1998 tank (2.74 mm); 1998 tank (2.85 mm); 1998 tank (2.35 mm); and 2004 tank (2.56 mm). (Tr. 558-560). Thus, the crimp overlap on the pre-2005 tanks examined by Barklage exceeded 2 millimeters but was less than 3 millimeters.

**{¶109}** Second, the tanks manufactured in 2005, the same year as Linert's tank, had the following crimp overlaps: 1.94 mm, 1.61 mm, 1.52 mm, 1.40 mm, 1.58 mm, 1.40 mm, 1.72 mm, 1.73 mm, 1.35 mm, 1.45 mm, 1.35 mm, and 1.26 mm. (Tr. 560-566). Thus, the crimp overlap on the 2005 tanks examined by Barklage exceeded 1 millimeter but was less than 2 millimeters. The 2005 tanks examined by Barklage were all manufactured between February and June 2005. (Tr. 560-566).

**{¶110}** Finally, the tanks manufactured in 2007 and 2008, had the following crimp overlaps: 2007 tank (4.45 mm); 2008 tank (3.76 mm); and 2008 tank (3.79 mm). (Tr. 566-567). Thus, the crimp overlap on the 2007-2008 tanks examined by Barklage exceeded 3.5 millimeters.

**{¶111}** On cross examination, Barklage stated he could not tell the jury how an additional length of crimp would correlate to what a fuel tank would do under pressure in an accident. (Tr. 598).

**{¶112}** Appellants also put forth evidence regarding Ford's "Crimp Improvement Project." Steven Haskell, a Ford manufacturing engineer on the fuel tank assembly line, testified that the Crimp Improvement Project was undertaken during 2007, in an effort to improve the crimp at the sender opening. (Tr. 653-656). The project was aimed to "refurbish the crimp tooling to provide a robust crimp." (Tr. 659). Haskell stated that ultimately Ford was able to get more metal folded over the top of the sender ring, approximately 1 to 1.5 millimeters. (Tr. 662-663). Haskell believed that before the Crimp Improvement Project the crimp overlap was around 3 millimeters. (Tr. 662). However, he stated that this measurement was not "specced" on the print. (Tr. 663). Haskell opined that increasing the crimp made it more "crashworthy." (Tr. 665).

**{¶113}** The focus of appellants' claim here is that Linert's tank did not meet Ford's design specification, which they claim to be that the crimp overlap was required to be 4.5 millimeters. The problem with this argument, however, is that it fails to take into consideration the testimony to the contrary. Ford's Specification does not include a dimension for the crimp overlap. Appellants' experts admitted this. And while appellants' experts claimed to have calculated that the Specification required a crimp overlap of 4.3 to 4.5 millimeters, Olson testified that coming up with such a dimension when one is not provided on the specification is against Ford policy. Olson stated, and the Specification demonstrated, that Ford did not provide a dimensional specification for the crimp overlap, it only provided that the crimp must go around the entire perimeter and it must not exceed boss height.

**{¶114}** Additionally, the evidence of the various crimp measurements put forth by Barklage was a very small sampling. Only four tanks were examined from the years 1998 to 2004. And only three tanks were examined from the years 2007 to 2008. Twelve tanks were examined from 2005. It would be difficult for the jury to draw broad conclusions or make any comparison between the 2005 tanks and the other tanks based on this limited sampling.

**{¶115}** In order to prove a manufacturing defect, appellants had to prove that when Linert's CVPI left Ford's control, it deviated in a material way from the design specifications. Because there was competent, credible evidence that the fuel tank did not deviate from the design specifications, the jury's verdict was not against the manifest weight of the evidence in this regard.

**{¶116}** Appellants' second argument as to the manufacturing defect claim is that the evidence demonstrated Linert's CVPI deviated from the performance standards applicable to the vehicle, specifically the 75-mph crash test, although they note that the trial court refused to give the jury an instruction to this effect.

**{¶117}** Appellants' accident reconstruction expert, Ronald Kirk, testified that the closing speed at the time of impact was approximately 70 to 75 mph. (Tr. 804). He reached this number based on his calculations that Linert was travelling at approximately 30 to 35 mph and Foutz was travelling at approximately 100 to 110 mph at the time of impact. (Tr. 804).

**{¶118}** As discussed in appellants' first assignment of error, Richard Cupka testified that Ford designed and tested the 2005 CVPI to withstand a 75 mph crash with a rear offset of 50 percent to the left by a 3,400-pound midsized vehicle with no punctures to the fuel tank and with no gas leakage. (Tr. 1640-1641). A 50 percent offset crash is where the right-hand fender would hit at about the middle of the trunk. (Tr. 1642). Cupka opined that any deformation to the fuel tank would be more severe in an offset crash as opposed to an inline crash, where both vehicles were perfectly lined up. (Tr. 1642).

**{¶119}** Ford's expert, accident reconstruction engineer Steven Fenton, opined

that Linert's accident did not occur under the same circumstances as the aforementioned crash test. He noted, importantly, that Linert's CVPI was not stopped at the time of collision; it was travelling at approximately 35 mph. (Tr. 2040). Additionally, he noted that Foutz's Cadillac weighed significantly more than the 3,400-pound midsize vehicle used in the crash test; the Cadillac weighed approximately 4,100 pounds. (Tr. 2042).

