

No. 2015-0114

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NOS. 101073, 101136

WESTGATE FORD TRUCK SALES, INC.,
Individually, and on behalf of Plaintiff Class,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

APPELLEE FORD MOTOR COMPANY'S MEMORANDUM OPPOSING JURISDICTION

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**INTRODUCTION AND EXPLANATION OF WHY THIS IS NOT A CASE
OF PUBLIC OR GREAT GENERAL INTEREST**

This is not a case of public or great general interest under Ohio law. To the contrary, it involves an individualized factual dispute over the meaning of a particular contract governed by Michigan law. After a full trial, a jury resolved that dispute in favor of the defendant, Ford Motor Company (“Ford”), agreeing with Ford’s construction of the contract and rejecting the contract-breach claim asserted by plaintiff Westgate Ford Truck Sales, Inc. (“Westgate”). Westgate does not contend that the jury was improperly instructed or that it considered inadmissible evidence. Westgate simply disagrees with the jury’s verdict. But that verdict was based on extensive evidence supporting Ford’s position—almost none of which Westgate discloses in its jurisdictional memorandum. The actual record of this case makes clear that there is no error in the jury’s verdict, no flaw in the Eighth District’s decision, and no basis for further review by this Court.

Ford and Westgate were parties to a Sales and Service Agreement (“SSA”) governing Ford’s sales to Westgate of medium- and heavy-duty trucks. For several decades, Ford sold trucks to Westgate pursuant to a discounting program that included, for certain sales, discounted prices published only to the individual dealer, rather than all dealers collectively. Westgate took advantage of those individualized discounts for hundreds of transactions over many years, without ever once suggesting that the discounts violated any provision of the SSA. After Ford exited the heavy truck business, however, Westgate filed this long-after-the-fact lawsuit, alleging that Ford’s individualized dealer discounts all along had breached one provision—Paragraph 10—of the SSA.

The trial court erroneously granted Westgate’s motion for summary judgment on liability, reading Paragraph 10 as unambiguously prohibiting Ford from offering any one dealer a price

not previously published to all dealers. A jury trial was held solely to determine Westgate's damages. Contrary to the suggestion in Westgate's jurisdictional memorandum, this first jury did *not* determine that Ford had breached the contract or that Ford's actions caused injury. The trial judge himself made those rulings. The jury simply calculated the amount of damages with respect to Westgate itself, which the trial court then extrapolated into a \$2 billion class judgment.

On appeal, the Eighth District reversed, holding that Westgate was not entitled to summary judgment on breach, because Paragraph 10 was ambiguous in relevant part, and because both parties had offered "reasonable" interpretations of the ambiguous language. *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 96978, 2012-Ohio-1942, ¶¶ 16, 22, 971 N.E.2d 967 ("*Westgate II*"). Accordingly, the Eighth District held that the dispute over whether Ford breached Paragraph 10 "require[d] resolution by a fact finder," and remanded for a jury to consider the textual and extrinsic evidence and resolve the ambiguity. *Id.* at ¶ 16.

At the eleven-day trial on remand, and consistent with the Eighth District's direction, the parties each presented evidence in support of their interpretation of the meaning of Paragraph 10. Ford emphasized, among other things, the parties' undisputed, decades-long course of conduct, which, under Michigan law, is among the most important evidence of the meaning of ambiguous contractual language. On the basis of that and other highly probative evidence supporting Ford's interpretation of Paragraph 10, the jury rejected Westgate's claim of breach.

The matter should have ended there, but it did not. Incredibly, the trial court granted Westgate judgment notwithstanding the verdict ("JNOV"), ruling—in a cursory order devoid of any record citations—that no reasonable juror could have construed Paragraph 10's ambiguity in Ford's favor. Unsurprisingly, the Eighth District swiftly reversed and reinstated the verdict.

