

IN THE SUPREME COURT OF OHIO

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

**APPELLANT FORD MOTOR COMPANY'S RESPONSE TO
ROSS AND BRENDA LINERT'S MEMORANDUM IN SUPPORT OF
JURISDICTION OF THEIR CROSS APPEAL**

Elizabeth B. Wright (0018456)
Counsel of Record
Conor A. McLaughlin (0082524)
Jennifer M. Mountcastle (0072504)
THOMPSON HINE LLP
127 Public Square, Suite 3900
Cleveland, Ohio 44114
(216) 566-5500 (phone)
(216) 566-5800 (facsimile)
Elizabeth.Wright@ThompsonHine.com
Conor.McLaughlin@ThompsonHine.com
Jennifer.Mountcastle@ThompsonHine.com

Clay A. Guise (0062121)
DYKEMA GOSSETT PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304-2820
(248) 203-0700 (phone)
(248) 203-0763 (facsimile)
CGuise@Dykema.com

Attorneys for Appellant Ford Motor Company

Robert W. Schmieder II
Robert J. Evola
Mark L. Brown
SLCHAPMAN LLC
330 North Fourth Street, Suite 330
St. Louis, MO 63102

Richard A. Abrams (0014382)
GREEN HAINES SGAMBATI CO., L.P.A.
National City Bank Building
Suite 400
P.O. Box 849
Youngstown, OH 44501

*Attorneys for Appellees Ross J. Linert and
Brenda Linert*

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENTS IN OPPOSITION TO PLAINTIFFS’ PROPOSITIONS OF LAW IN SUPPORT OF THEIR CROSS APPEAL.....	2
<u>Plaintiffs’ Proposition of Law Nos. 1, 2, and 3</u> : Plaintiffs’ challenges to the jury instructions do not raise questions of public and great general interest and are meritless.....	2
<u>Plaintiffs’ Proposition of Law No. 4</u> : Plaintiffs’ baseless attack on the Trial Court’s credibility is procedurally improper	4
III. CONCLUSION	5

I. INTRODUCTION

Plaintiffs do not even attempt to demonstrate that any of their propositions of law present a question of public or great general interest that would warrant this Court's review. Their arguments in favor of jurisdiction do not identify any conflict or confusion among Ohio authorities on any of their propositions of law. In contrast to Ford, which challenged the Seventh District Court of Appeals' *definition* of "risk" under O.R.C. § 2307.76 and explained how such a definition could affect the reading of other provisions, Plaintiffs' first proposition of law does not challenge the Appellate Court's interpretation of the statutory term "performance standards." Plaintiffs merely quibble with the Appellate Court's determination – and corresponding refusal to instruct the jury – that performance standards were not at issue in this case (a fact-intensive determination ill-suited for this Court's review). The remaining three "propositions of law" simply point out alleged errors by the Appellate Court and do not cite any authority that the Court rejected or misinterpreted.

Plaintiffs' propositions of law also fail to identify any significant public policy implications. While Ford explained how treating safety improvements as evidence of manufacturer liability influences public policy by discouraging manufacturers from making such improvements, Plaintiffs did not articulate any public policy arguments in support of their propositions of law or explain how this Court's review of their propositions of law would affect citizens, litigants, and corporations subject to Ohio law.

Given Plaintiffs' failure to marshal any colorable arguments in support of their request for review, the Court should decline to accept jurisdiction to consider Plaintiffs' propositions of law.

II. ARGUMENTS IN OPPOSITION TO PLAINTIFFS' PROPOSITIONS OF LAW IN SUPPORT OF THEIR CROSS APPEAL.

Plaintiffs' Proposition of Law Nos. 1, 2, and 3: Plaintiffs' challenges to the jury instructions do not raise questions of public and great general interest and are meritless.

Plaintiffs' first three propositions of law in their cross appeal relate to the Trial Court's discretionary decisions regarding jury instructions, all of which the Appellate Court affirmed. Plaintiffs' arguments have no applicability beyond this case, and are simply an attempt to seek another level of review, not to have an issue of public and great general interest settled.