**{¶120}** Additionally, Kirk testified that the offset in the Linert crash was offset roughly six inches to the right, so it was almost a 100 percent overlap, as opposed to the crash test's 50 percent overlap. (Tr. 786).

**{¶121}** Given the significant differences between Ford's crash test conditions and the conditions of the Linert/Foutz crash, it is a reasonable conclusion that Linert's CVPI did not deviate from Ford's performance standards because Ford did not have a standard in place for a crash involving one car traveling at 35 mph and the other car, weighing over 4,000 pounds, travelling at over 100 mph with a nearly 100 percent overlap.

**{¶122}** Moreover, because the trial court did not instruct the jury on this specific claim, as discussed in appellants' first assignment of error, the jury's verdict could not have been against the manifest weight of the evidence because it never reached this issue.

**{¶123}** As to the inadequate warning claim, appellants assert that they presented "a mountain" of evidence showing that Ford knew that the location of the fuel tank was a problem in the CVPI and Ford's corporate representative admitted that he did not understand the only warning ever given. Appellants point to the testimony regarding the history of the fuel tank in Ford vehicles. They further point to testimony that every new platform vehicle built by Ford since 1981 has located the fuel tank forward of the rear axle except for the CVPI. And the 2005 CVPI was the only police vehicle produced by any manufacturer that has a vertical behind-the-axle fuel tank location and the only Ford vehicle manufactured at the time with a behind-the-axle fuel tank.

**{¶124}** Additionally, appellants point out that after the sale of Linert's CVPI, Ford continued to acquire knowledge of the fire risk. They point to evidence of the Crimp Improvement Project, which appellants claim was undertaken by Ford to improve the precise manufacturing defect they claimed. This evidence goes to appellants' claim on post-sale failure to warn, which the trial court refused to instruct the jury on.

**{¶125}** According to R.C. 2307.76(A)(1), in order to prove that the CVPI was defective due to inadequate warning at the time of marketing, appellants had to prove:

> (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;
>
> (b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

**{¶126}** According to R.C. 2307.76(A)(2), in order to prove that the CVPI was defective due to inadequate post-marketing warning appellants had to prove the same elements except that instead of proving that Ford failed to provide the warning, they had to prove that Ford failed to provide the post-marketing warning that a manufacturer exercising reasonable care would have provided concerning the risk.

**{¶127}** In support of their claim for inadequate warning at the time of marketing, appellants point to the following evidence.

**{¶128}** Michael Harrigan, Sr., a Ford fuel systems technical specialist, testified that over the years there have been observations that the potential loss of

integrity of the fuel system could be improved by moving the tank from one place to another in the vehicle. (Tr. 1690-1691). Jack Ridenour, a retired Ford automotive engineer, acknowledged a Ford document stating that by 1989, Ford's preferred practice was to locate fuel tanks forward of the axle in the "midship" location. (Tr. 2398-2399; P.Ex. 706). Ridenour further stated that in the United State, on every new platform at Ford the fuel tank has been placed forward of the axle. (Tr. 2401). Ridenour testified that as of 2005, the CVPI was the only vehicle manufactured for police use with a vertical, behind-the-axle fuel tank location. (Tr. 2403-2404). This was despite the fact that Ford was aware police vehicles are a thousand times more likely to be involved in a high-speed, rear-impact crash. (Tr. 1639).

**{¶129}** Ford, however, points to the following evidence in support of the jury's verdict in its favor on appellants' inadequate warning at the time of marketing claim.

**{¶130}** Appellants' expert crash investigator, Arndt, testified that the risk of rear-end, post-collision fire for police vehicles is rare. (Tr. 1437). Arndt also agreed that there is no fuel system that will guarantee no leaks will occur in a high-speed, rear impact; no car has a leak-proof or fire-proof fuel system; you cannot design a fuel system to survive every crash or eliminate all risks; no matter how solid the design, there will be accidents where the fuel system is punctured or compromised; a puncture or compromise does not mean the fuel system is defective; a fire that results from such a compromise does not mean the fuel system is defective; and there is a risk and possibility that exists with all vehicles, regardless of where the fuel tank is located, for post-collision fire. (Tr. 1437-1440).

**{¶131}** Additionally, Ridenour testified regarding the heavy-duty, commercial-use type of frame surrounding and protecting the CVPI's fuel tank. (Tr. 2279-2286, 2292). Ridenour also testified that Linert's CVPI met Ford's 75-mph crash test with a 50 percent rear offset to the right. (Tr. 2297-2299). The 75-mph crash test was implemented by Ford when taking into consideration that police vehicles often stop on the right side of the shoulder of a high-speed road. (Tr. 2297-2299). Ridenour stated that Ford was the only manufacturer of police vehicles to implement this 75-

mph crash test. (Tr. 2299-2300). In fact, he stated that when the Chevrolet Impala and Dodge Magnum, both with forward-of-the-axle fuel tanks, were submitted to Ford's 75-mph crash test they failed. (Tr. 2301-2305).