The Eighth District’s factbound, Michigan-law ruling involves no issues of public or great general interest in Ohio. Contrary to Westgate’s argument (Mem. 9-10), the Eighth District’s ruling does not rest on Ohio law—the opinion explicitly recognizes that Michigan law governs the SSA and invokes Michigan precedent in reciting the rules for construing it. Op. ¶¶ 3, 19. Nor does the decision hold that a court is barred from construing an ambiguous contract as a matter of law, even when the evidence relevant to the contract’s meaning is “one-sided.” Mem. 8. The decision instead correctly holds that the evidence here was *not* one-sided, but amply supported Ford’s interpretation, just as the Eighth District had already held in reversing the prior summary judgment for Westgate. The decision thus rightly condemns the trial court’s failure to adhere to the Eighth District’s prior ruling that Ford’s interpretation—based on the same textual and extrinsic evidence presented to the jury—was a reasonable interpretation of the SSA. Those unexceptionable and plainly correct rulings implicate no broader issue of Ohio law, except perhaps to confirm the obvious: trial courts cannot demonstrate such naked disdain for the jury’s factfinding role as that evinced by the repeated efforts of the trial court here to prevent any jury from determining the meaning of Paragraph 10.

There is equally little merit to the procedural complaints raised by Westgate. The Eighth District correctly observed that the trial court’s written post-trial order—the only order that matters, *see* Civ.R. 59(A)—decided only Westgate’s JNOV motion, and that Westgate waived on appeal any challenge to the trial court’s failure to address its new trial motion. The Eighth District nevertheless addressed the issue directly, and held that even if the trial court’s order could be read as implicitly granting a new trial, that ruling was incorrect, because it rested on the false legal premise that the undisputed course-of-conduct evidence “was only pertinent to Ford’s affirmative defenses” and “‘d[id] not inform the inquiry as to the intent of the parties in the

contract.” Op. ¶¶ 17-18 (quoting R. 610 at 4). In fact, such evidence is *highly probative* of the parties’ intent under Michigan law, *see infra* at 10-11, and thus the Eighth District held—quite correctly—that “the trial court abused its discretion by excluding relevant evidence, heard by the jury, from its consideration before declaring Ford’s evidence insufficient to sustain the judgment.” *Id.* ¶ 20.

Nothing about that ruling, or the jury verdict it reinstates, merits further review. It is time to bring an end to this matter. The jury verdict here was supported by overwhelming evidence. It is entitled to respect and finality. Jurisdiction should be denied.

COUNTERSTATEMENT OF THE CASE AND FACTS

The record described in Westgate’s memorandum bears little resemblance to the actual record addressed by the jury, and carefully considered by the Eighth District.

A. The SSA And The Appeal CPA Program

This case turns on the meaning of Paragraph 10 of the SSA under Michigan law. The medium and heavy truck markets were fiercely competitive, and the SSA was designed to allow Ford and the dealers to succeed in those intense environments. Both parties acknowledged their “interdependence . . . in achieving their mutual objectives of satisfactory sales, services, and profits,” and that they could “succeed only through cooperative and competitive effort.” SSA at i-ii. Ford therefore agreed to “make available to its dealers a variety of quality truck products . . . at competitive prices,” and to provide dealers with a “reasonable profit opportunity,” in exchange for the dealers’ agreement to vigorously sell Ford products. *Id.*

Ford was a price follower in the truck industry. As a result, Ford constantly had to adapt its prices and products to accommodate the perpetually-shifting marketplace. Paragraph 10 of

the SSA played a critical role in those efforts, granting Ford flexibility to adapt prices to competitive conditions. It provided, in relevant part, as follows:

Sales of COMPANY PRODUCTS by the Company to the Dealer hereunder will be made in accordance with the prices, charges, discounts and other terms of sale set forth in price schedules or other notices published by the Company to the Dealer from time to time in accordance with the applicable TRUCK TERMS OF SALE BULLETIN. . . . The Company has the right at any time and from time to time to change or eliminate prices . . . by issuing a new TRUCK or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN, new price schedules, or other notices.

SSA at 13 ¶ 10.