Plaintiffs' arguments also lack merit. Jury instructions must be examined as a whole; the consideration is whether the instructions as a whole misled the jury, thereby materially affecting the complaining party's substantial rights. *Kokitka v. Ford Motor Co.*, 73 Ohio St. 3d 89, 93, 652 N.E.2d 671 (1995). "[T]here is a strong presumption in favor of the propriety of jury instructions." *Arthur Young & Co. v. Kelly*, 88 Ohio App. 3d 343, 350, 623 N.E.2d 1303 (1993). Further, the complaining party must show that it suffered prejudice from the alleged errors in the jury instructions. *Kokitka*, 73 Ohio St. 3d at 93-94.

The Trial Court was well within its discretion to refuse to instruct the jury that Plaintiffs could establish a manufacturing defect by proof the subject vehicle deviated from Ford's "performance standards" because Plaintiffs presented no evidence the subject vehicle failed to meet an applicable performance standard. *See Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 591, 575 N.E.2d 828 (1991) ("the trial court will not instruct the jury where there is no evidence to support an issue"). The evidence at trial demonstrated that the accident was different from, and more severe than, Ford's 75-mph laboratory crash test under controlled conditions, and thus, that lab test could not serve as the basis for Plaintiffs' requested instruction. Furthermore, Plaintiffs presented no evidence that Mr. Linert's vehicle would have failed Ford's 75-mph

laboratory crash test. Accordingly, the Trial Court properly refused to give the requested instruction and this case-specific decision raises no issue of public and great general interest.

The Trial Court also properly instructed the jury that federal regulations “impose specific limitations and requirements on the design and performance of the fuel tank,” that the applicable standard is a “minimum standard,” that the jury may consider “[c]onformity with any Federal Motor Vehicles Safety Standard” as a factor in deciding the foreseeable risks of the 2005 Ford Crown Victoria Police Interceptor, but that such evidence “*is not conclusive*” regarding product defect. *Linert v. Ford Motor Co.*, 7th Dist. No. 2011 MA 00189, slip. op. at ¶ 38 (emphasis added). This instruction, read as a whole, properly characterizes a Federal Motor Vehicle Safety Standard and is consistent with Ohio Rev. Code § 2307.75(B)(4), which defines when a product is defectively designed and expressly provides that the foreseeable risks associated with a product “shall” be determined by considering compliance with government regulations. Regardless, Plaintiffs could not establish that they were prejudiced by this instruction because the jury expressly found that Plaintiffs failed to prove a practical and technically feasible alternative design, the “first element” of their design defect claim. *Linert* at ¶ 40. Thus, the jury “never moved on to reach the issue of foreseeable risks with the design, which is the focus of the instruction at issue.” *Id.*

Finally, Plaintiffs’ argument that the jury instructions unnecessarily repeated a correct statement of their burden of proof ignores the challenge of instructing the jury in a complex product liability case involving multiple claims. The Trial Court structured its instructions to first introduce general concepts, including the burden of proof, then introduce a cause of action, and finally to explain the elements of that cause of action, providing the jury the information it needed to understand the law applicable to Plaintiffs’ multiple claims with multiple elements,

and to understand how the burden of proof applied to each. This structure was carefully designed, accurately stated the law on all of Plaintiffs' claims, and the repetition was not unnecessary or prejudicial.

As a result, Plaintiffs' propositions of law Nos. 1, 2, and 3 are neither appropriate for this Court's review under Supreme Court Practice Rule 5.02 nor substantively meritorious.

Plaintiffs' Proposition of Law No. 4: Plaintiffs' baseless attack on the Trial Court's credibility is procedurally improper.