**{¶132}** Ford presented competent, credible evidence to support the jury's finding on appellants' inadequate warning at the time of marketing claim. Ford presented evidence that there was no danger to warn regarding the placement of the fuel tank in the CVPI because the location of the fuel tank was not a danger that required warning about. And it presented evidence that the CVPI's fuel tank passed Ford's 75-mph crash test when other police vehicles' tanks failed the test. Thus, the jury's verdict was not against the manifest weigh of the evidence on this claim.

**{¶133}** In support of their claim for post-sale inadequate warning, appellants point to the following evidence.

**{¶134}** Olson testified regarding the Crimp Improvement Project. He stated his involvement began in 2007, when he notified others at Ford of some "real-world" incidents and showed them a few photographs of sender units that had dislodged. (Tr. 2254-2255). This initiated the Crimp Improvement Project. (Tr. 2255). Appellants point out that Ford initiated the Crimp Improvement Project after Linert's CVPI was manufactured but prior to Linert's accident. Olson stated that Ford never sent out any type of warning or notification about the crimp or sender unit during the time period of 2005 to 2007. (Tr. 2261-2262).

**{¶135}** As discussed above, the trial court did not instruct the jury on a post-sale failure to warn claim. Therefore, the jury did not reach a verdict on this claim. It then follows that the jury's verdict cannot be against the manifest weight of the evidence on this claim.

**{¶136}** In sum, the jury's verdict is supported by some competent, credible evidence. This was a highly complicated, technical case in which the jury heard substantial evidence supporting each side's position. When the evidence is susceptible to more than one interpretation, we must construe it consistently with the jury's verdict. Thus, in this case, we cannot conclude that the jury's verdict was

against the manifest weight of the evidence.

**{¶137}** Accordingly, appellants' third assignment of error is without merit.

**{¶138}** Appellants' fourth assignment of error states:

> THE TRIAL COURT ERRED IN FAILING TO ALLOW PLAINTIFFS TO AMEND THEIR COMPLAINT.

**{¶139}** Here appellants assert the trial court should have allowed them to file their Second Amended Complaint. They claim that by not allowing them to amend their complaint the trial court forced them to assert damages they no longer believed the evidence supported. Appellants assert that after discovery was concluded, they believed the evidence demonstrated that Foutz's negligence only caused Linert's soft tissue damage and possibly a broken rib and that the fire was a result of vehicle defect. They claim their Second Amended Complaint would have tailored the allegations against Ford to the defects shown by the expert testimony.

**{¶140}** A party may amend its pleading at any time with the written consent of the adverse party or by leave of court. Civ.R. 15(A). "Leave of court shall be freely given when justice so requires." Civ.R. 15(A).

**{¶141}** Civ.R. 15 allows for the liberal amendment of pleadings. *West v. Devendra*, 7th Dist. No. 11 BE 35, 2012-Ohio-6092, ¶49. Nonetheless, a trial court should overrule a motion to amend if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 706 N.E.2d 1261 (1999), citing *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984), at paragraph two of syllabus. The decision of whether to grant a motion for leave to amend a pleading is within the trial court's discretion. *Id.*

**{¶142}** In this case appellants sought to amend their complaint as to what damages were caused by which defendant. Specifically, appellants sought to amend their complaint to allege that Foutz was responsible only for Linert's soft tissue injuries and a broken rib and not for Linert's burn injuries. They asserted that after discovery was completed, they believed the evidence demonstrated Foutz was

responsible for Linert's soft tissue injuries and broken rib and Ford was responsible for Linert's burn injuries because the fire was a result of a defective vehicle.

**{¶143}** Ford opposed the amendment arguing that appellants sought to change their proximate cause theories against it and Foutz by attempting to relieve Foutz of liability for Linert's burn injuries.

**{¶144}** The trial court denied appellants' motion to amend their complaint stating only that, "[n]either party may read from complaints."

**{¶145}** The trial court did not abuse its discretion in overruling appellants' last-minute motion for leave to file their Second Amended Complaint. Appellants filed their initial complaint in this case on September 5, 2008, and their Amended Complaint on October 15, 2008. They did not seek leave to file the Second Amended Complaint until two-and-a-half years later. When they asked for leave, the trial was just over one month away and the trial date had been set for over one year. Moreover, by that time, Ford had already filed its motions for summary judgment, which the court decided a week after appellants' motion for leave.

**{¶146}** Other courts have found similarly late-filed motions to amend to be untimely and prejudicial. For instance in *Turner*, 85 Ohio St.3d at 99, the Ohio Supreme Court found a motion to amend filed after a trial date was set and two years and ten months after the litigation had commenced to be prejudicial and untimely. In *Robinson v. Omega Labs, Inc.*, 5th Dist. No. 2006CA00178, 2007-Ohio-2482, ¶25, the court found a motion for leave to amend filed two months before trial and after the defendant had moved for summary judgment was untimely, showed undue delay, and would cause undue prejudice. And in *Suriano v. NAACP*, 7th Dist. No. 05 JE 30, 2006-Ohio-6131, ¶86, this court found the trial court did not abuse its discretion in disallowing leave to amend 19 months after the complaint had been filed, a summary judgment hearing had already been held, and the request was based on redacted comments in a deposition transcript that the appellee had in her possession for six months.