Starting in the 1960s, Ford followed its competitors in creating deal-specific discount programs designed to enable dealers to close particular truck sales that would otherwise be lost to rival dealers or manufacturers. Those discount programs eventually became known as “Competitive Price Assistance,” or “CPA.” In 1991, Ford once again took after its peers in remodeling the CPA program to feature two types of discounts. The first, called Sales Advantage CPA, was a standard discount from the wholesale price, calculated based on fixed formulas provided to all dealers. The second, known as Appeal CPA, was a transaction-specific discount available where the Sales Advantage discount proved insufficient to meet competitive need for a particular sale. Appeal CPA discounts were not transmitted to all dealers, for good reason: if Ford had broadly disclosed the discounts it was providing to each dealer, its competitors would easily have undercut Ford’s price points and seized its market share. Dealers were not required to utilize Appeal CPA on any deals—Westgate itself, in fact, used Appeal CPA less than 50% of the time. But Westgate and other dealers often did request Appeal CPA, because the deal-specific discounts allowed them to make sales (and thus obtain profits) that otherwise would have been lost to competitors.

B. Westgate I And II

Westgate filed this breach of contract action in October 2002—years after Ford exited the heavy-truck business—alleging that the CPA program breached Paragraph 10 of the SSA. According to Westgate, Paragraph 10 prohibited Ford from offering to any one dealer a price that Ford had not previously published to all other dealers. The trial court certified a class of all Ford authorized medium and heavy truck dealers who completed sales in or after 1987. Ford objected to class treatment and appealed the certification order to the Eighth District, which affirmed. *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-4013 (“*Westgate I*”). The trial court then granted Westgate summary judgment on liability, finding that Paragraph 10 unambiguously prohibited the Appeal CPA dealer-specific discount program. A damages-only jury trial followed, in which the jurors were told to assume that Ford had breached the contract. The jury returned a verdict of \$4.5 million for Westgate, which the trial court extrapolated to a classwide judgment of almost \$2 billion.

Ford appealed, and in *Westgate II*, the Eighth District reversed, agreeing with Ford’s argument that the disputed textual and extrinsic evidence at least required a jury trial on the meaning of Paragraph 10. Summary judgment was improper, the court explained, because Paragraph 10 was ambiguous in relevant part, and because both parties had offered “reasonable arguments as to what Paragraph 10 required.” 2012-Ohio-1942, 971 N.E.2d 967, at ¶ 22. The Eighth District remanded to allow “a fact finder” to evaluate the parties’ arguments and evidence and determine Paragraph 10’s meaning. *Id.* at ¶ 16. This Court declined jurisdiction. Sup. Ct. No. 2012-1243.

C. The Jury Trial Resulting In A General Verdict For Ford

A jury heard evidence and argument for eleven days. The trial evidence overwhelmingly supported Ford's interpretation of Paragraph 10.

Most importantly, Ford introduced undisputed evidence of the parties' longstanding course of conduct under Paragraph 10, which under Michigan law is one of the "best indications" of the meaning of an ambiguous contractual provision. *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich. 459, 479, 663 N.W.2d 447 (2003) (quotations omitted); *see infra* at 10-11. Tom Beule, Westgate's owner, sold trucks under the SSA for 25 years and requested and accepted Appeal CPA discounts over a hundred times. Beule and other dealers wanted to receive Appeal CPA discounts quickly, and accepted them in a variety of different formats, including individual emails, faxes, and phone calls. And while the SSA explicitly required Westgate to bring any claims of breach to the attention of Ford's Dealer Policy Board, Beule never once complained—or even suggested—to the Board, or anyone else, that Appeal CPA breached Paragraph 10.

The evidence also showed that Ford's interpretation of Paragraph 10 advanced the purpose of the SSA. Pursuant to Michigan law, the jurors were instructed to consider Paragraph 10 in the context of the SSA "as a whole." Tr. 3563; *see Klapp* at 469. Ford's witnesses showed that Paragraph 10 furthered the SSA's core objective of keeping Ford and its dealers competitive because it allowed dealers to obtain individualized prices quickly as needed to close specific sales. The evidence also established that Westgate's proposed construction of Paragraph 10 would have been economically ruinous for both Ford and the dealers, who would have been left unable to compete with Ford's rivals, all of whom used similar sale-specific discount programs. The jury considered the evidence, applied its instructions, and rendered a verdict for Ford.

