

Case No. 2015-0114

In the Supreme Court of Ohio

Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio

Case Nos. 101073 and 101136

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

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

APPELLANT'S MOTION FOR RECONSIDERATION

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INTRODUCTION

Pursuant to Supreme Court Practice Rule 18.02(B)(1), appellant Westgate Ford Truck Sales, Inc. (“Westgate”) respectfully moves this Court for reconsideration of its Order declining to accept this jurisdictional appeal. Without action by this Court, over 3,500 franchised Ford dealerships, including 286 Ohio dealerships, will be forever barred from remedying the damage caused by Ford’s replacement of contractually required *published* prices with a pricing scheme that allowed Ford to use *unpublished* prices to systematically dispossess the dealers of their profits. The challenged conduct includes Ford’s intentional inflation of published dealer wholesale prices (thereby creating the need for dealer discounts); Ford’s creation of secret discounts that were doled out deal-by-deal based on a Ford manager’s perception of a dealer’s “need;” Ford’s use of chargebacks and other punitive measures to confiscate dealer profits that exceeded “approved” levels; and Ford’s use of intimidation to discourage dealers from challenging Ford’s reach into the retail marketplace that was contractually reserved to the dealers. The net result of that conduct was the unlawful shifting of hundreds of millions of dollars in dealer profits to Ford. Westgate respectfully suggests that before that conduct goes forever unredressed, this case deserves a closer look.

Westgate is mindful that motions for reconsideration should not simply reargue the case. Rather, the authority to reconsider allows the Court to “correct decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 5 (internal quotations omitted). This Court should reconsider its decision to decline jurisdiction here because Ford’s Memorandum Opposing Jurisdiction (“Opposition”) seeks to create a false

impression that the dealers in the class *acquiesced* in Ford's conduct. Nothing could be further from the truth. And, since that insinuation serves as the foundation for the "course of conduct" evidence on which the court below so heavily relied in reversing the trial court's JNOV and new trial order, a full briefing of the issues is warranted.

MOTION FOR RECONSIDERATION

It is possible, perhaps even likely, that this Court refused jurisdiction based on Ford's characterizations of the record evidence as set forth in its Opposition. That Opposition, however, creates a false impression about the record. Once that false impression is addressed, the errors in the decision below, and the need for review here, are readily apparent.

- 1. The "course of conduct evidence" was *not* ignored by the trial court as Ford argues and the Court of Appeals found, but was instead fully recognized for what it really was: evidence of a lack of options in the dealers.**

Ford argues, and the court below somehow found (Op. ¶19), that the trial court *ignored* course-of-conduct evidence that Ford offered, or alternatively, that the trial court only considered that evidence for purposes of affirmative defenses and not breach. (Op. ¶¶17, 18). Importantly, the only evidence Ford presented to support its "course of conduct" argument was the fact that the dealers made use of the CPA program (i.e., the program by which Ford transformed its published pricing system into an unpublished pricing system) for a number of years. From this, Ford argues that the dealers must be deemed to have *voluntarily* "gone along with" the CPA program, thus evidencing their "agreement" with Ford's construction of paragraph 10 of Ford's standard dealer agreement with its truck dealers (the "SSA"). (*See* Ford's Opposition at 2, 7).

Contrary to statements in the decision below, however, the trial court did not ignore this conduct evidence. Indeed, the judge *must* have considered it because he found this course of conduct was not based on anyone's interpretation of the contract, but was instead based on a lack of options available to the dealers. As proof Judge Corrigan did not "ignore" this evidence, he expressly referred to it in his ruling granting JNOV.

But a more important point bears note as well: Ford observes that the class representative, Mr. Beule, did not complain about CPA, and from that fact seeks to create the impression that no dealers were complaining. (*See* Ford Opposition at 7, 11 n.1). To the contrary, the record evidence showed that other members of the class were complaining about the CPA program almost from its inception. For example, Capitol Ford in Atlanta not only took its complaints before the Dealer Policy Board in 1990 (to no avail, (*see* Trans. 3080-88), thus rendering hollow Ford's criticism of Mr. Beule for not doing the same thing), but Capitol Ford actually sued Ford for breach of contract over the harm the CPA program caused its dealership. *See Capitol Ford Truck Sales, Inc. v. Ford Motor Company*, 819 F.Supp. 1555 (N.D. Ga. 1992)(a companion case to this federal case was filed in Georgia state court in 1988, less than five years after the CPA program assumed its final form; Capitol Ford was terminated by Ford). Another dealer, Metro Ford in Dallas, also sued Ford for breach of contract over the operation of the CPA program. *See Ford Motor Company v. Metro Ford Truck Sales, Inc.*, 1999 WL 1126280 (Tex.App. – Dallas 1999, rev. denied)(this case was filed in 1994; Metro was threatened with termination by Ford and the owners eventually were forced to sell). (*See* Trans. 3102-07). Also unrefuted was the evidence showing that Ford, through what it called

“chargebacks,” confiscated so-called “excess” profits from dealers as part of CPA. (*See* Trans. 1861).