**{¶147}** Furthermore, appellants were not prejudiced at trial by not having filed

their Second Amended Complaint. In its judgment entry denying leave to amend, the trial court stated that the parties would not be permitted to read from their complaints. And appellants presented their theory throughout the trial that Ford was solely responsible for Linert's burn injuries. In sum, during closing arguments, appellants' counsel told the jury:

> Now, Ford wants to make this case all about Adrien Foutz. I want to get that off the table real quick. Your Honor will instruct you at the end. This case is about cause and proximate cause. There's cause and then there's legal proximate cause. When we talk about Adrien Foutz, it's important to know that we are not asking for damages from the collision itself. For the rib injuries, that's not about Adrien Foutz. This is about Ford Motor Company and burn injuries that were caused by their negligence. Ford is not responsible for those damages, that's a separate issue and that's not what we are here about.

(Tr. 2456-2457).

**{¶148}** Counsel later told the jury, "At the end of the day, no defect in the crimp, no sender unit failure, no fire, no injuries, Ross goes home with broken ribs. And it was all because of this defective vehicle." (Tr. 2508).

**{¶149}** Thus, appellants presented their theory to the jury that Ford was the party responsible for Linert's burn injuries.

**{¶150}** In sum, the trial court did not abuse its discretion in denying appellants' motion for leave to amend their complaint.

**{¶151}** Accordingly, appellants' fourth assignment of error is without merit.

**{¶152}** Appellants' fifth assignment of error states:

> THE TRIAL COURT ERRED BY EXCLUDING THE TESTIMONY, IN PARTICULAR THE ADMISSIONS, OF FORD EMPLOYEE BRYAN GERAGHTY.

**{¶153}** In this assignment of error, appellants assert the trial court should have permitted them to read portions of Bryan Geraghty's deposition to the jury.

**{¶154}** Geraghty is one of Ford's fuel system engineers. (Tr. 1608). The deposition appellants wanted to read to the jury was not from this case but was from a 2003 case in Texas. (Tr. 1612). Appellants sought to introduce some background testimony and the following statement by Geraghty:

> [W]e asked him: As a general rule if the impact forces are not strong enough to injure the person inside the car, the fuel system on that car should maintain it's [sic.] integrity?
>
> Answer: I think that's what I said earlier, something similar to that. I would agree with that.

(Tr. 1608-1609).

**{¶155}** The trial court did not allow this testimony because it was from another case and because appellants' expert had already testified to the same thing. (Tr. 1611).

**{¶156}** Appellants argue that the jury should have been able to hear that the opinion of appellants' expert was the same as Ford's design engineer.

**{¶157}** Pursuant to Civ.R. 32(A)(2):

> At the trial * * * any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:
>
> * * *
>
> (2) The deposition of a party or of *anyone who at the time of taking the deposition was an officer, director, or managing agent, or a*

> *person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a public or private corporation*, partnership or association which is a party may be used by an adverse party for any purpose.

(Emphasis added.)

**{¶158}** Appellants sought to read the statements from Geraghty's deposition to the jury under Civ.R. 32(A)(2). They asserted Geraghty's deposition was admissible because it was a statement made by a Ford employee. (Tr. 1609, 1613). However, Geraghty was not one of the types of people listed in Civ.R. 32(A)(2) at the time his deposition was taken. There is nothing in his deposition excerpt to suggest that Geraghty was anything more than a Ford employee at the time his deposition was taken. He provided no testimony that he was an officer, director, or managing agent of Ford or that he was designated by Ford to testify on its behalf. And there is no provision in Civ.R. 32(A)(2) that the deposition of an employee of a corporation may be used against the corporation in another unrelated case. Therefore, the trial court did not abuse its discretion in excluding Geraghty's deposition except from evidence.

**{¶159}** Accordingly, appellants' fifth assignment of error is without merit.

**{¶160}** Appellants' sixth assignment of error states:

> THE TRIAL COURT ERRED IN PRECLUDING PLAINTIFFS FROM CROSS EXAMINING FORD'S WITNESS JACK RIDENOUR REGARDING HIS INVESTIGATION OF MULTIPLE OCCURRENCES INVOLVING FORD'S PINTO.

**{¶161}** Jack Ridenour is a Ford retiree who held the position of chief engineer of vehicle safety. While cross-examining Ridenour, appellants sought to question him regarding his investigation of fire and explosion accidents involving Ford Pintos, but the trial court did not allow this line of questioning. (Tr. 2432-2440). Appellants wanted to present testimony that Ridenour investigated 12 incidents of fire or

explosion with the Ford Pinto and that he never determined any of these incidents to be due to a defect, yet Ford concluded the Pinto was not up to specifications regarding rear impact and fire safety and, therefore, recalled the Pinto. (Tr. 2438). Appellants were attempting to demonstrate that Ridenour has investigated 700 to 1,200 incidents and he has never found there to be a defective condition. (Tr. 2433). They asserted that this would demonstrate Ridenour's bias and hurt his credibility. (Tr. 2433). The trial court determined that appellants could question Ridenour about his hundreds of investigations without ever finding a defect, but that they could not specifically refer to the Pinto. (Tr. 2433, 2439-2440).