In post-trial motions challenging the verdict, Westgate raised no objection to any instruction or evidentiary ruling. Westgate instead urged the court simply to resuscitate the summary judgment ruling the Eighth District had already reversed, arguing that the trial record was equivalent to the record “that originally compelled this Court to enter judgment as a matter of law for Westgate on liability.” The trial court agreed. In a four-page written order granting JNOV on the issue of breach, the trial court dismissed the eleven days of trial testimony and more than 3,000 exhibits with the cursory pronouncement that “Ford’s implementation of the Appeal CPA program thwarted the purpose of the contract and intent of the parties that the dealers were to exploit the retail market.” R. 610 at 3. The order cited no evidence in support of its assertion that the evidence was contrary to the verdict.

D. Proceedings On Appeal

Ford appealed, arguing that the trial court’s order both violated the law of the case established by the Eighth District’s prior ruling that Ford’s interpretation was reasonable, and ignored the overwhelming evidence supporting Ford’s construction of the contract. Ford also argued that the class should be decertified, and that Westgate’s claims were time-barred by Ohio’s four-year statute of limitations for claims arising from contracts for the sale of goods, and Ohio’s fifteen-year limitations period for claims arising from other written contracts. The Eighth District ruled in Ford’s favor, reinstated the jury verdict, and declared the other assigned errors moot.

The Eighth District first concluded that the trial court’s JNOV order contravened the law of the case. *Westgate II* had already held that “Ford’s interpretation of the ambiguous language . . . was a reasonable interpretation, especially pertinent in light of the parties’ course of conduct.” Op. ¶ 12. Accordingly, “[t]he trier of fact needed to resolve the ambiguity in the

language to determine whether the parties intended the SFA to allow the appeal level CPA program as Ford implemented it, especially in consideration of Westgate’s course of conduct in participating in the program.” *Id.* at ¶ 14. But rather than respecting the jury’s resolution of the ambiguity, the trial court simply re-imposed its own view of Paragraph 10, “irrespective of the parties’ interpretation of the ambiguous phrases contained in that clause.” *Id.* at ¶ 10. The trial court thus “ignored [the Eighth District’s] decision holding that Ford’s interpretation of the ambiguous publication requirement in paragraph 10, permitting every aspect of the appeal level CPA program, was a reasonable one.” *Id.* at ¶ 13. At least where, as here, an appellate court has previously determined that both parties proffer reasonable arguments concerning the meaning of ambiguous contract language, a trial court cannot override the jury’s assessment of disputed evidence concerning the parties’ contemporaneous interpretation of that language. *Id.* at ¶ 14.

The Eighth District also observed that Westgate had waived on appeal any objection to the trial court’s failure either to address Westgate’s new trial motion in its written order, as required by Rule 59(A), or to conditionally grant a new trial, as required by Rule 50(C). *Id.* at ¶ 16. The Eighth District nevertheless treated the order as if it had granted a new trial, and reversed on the ground that the order was “incorrectly premised on the belief that the course of conduct evidence was only pertinent to Ford’s affirmative defenses,” and not to the meaning of the provision. *Id.* at ¶ 17. In fact, under Michigan law and the jury’s own instructions, the jury, in determining the parties’ intent, was “free to consider the parties’ course of conduct throughout the ten years the contract bound Ford and Westgate.” *Id.* at ¶ 19. More specifically—and worse for Westgate—the jury “was free to deem Westgate’s evidence of its interpretation of the ambiguous language . . . as incredible based on its course of conduct in actively participating in the appeal level CPA program.” *Id.* at ¶ 20. Accordingly, the Eighth District concluded, even if

the trial court's order were read "as conditionally granting the motion for a new trial, the trial court abused its discretion by excluding relevant evidence, heard by the jury, from its consideration before declaring Ford's evidence insufficient to sustain the judgment." *Id.*