Plaintiffs' groundless attack on Judge Thomas Curran's character and credibility is not worthy of this Court's attention and is procedurally improper. As the Court is aware, only the Chief Justice has authority to hear disqualification matters, and on appeal a litigant generally cannot seek to void a judgment claiming the trial judge should have disqualified himself. *See e.g., Beer v. Griffith*, 54 Ohio St. 2d 440, 441-42, 377 N.E.2d 775 (1978); *Yeager v. Moody*, 7th Dist. No. 11 CA 874, 2012-Ohio-1691, at ¶ 4; *B.W. v. D.B.*, 193 Ohio App. 3d 637, 2011-Ohio-2813, 953 N.E.2d 369, at ¶ 73. Rather, a litigant must file an affidavit of disqualification with the Supreme Court of Ohio, the exclusive means for a claim that a common pleas judge is biased. *State v. Valenti*, 6th Dist. No. WD-05-046, 2006-Ohio-3380, at ¶ 25. Plaintiffs did not do so.

Further, Plaintiffs failed to preserve the issue for appeal. During trial, Plaintiffs' counsel noted that the Trial Court had not disclosed the fact that he drove a Mercury Grand Marquis, but Plaintiffs neither asked Judge Curran to recuse himself nor filed a motion seeking recusal. Plaintiffs also failed to raise the issue of recusal in their motion for a new trial. They waited until their appellate brief, more than eight months after the conclusion of trial, to claim Judge Curran was biased.

Plaintiffs now attempt to invoke Ohio R. Civ. P. 60(B)(5), yet another procedurally improper maneuver. They cannot seek relief under Rule 60(B) for the first time on appeal

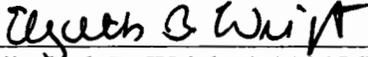
attempting to set aside a Trial Court judgment; they were required to, but did not, file a motion invoking the Rule in the Trial Court. *See* Ohio R. Civ. P. 1(C); *Merkle v. Merkle*, 5th Dist. No. 13-CA-31, 2014-Ohio-81, at ¶ 23 (plaintiff did not raise her Rule 60(B)(5) arguments in the trial court and therefore was precluded from doing so on appeal); *May v. Westfield Village, L.P.*, 5th Dist. No. 02-COA-051, 2003-Ohio-5023, at ¶ 21 (refusing to consider appellant's estoppel argument because appellant failed to raise that argument in its Rule 60(B)(5) motion before the trial court); *cf. Nyamusevya v. Nkurunziza*, 10th Dist. No. 10AP-857, 2011-Ohio-2614, at ¶¶ 16-17 (plaintiff failed to request relief from the trial court under Rule 60(A) and thus there was no issue for the appellate court to decide). This claim is procedurally improper and does not raise an issue of public or great general interest.

III. CONCLUSION

For the foregoing reasons, Appellant Ford Motor Company respectfully requests that this Court deny jurisdiction on the four propositions of law raised in Plaintiffs' cross appeal.

Respectfully Submitted,

Clay A. Guise (0062121)
DYKEMA GOSSETT PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304-2820
(248) 203-0700
(248) 203-0763 (facsimile)
CGuise@Dykema.com


Elizabeth B. Wright (0018456)
Conor A. McLaughlin (0082524)
Jennifer M. Mountcastle (0072504)
THOMPSON HINE LLP
127 Public Square, Suite 3900
Cleveland, OH 44114-1291
(216) 566-5500
(216) 566-5800 (facsimile)
Elizabeth.Wright@ThompsonHine.com
Conor.McLaughlin@ThompsonHine.com
Jennifer.Mountcastle@ThompsonHine.com

Attorneys for Appellant Ford Motor Company

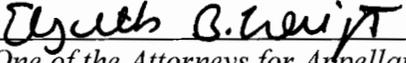
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by regular U.S. mail this 6th day of January, 2015, upon the following:

Robert W. Schmieder II, Esq.
Robert J. Evola, Esq.
Mark L. Brown, Esq.
SLCHAPMAN LLC
330 North Fourth Street, Suite 330
St. Louis, MO 63102

Richard A. Abrams, Esq.
GREEN HAINES SGAMBATI CO., L.P.A.
National City Bank Building
Suite 400
P.O. Box 849
Youngstown, OH 44501

Attorneys for Plaintiffs-Appellees Ross J. Linert and Brenda Linert



*One of the Attorneys for Appellant Ford Motor
Company*