**{¶162}** Appellants now argue this questioning went to Ridenour's credibility and bias and was proper impeachment evidence.

**{¶163}** The decision to exclude evidence was within the trial court's discretion. *Wightman*, 86 Ohio St.3d at 437. The trial court disallowed reference to the Pinto based on Evid.R. 403(A), which provides relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

**{¶164}** Ford argued that by bringing up the Pinto appellants were attempting to "smear" Ford and Ridenour by implication due to the Pinto's "horrendous reputation." (Tr. 2434-2435). The trial court agreed.

**{¶165}** The trial court did not abuse its discretion in disallowing reference to the Pinto. As Ford alluded to, the Pinto has a reputation as a poorly designed vehicle that had a tendency to catch fire. Hence, reference to the Pinto could likely result in unfair prejudice in this case. Moreover, the court determined appellants could still make their point as to Ridenour's credibility and bias without specific reference to the Pinto. (Tr. 2433, 2440). And it instructed appellants they could question Ridenour about the fact that he investigated hundreds of vehicles and never found one to be unsafe. (Tr. 2439-2440). Thus, the court still permitted appellants' general line of questioning.

**{¶166}** Accordingly, appellants' sixth assignment of error is without merit.

**{¶167}** Appellants' seventh assignment of error states:

IT WAS ERROR TO ADMIT FORD'S EVIDENCE PURPORTING TO SHOW THAT IT PROVIDED A WARNING REGARDING RISK OF FIRE IN LIGHT OF FORD'S FAILURE TO DISCLOSE ANY SUCH WARNING DURING DISCOVERY.

**{¶168}** Appellants contend here that after discovery was complete, during summary judgment pleading, Ford produced the affidavit of its employee/expert Jon Olson who concluded that the dashboard warning sticker, part # 5W7A-19C541-BA must have been included on Linert's CVPI. They argue it was error to allow Ford to change its story as to what warning was given so close to trial because they had no opportunity to allow an expert to evaluate the warning. Thus, appellants contend Civ.R. 37 required sanctions, specifically the trial court should not have permitted Ford to introduce this evidence at trial.

**{¶169}** A trial court has broad discretion to impose sanctions against a party who violates the discovery rules, and this court will not reverse the trial court's determination on this issue absent an abuse of discretion. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

**{¶170}** The warning label Olson referred to was a dashboard label that read: "WARNING: TO REDUCE THE RISK OF POSSIBLE SERIOUS INJURY OR DEATH: ALIGN AND MOUNT HARD OR SHARP POLICE EQUIPMENT IN TRUNK LATERALLY. FOR DETAILS, SEE OWNER GUIDE SUPPLEMENT OR WWW.CVPI.COM."

**{¶171}** As Ford contends, appellants' counsel admitted he was not aware that Ford had produced the warning label during discovery and agreed to withdraw the motion for sanctions if the production was confirmed. (Tr. 152-156).

**{¶172}** In response to appellants' motion for a new trial, Ford's attorney, Clay Guise, attached his affidavit. Atty. Guise averred that after appellants' counsel told the court appellants would withdraw their objection if Ford demonstrated that it had

produced the warning label, he sent an email dated July 12, 2011, to appellants' counsel with the warning label attached that included the appropriate Bates Stamp. (Aff. Clay Guise, ¶¶4-6, attached as Ex. K to Ford's Opposition to Motion for New Trial).

**{¶173}** Based on Atty. Guise's affidavit and its attachments, appellants' objection would have been withdrawn. Appellants' counsel specifically stated that they would withdraw the objection if Ford showed them that it provided them with the warning label more than a month before trial. And Atty. Guise's affidavit is evidence that Ford provided appellants' with the warning label and Atty. Guise demonstrated this to appellants' counsel in his July 12, 2011 email. Atty. Guise sent this email just one day after the trial started, so appellants were aware of this fact during trial, which is likely why they did not object to it. (See Tr. 2203-2205).

**{¶174}** Accordingly, appellants' seventh assignment of error is without merit.

**{¶175}** Appellants' eighth assignment of error states:

> THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF 29 [sic.] OTHER SIMILAR INCIDENTS.

**{¶176}** During trial, appellants sought to introduce evidence of 61 other accidents they claimed occurred under substantially similar circumstances. (P.Ex. 462). They sought to do so by way of their expert Mark Arndt, a crash investigator. Over the course of his career, Arndt accumulated information from police reports, reports of other investigators, documents from Ford, photographs, and personal inspection. (Tr. 1327). Arndt compiled a database of Ford vehicles with vertical, behind-the-axle fuel tanks involved in rear-end collisions and how their fuel systems performed. (Tr. 1336-1337). In order to narrow down his list for this case, Arndt used the criteria that the accident had to involve a Panther platform vehicle that was involved in a rear impact with the failure of the fuel containment system. (Tr. 1338). Included in his information for each prior accident, Arndt included whether the accident resulted in a fire and whether the fire produced any burn injuries. (Tr. 1340).