ARGUMENT

I. **Proposition of Law 1: The trial court's JNOV was improper because overwhelming evidence supports the jury's verdict and because a prior appellate decision ruled that the contractual ambiguity was for the jury to resolve**

Westgate's first proposition of law states an unexceptionable principle, but then incorrectly applies it to a misdescribed record. This Court generally will not accept jurisdiction when a party seeks "no more than 'error correction.'" *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 492, 727 N.E.2d 1265 (2000) (Cook, J., concurring). Westgate does not even seek that much, because it identifies no errors to be corrected.

All agree that "once a contractual term is held ambiguous, the meaning becomes a question of fact." Mem. 12. It is also true that, "like any other question of fact, the meaning of an ambiguous contract provision can be resolved as a matter of law *when the evidence only supports one meaning.*" *Id.* (emphasis added). Westgate thus concedes, as it must, that it can prevail in this appeal *only* if the evidence relevant to Paragraph 10's meaning was completely "one-sided" in Westgate's favor. *Id.* at 8; *see id.* at 7, 12. It obviously was not. To the contrary, the Eighth District twice recognized that Ford's interpretation—and hence the jury verdict—was amply supported by the textual and extrinsic evidence, including the course-of-conduct evidence that, under Michigan law, is "entitled to great, if not controlling weight" in construing ambiguous contract language. *Det. Greyhound Emp. Fed. Credit Union v. Aetna Life Ins. Co.*, 381 Mich. 683, 686 n.1, 167 N.W.2d 274 (1969) (quotations omitted); *see Klapp*, 468 Mich. at 479, 663 N.W.2d 447 (course of conduct is one of the "best indications" of an ambiguous provision's meaning (quotations omitted)); *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*,

96 F.3d 174, 180 (6th Cir.1996) (course of conduct “entitled to great weight in interpreting ambiguous provisions of the contract”); *Ford Motor Co. v. Northbrook Ins. Co.*, 838 F.2d 829, 832 (6th Cir.1988) (same).

Pursuant to those precedents, the jury was specifically instructed to “consider the course of conduct of the parties after they entered into the contract and before they discovered that they disagreed with one another as evidence of their agreed intent.” Tr. 3563. The course of conduct evidence the jury considered was wholly undisputed. Westgate participated in the Appeal CPA program for over 25 years and earned substantial profits without ever suggesting the program breached Paragraph 10—even though the SSA *explicitly required* Westgate to bring any asserted breach to the attention of the Dealer Policy Board. Dealers actively sought out Ford’s methods of publishing prices via a variety of methods, in order to ensure that they could complete sales in a constantly-fluctuating marketplace. Consistent with Michigan law and its unchallenged instruction, the jury relied on that record to find that the Appeal CPA program was consistent with the parties’ “agreed intent” (*id.*) as to the meaning and operation of Paragraph 10.¹

The jury was also instructed “to consider the agreement as a whole” in assessing “the parties’ intentions” as to Paragraph 10. Tr. 3563; *see Klapp* at 469 (ambiguous language must be construed in light of “the apparent purpose of the contract as a whole” (quotations omitted)). The record showed that Paragraph 10 facilitated competitive pricing and thus advanced the SSA’s core objective of allowing Ford and dealers to succeed in a fierce marketplace.

¹Westgate asserts, like it did at trial, that the course of conduct evidence should be disregarded because the dealers had no choice but to participate in the appeal CPA program. Mem. 15. The jury sensibly rejected that argument. Westgate did not use Appeal CPA on every deal, or even the majority of its deals. More importantly, the SSA not only permitted, but *required* Westgate to notify the Dealer Policy Board of any potential claims of breach. SSA at 15 ¶ 16. Westgate of course could have asserted any breach objections before the Dealer Policy Board or in court while continuing to enjoy the benefits of Appeal CPA.