He opined that the 61 other incidents were similar to Linert's accident. (Tr. 1343). Of those 61 other incidents, 35 involved a fire and burn injuries or death. (Tr. 1343).

**{¶177}** On cross-examination, Arndt admitted that in 2003, design changes were made to the vehicle to meet Ford's new 75-mph crash test. (Tr. 1350-1351). Arndt also admitted that he did not calculate the speeds of the vehicles involved in the other incidents nor could he give the weights of the striking vehicles. (Tr. 1354-1355).

**{¶178}** The trial court allowed 35 of the 61 other incidents. It concluded that those accidents were similar to the Linert accident because those accidents involved fires. (Tr. 1381-1382). The court stated that a rear impact with a fire was the criteria it used to determine which accidents of the 61 were similar to Linert's accident and, therefore, were admissible. (Tr. 1381).

**{¶179}** Appellants argue the trial court should have allowed it to introduce evidence of the other 29 "similar incidents" that involved Planter platform vehicles, vertical behind-the-axle fuel tank location, and a fuel tank that was compromised in an accident even though no fire occurred in these accidents. Appellants argue the trial court erred because the evidence of the similar incidents was relevant to Ford's knowledge and foreseeability of the risk of fire.

**{¶180}** The Ohio Supreme Court addressed the issue of admissibility of prior accidents in *Renfro v. Black*, 52 Ohio St.3d 27, 31, 556 N.E.2d 150 (1990):

> The law in the area of admissibility of "prior accidents" or occurrence evidence was succinctly stated in *McKinnon v. Skil Corp.* (C.A.1, 1981), 638 F.2d 270. There, the court considered admissibility of prior accident evidence in a products liability action concerning an allegedly defective Skil saw. The plaintiff attempted to introduce answers to interrogatories regarding prior personal injury accidents involving the Skil saw. The answers did not indicate how the injuries occurred or whether they resulted from defective lower blade guards. Plaintiff contended that the interrogatory answers were admissible on Skil's knowledge of prior

> accidents relevant to the duty to warn, to establish evidence of the existence of defect, causation, and negligent design, and to attack the credibility of the defendant's expert witness. The court held that "[e]vidence of prior accidents is admissible on the first four issues only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar. * * *" (Citations omitted.) *Id.* at 277.

**{¶181}** It is within the trial court's discretion to determine whether the prior accidents were substantially similar to the accident at issue. *Eakes v. K-Mart Intern. Headquarters, Inc.*, 2d Dist. No. 17334. 1999 WL 252481, *3 (Apr. 30, 1999).

**{¶182}** Thus, in examining the admissibility of the prior accidents in this case, we look at whether the trial court abused its discretion in determining that appellants did not demonstrate that the other 29 accidents occurred under substantially similar circumstances as those in Linert's accident.

**{¶183}** Appellants sought to introduce the prior accidents to show that Ford had knowledge of a risk of fire. The trial court did not exclude all of Arndt's other similar accidents. The court allowed evidence of 35 of the other accidents, more than half of Arndt's list. The accidents the court allowed were the ones in which a fire occurred. Thus, the trial court specifically limited its ruling to those accidents that were most similar to Linert's accident. The court acted within its discretion in limiting the admissibility of the alleged similar accidents to those accidents that involved a resulting fire since the fire and its cause were the key issues in this case.

**{¶184}** Moreover, appellants could have proved their point of Ford's knowledge of the risk of fire with the 35 allowable accidents. To allow the continuous presentation of alleged similar incidents could well have been a needless presentation of cumulative evidence, which is another reason the trial court did not abuse its discretion in limiting this evidence. See Evid.R. 403(B).

**{¶185}** Accordingly, appellant's eighth assignment of error is without merit.

**{¶186}** Appellants' ninth assignment of error states:

THE TRIAL COURT ERRED BY FAILING TO ALLOW EXHIBITS 492 AND 501, ACCIDENT REPORTS BY NHTSA AND THE OHIO STATE POLICE GO TO THE JURY FOR DELIBERATIONS DESPITE HAVING ADMITTED THEM INTO EVIDENCE.

**{¶187}** Here appellants assert the trial court should have allowed the Ohio State Police and NHTSA accident reports (P.Exs. 492, 501) to go with the jury during their deliberations. Appellants claim these exhibits were admitted into evidence and, therefore, the jury should have had access to them during deliberations. They point out that, when it came to other exhibits, the trial court stated: "If they are admitted, they go to the jury." (Tr. 2129). By not allowing the jury to have these reports, appellants argue, the trial court sent the message that they were not as important as the other evidence that was sent to the jury room.

**{¶188}** Plaintiff's Exhibits 492 and 501 were not actually admitted into evidence. The parties and the court engaged in a long discussion about whether these two exhibits were ever actually admitted and they never reached an agreement on the record. (Tr. 2668-2680). The court then stated, "It just isn't worth the risk for me. I think these have been collaterally supported by numerous other documents and also considerable professional argument on these issues." (Tr. 2680). Appellants' counsel then stated that he was going to set Plaintiff's Exhibits 492 and 501 "over here with this other stack that's not going to the jury." (Tr. 2680). Thus, because Plaintiff's Exhibits 492 and 501 were not admitted, there was no error in the court's failure to send them back with the jury during their deliberations.

**{¶189}** Accordingly, appellants' ninth assignment of error is without merit.

**{¶190}** Appellants' tenth assignment of error states:

THE TRIAL COURT ERRED BY APPLYING MICHIGAN LAW TO BAR PLAINTIFFS' PUNITIVE DAMAGE CLAIMS AGAINST FORD.

**{¶191}** Prior to trial, Ford filed a motion for summary judgment on appellants'

claim for punitive damages. Ford argued that under Ohio's choice-of-law rules, Michigan law applied to the punitive damages claim because its principal place of business and the location of its relevant conduct in designing the CVPI were in Michigan. Under Michigan law, punitive damages are not permitted for the purposes of punishing or making an example out of a defendant. Appellants filed a response in opposition. They did not dispute that under Michigan law punitive damages were not permitted. Instead, they argued that Ohio law, not Michigan law, applied to their punitive damages claim.

**{¶192}** The trial court granted Ford's motion for summary judgment. In doing so, the court found that Michigan law applied to appellants' punitive damages claim because Michigan has the most significant relationship to appellants' claim for punitive damages. Consequently, the court did not permit appellants to present evidence of punitive damages at trial.

**{¶193}** Appellants now argue the trial court erred in applying Michigan law and granting summary judgment to Ford on the issue of punitive damages. They claim that had the court applied Ohio law, evidence of punitive damages would have been allowed.

**{¶194}** In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.,* 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming,* 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.,* 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248, 106 S.Ct.

2505, 91 L.Ed.2d 202 (1986).

**{¶195}** Likewise, we review a trial court's choice-of-law determination de novo. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶24.

**{¶196}** The Ohio Supreme Court has adopted the Restatement of the Law of Conflicts' approach for determining choice-of-law questions. *Morgan v. Biro Mfg. Co., Inc.*, 15 Ohio St.3d 339, 341-342, 474 N.E.2d 286 (1984). The Restatement provides a presumption that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit. *Id.* at 342, citing Section 146 of 1 Restatement of the Law 2d, Conflict of Laws (1971) 430.

**{¶197}** When determining which state has the most significant relationship to the lawsuit, courts must consider: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 of the Restatement that the court deems relevant.[1] *Id.*, citing Section 145 of 1 Restatement of the Law 2d, Conflict of Laws (1971) 414.

**{¶198}** Thus, we must apply the above factors to the facts of this case.

**{¶199}** First, we must begin with the presumption that Ohio law controls, because it was the location of the injury, unless the factors demonstrate that Michigan has a more significant relationship to the lawsuit.

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[1] Section 6 of 1 Restatement of the Law 2d, Conflict of Laws 10, provides as follows:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of law to be applied.

**{¶200}** Next, we must consider the place of the injury. Linert's accident occurred in Ohio. Thus, Ohio is the state where the injury occurred.

**{¶201}** The next factor is the place where the conduct causing the injury occurred. The conduct that allegedly caused the injury in this case occurred in Michigan. Michigan is the state where Ford designed the 2005 CVPI, including the fuel tank, and where it manufactured the CVPI. (Ridenour Aff. ¶¶7, 8, 9). It is also the state where Ford conducted rear crash testing and fuel-system integrity testing. (Ridenour Aff. ¶¶15, 17, 21).

**{¶202}** Under the next factor, we must consider appellants' domicile and Ford's place of business. Appellants both reside in Ohio. Ford is based in Michigan. Linert's CVPI was sold to the Austintown Police Department from an Ohio Ford dealership. The CVPI was used in Ohio by an Ohio public entity, the Austintown Police Department.

**{¶203}** Next, we must look at the place where the relationship between the parties, if any, is located. There is no relationship between the parties such as employer-employee or a contractual relationship.

**{¶204}** Finally, the parties have not pointed to any factors Section 6 of the Restatement that may apply here.

**{¶205}** The factors in this case slightly favor Ohio over Michigan. The injury took place in Ohio. The conduct allegedly causing the injury took place in Michigan. The plaintiffs are from Ohio. The defendant is based in Michigan. Although Ford is based in Michigan, the vehicle at issue in this case was sold in Ohio, by an Ohio Ford dealership, to an Ohio police department. We must also consider the presumption that applies here: the law of the place of injury controls unless another jurisdiction has a more significant relationship to the lawsuit. *Morgan*, 15 Ohio St.3d at 342, citing Section 146 of 1 Restatement of the Law 2d, Conflict of Laws (1971) 430. Because it cannot be said that Michigan has a more significant relationship to the lawsuit than Ohio, we must conclude that Ohio law applies.

**{¶206}** Ford also argued in its summary judgment motion that even if Ohio

law applied, appellants' claim for punitive damages was still precluded. Ford based its argument on R.C. 2307.80(D)(1), which provides that a products liability defendant shall not be liable for punitive damages in connection with the claim if the defendant fully complied with all applicable government safety and performance standards.