Westgate’s jurisdictional memorandum omits both the instructions and the extensive evidence supporting Ford’s interpretation. The *actual* record makes clear why Westgate’s proposition of law has no application here. A finding of ambiguity may not “preclude a court from later determining breach as a matter of law *if that evidence overwhelmingly favors one party*,” as Westgate’s proposition states (Mem. 12), but here the evidence did *not* “overwhelmingly favor” Westgate. If anything, the evidence overwhelmingly favored Ford, and hence the verdict. The Eighth District thus correctly reversed the JNOV, under the standard Westgate itself invokes.

The Eighth District also did not err in holding that the JNOV contravened the law of the case established by the prior Eighth District ruling in *Westgate II*. That ruling did not find Paragraph 10 to be ambiguous in the abstract, as Westgate suggests. Rather, *Westgate II* specifically reversed a summary judgment ruling Ford challenged as contrary to substantial record evidence supporting Ford’s interpretation, including the same course of conduct discussed above and considered by the jury. The Eighth District held that, “especially in consideration of Westgate’s course of conduct in participating in the program,” it was for a “trier of fact”—not the trial judge—“to resolve the ambiguity in the language to determine whether the parties intended the S[S]A to allow the appeal level CPA program as Ford implemented it.” Op. ¶ 14; *see supra* at 6. In light of that and other evidence, the Eighth District explained in *Westgate II*, Ford’s interpretation was at least “reasonable,” precluding a court from rejecting it as a matter of law. *Westgate II*, 2012-Ohio-1942, 971 N.E.2d 967, at ¶ 22. The trial court thus violated the law of the case not simply because it resolved an ambiguity as a matter of law, but because it did so *after* the Eighth District had already held that there was *conflicting evidence of meaning requiring resolution by a factfinder*. Indeed, Westgate’s own counsel urged the trial court to

grant JNOV for the same reason it previously granted summary judgment, and its JNOV motion even highlighted the same evidence that it had previously emphasized in its summary judgment motion. *See* Ford 8th Dist. Br. 19 & n.2. But if that evidence did not justify summary judgment before trial, the same evidence could not justify JNOV after trial. *See Harkcom v. Ohio Power Co.*, 5th Dist. Stark No. CA-8714, 1992 WL 332999, *2 (Oct. 26, 1992) (JNOV improper where “the evidence presented at trial was substantially the same as that upon which [the appellate court] based [its] prior summary judgment reversal”). The Eighth District’s nearly-verbatim repetition of its earlier improper summary judgment directly contravened “the mandate of an appellate court,” *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 323, 649 N.E.2d 1229 (1995); *see Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984), as the Eighth District correctly recognized. That ruling is not erroneous—it is unassailable.²

II. Proposition of Law 2: If the trial court implicitly granted a new trial, the Eighth District correctly reversed it, because the order rested on a fundamental error of law and because the jury’s verdict was not a manifest injustice

Westgate’s remaining two propositions of law collapse into a single, case-specific procedural challenge to the Eighth District’s handling of Westgate’s conditional new trial motion. Westgate initially objects to the Eighth District’s conclusion that the trial court’s failure to act on Westgate’s motion “was equivalent to a denial,” which Westgate did not appeal. Mem. 14. But under Civil Rule 59(A), if the court had granted the motion, it was *required* to “specify in writing the grounds upon which such new trial is granted,” as the Eighth District correctly

² The Eighth District did not say, as Westgate represents, that “the question of breach had to go to the jury and ‘*nothing at trial could alter this determination.*’” Mem. 7 (quoting Op. ¶ 14). In the sentence that precedes Westgate’s selective quotation, the Eighth District observed that its prior decision held “that Ford’s interpretation of the ambiguous publication requirement in paragraph 10, permitting every aspect of the appeal level CPA program, was a reasonable one.” Op. ¶ 13. Nothing at trial *could* alter that determination—the question being tried was *not* whether either party’s interpretation was “reasonable,” but *which reasonable interpretation the parties actually intended to adopt*.

observed. Civ.R. 59(A); *see* Op. ¶ 16. Given the failure to satisfy this necessary precondition to the granting of a new trial motion, it was appropriate to deem the motion denied.

More important for present purposes, however, the Eighth District went on to address the trial court's order *at length*—not in “passing” (Mem. 14)—*as if* it were a written specification of the grounds for a new trial, rather than solely for JNOV. Op. ¶¶ 17-20. The Eighth District, in other words, treated the order exactly as Westgate's proposition says it should have been treated.

And contrary to Westgate's final objection, the Eighth District did not err in reversing the order. As the Eighth District correctly observed, the order was premised on a critical legal error, *viz.*, that the undisputed course-of-conduct evidence was *irrelevant* to the meaning of Paragraph 10, and instead affected only Ford's affirmative defenses of modification, waiver, and estoppel. Op. ¶¶ 17-18. In fact, the course-of-conduct evidence was directly relevant to Paragraph 10's meaning, both under Michigan law and the jury's explicit instructions, which have never been challenged. *See supra* at 7-8. The Eighth District thus did not fail to defer to the trial court's supposed weighing of the conflicting evidence, as Westgate's proposition of law assumes. The Eighth District instead held that the trial court's entire order was infected by a foundational legal error that vitiated its whole analysis:

The trial court incorrectly applied the law by failing to consider the evidence of the course of performance as it related to the parties' interpretation of paragraph 10, and therefore, any weighing of evidence it undertook in deciding that Ford's evidence of the parties' intent was substantially outweighed by Westgate's contradictory evidence was in error. The court excluded relevant evidence and then deemed Ford's remaining evidence insufficient to sustain the verdict. Op. ¶ 19.

In other words, both the JNOV and the implicit new trial order erroneously excluded consideration of the undisputed course-of-conduct evidence—the very evidence that is actually *most* relevant to the meaning of ambiguous contract language. This Court held in *White Motor Corp. v. Moore*, 48 Ohio St.2d 156, 357 N.E.2d 1069 (1976)—a precedent Westgate itself relies

upon—that when a JNOV and implicit new trial order rest on the same legal error, it is proper to reverse both orders together. *Id.* at 162. That principle governs here.

Another controlling rule is that a new trial cannot be granted “when the verdict is one clearly possible under the evidence produced and the law.” *Parm v. Patton*, 20 Ohio App.2d 83, 86, 251 N.E.2d 626 (1969). “It is well established that a jury verdict is not against the manifest weight of the evidence simply because the trial judge, if sitting as trier of fact, would have decided differently from the jury.” *Getsedis v. Anthony Allega Cement Contractors*, 8th Dist. Cuyahoga No. 64954, 1993 WL 379351, *4 (Sept. 23, 1993) (citing *Parm*). Westgate’s proposition wrongly assumes that the trial judge is entitled to the same deference as the jury, and that a new trial order therefore must be affirmed merely so long as there is “competent and credible evidence” supporting the court’s view of the record. Mem. 15. In fact, a new trial order can be affirmed only if the evidence sufficed to establish that the verdict constituted “a manifest injustice.” *Rohde v. Farmer*, 23 Ohio St.2d 82, 92, 262 N.E.2d 685 (1970). As the Eighth Circuit understood, when the trial court’s legal error concerning the course-of-conduct evidence is corrected, there is no basis whatsoever for a conclusion that the jury verdict here worked a manifest injustice. The only manifest injustice would be reversing that verdict.³

CONCLUSION

The Court should deny jurisdiction over Westgate’s appeal.

³ Westgate also recycles several failed jury arguments to criticize the Eighth District’s ruling (Mem. 15), but those arguments are hardly matters of great importance for Ohio law, and they are wrong for the reasons Ford explained above, *see supra* n.1, at trial, and before the Eighth District. *See Ford* 8th Dist. Br. 25-28; *Ford* 8th Dist. Reply Br. 9-10.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **Appellee Ford Motor Company's Memorandum**

Opposing Jurisdiction has been served by regular U.S. Mail, postage prepaid, this 20th day of

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