**{¶207}** The trial court never reached the issue of whether R.C. 2307.80(D)(1) precluded appellants' punitive damages claim, however, because it determined that Michigan law, not Ohio law, applied. Where the trial court grants summary judgment based on one issue and fails to address remaining issue, the remaining issue is not properly before the appellate court. *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 89, 585 N.E.2d 384 (1992); *Tree of Life v. Agnew*, 7th Dist. No. 12 BE 42, 204-Ohio-878, ¶27. Thus, the issue of whether R.C. 2307.80(D)(1) precludes punitive damages in this case is not properly before us. This is an issue to be addressed by the trial court on remand.

**{¶208}** Accordingly, appellants' tenth assignment of error has merit.

**{¶209}** Appellants' eleventh assignment of error states:

> THE TRIAL COURT ERRONEOUSLY FAILED TO RECUSE HIMSELF, OR AT MINIMUM, ADVISE THE PARTIES THAT HIMSELF [sic.] DROVE A PANTHER PLATFORM VEHICLE.

**{¶210}** In their final assignment of error, appellants contend that midway through the trial they learned the trial court judge drove a Mercury Grand Marquis, which is a Panther Platform vehicle with the same fuel tank design that was at issue. Appellants argue that the judge should have disqualified himself or, at least, disclosed this information to the parties and given them the option of waiving the disqualification. Appellants further assert that the jurors may have seen the judge driving this vehicle to court, which could have influenced their opinions.

**{¶211}** "The Chief Justice of the Supreme Court of Ohio, or his designee, has exclusive jurisdiction to determine a claim that a common pleas judge is biased or prejudiced." *Jones v. Billingham*, 105 Ohio App.3d 8, 11, 663 N.E.2d 657 (2d

Dist.1995), citing Section 5(C), Article IV, Ohio Constitution; *Adkins v. Adkins*, 43 Ohio App.3d 95, 539 N.E.2d 686 (4th Dist.1988). R.C. 2701.03 provides the exclusive means by which a litigant can assert that a common pleas judge is biased or prejudiced. *Id.* R.C. 2701.03(A) provides:

> If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

**{¶212}** An appellate court lacks the authority to pass upon the disqualification of a common pleas court judge or to void the judgment of a trial court on that basis. *State v. Ramos*, 88 Ohio App.3d 394, 398, 623 N.E.2d 1336 (9th Dist.1993).

**{¶213}** We are without the authority to determine whether the trial court judge was biased or should have recused himself in this case. If appellants thought the trial court judge should have recused himself, their remedy was to file an affidavit of disqualification with the clerk of the Ohio Supreme Court.

**{¶214}** Accordingly, appellants' eleventh assignment of error is without merit.

**{¶215}** In conclusion, appellants' first and second assignments of error have merit in part. The trial court erred in failing to instruct the jury on appellants' claim for post-marketing failure to warn. It also erred by excluding evidence that, subsequent to the sale of the subject CVPI, Ford offered a fire suppression system on the CVPIs. This evidence would have offered further support for appellants' post-marketing failure to warn claim. Additionally, appellants' tenth assignment of error has merit. Ohio law, not Michigan law applies to appellants' punitive damages claim.

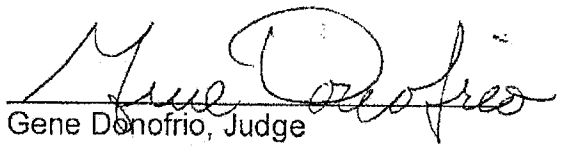
**{¶216}** For the reasons stated above, the trial court's judgment is hereby

reversed as to the post-marketing failure to warn claim. The matter is remanded to the trial court for further proceedings on this claim only. The court's judgment granting summary judgment to Ford on appellants' punitive damages claim is also reversed. Ohio law applies to appellants' punitive damages claim. On remand, the trial court is to consider Ohio law when determining whether appellants may present evidence of punitive damages. The judgment is affirmed in all other respects.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.

APPROVED:



Gene Donofrio, Judge

OCT 19 2011
FILED
ANTHONY VIVO, CLERK

**IN THE COURT OF COMMON PLEAS**
**MAHONING COUNTY, OHIO**

ROSS J. LINERT

Plaintiff

Vs.

ADRIEN FOUTZ, et al

Defendant

2008 CV 3554

JUDGE THOMAS P. CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

October 19, 2011

**JUDGMENT ENTRY (DENYING MOTION FOR NEW TRIAL)**

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On July 26, 2011 the jury in this case returned a verdict in favor of Defendant, Ford Motor Company. Thereafter, Plaintiff Ross J. Linert filed a motion for new trial on August 9, 2011. This motion was briefed by both sides and argument was had in open court on October 11, 2011.

This Court has carefully considered the arguments of the Plaintiff. This Court finds that the motion for new trial is not well taken and is therefore denied.

**IT IS SO ORDERED.**

October 19, 2011
DATE

Thom P. Curran
JUDGE THOMAS P. CURRAN
Sitting On Assignment
Article IV, Section 6
Ohio Constitution

CLERK: Copies to all parties

EXHIBIT
C

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by regular U.S. mail this 10th day of November, 2014, upon the following:

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