These complain-at-your-peril reactions by Ford were surely enough to cause dealers to fear complaining. Given Ford’s reaction to dealer complaints, Mr. Beule had to be understandably reluctant to complain himself, given the unrefuted testimony that dealers had everything they owned at risk. (*See* Trans. 1818). Not only does Ford seek to create a false impression regarding the existence of complaints about the CPA program, but the entirety of the evidence at trial refutes Ford’s argument. If the jury ignored this overwhelming evidence to return a verdict in favor of Ford’s unsupported arguments, it clearly “lost its way” just as the trial court found, and the trial court was duty bound to grant a JNOV or new trial.

Accordingly, Westgate respectfully urges the Supreme Court to review this case on the merits before leaving in place a decision that rests on faulty factual underpinnings, and as a result denies justice to a nationwide class of dealers.

2. Contract construction is based on the intent of the parties.

The trial judge correctly realized that a party may act in a certain way for any number of reasons, and those reasons are vitally important in a contract construction case because they and they alone illuminate *intent*: the linchpin of contract construction.

Missing from Ford’s trial presentation was any evidence that any dealer actually “went along with” the CPA program *because* he or she thought unpublished CPA discounts were permitted by the dealer franchise agreement. In fact, no dealers testified that they understood the contract to allow unpublished pricing. As dealer Pat Cayce testified, the act of “going along with” the CPA program did not support the argument

that the SSA, which expressly requires only published pricing, really permitted *un*published pricing as well. Cayce's completely-unrefuted testimony was that dealers had no realistic choice but to go along or fold their dealerships. Mr. Cayce's testimony not only makes logical sense, but it was unrefuted by Ford and thus presented conclusive evidence that "going along with" the CPA program was no evidence of contract construction or intent. On this record, it would have been error for the trial court to allow the jury's verdict to stand. The court below thus erred in overturning the trial court's reasoned, informed decision.

3: Ford's claim that the evidence in the latest trial was "substantially the same" as that in the first trial is only partially true and thus misleading.

Ford argues that because the evidence in the first damages-only trial in this matter was substantially the same as the evidence in the more recent trial at issue here, a JNOV was automatically improper in the more recent trial if a summary judgment was improper in the first trial. (Ford's Opposition at 12-13). Had the evidence in both trials been the same, Ford's argument may make sense. However, despite Ford's claims, the evidence presented in the two trials was decidedly *not* the same.

The first trial was for damages only, following summary judgment that Ford had breached the SSA. That trial therefore did not involve evidence concerning breach or contract construction, so the parties offered no such evidence. In fact, when Ford attempted to present this evidence in the first trial, claiming it went to damages and not liability, the trial court rejected the evidence, and that rejection became one of the bases for Ford's arguments in the first appeal.

In the second trial, similar *damages* evidence was presented, but this time it was accompanied by the previously-excluded-because-irrelevant evidence on contract construction and intent. At this second trial, the dealers presented unrefuted evidence that, from 1960 to 1981, Ford always published *all* prices and discounts to dealers, the same way Ford still does today with cars and light trucks. This evidence was meant to show how the parties understood and construed the contract language regarding “published prices” from the time the franchise agreements were first signed in 1960 until the time when disputes first arose in 1983 (the relevant inquiry). And on that inquiry, Ford presented no evidence; no witnesses said any dealer thought the contract word “published” actually meant “unpublished” when they signed up; no witnesses said the parties agreed, verbally or in writing, to change what the contract had said and meant for over 20 years; no witnesses said they agreed to change the contract due to “fierce” competition; no witnesses said the dealers had any choice other than to accept CPA or go out of business. Ford was able to impose the CPA program because it was the stronger party and could force the dealers to go along even though their contract prohibited Ford from doing what it did.

The point is: the evidence offered in the first damages-only trial was quite different from the evidence offered in the second trial. The JNOV in the second trial therefore was based on different evidence from that supporting the summary judgment in the first trial, even though both sets of evidence were overwhelmingly in favor of the dealers. And when Ford was allowed to offer its evidence of contract intent and construction in a trial setting at the second trial, it had no *evidence* to offer, only argument.

The trial judge properly decided that the overwhelming evidence arrayed against Ford could not be ignored by a reasonable jury and therefore, the jury here must have lost its way and based its decision on something other than the evidence. Actually, the trial judge *twice* decided that Ford breached the contract, and on two very different records: once on Ford's unconvincing affidavits on summary judgment, and again on the live testimony in the most-recent trial, meaning Ford's second bite at the apple was no better than its first. Far from depriving the jury of its legitimate role in the case, Judge Corrigan decided that the evidence simply was not sufficient *as a matter of law* to support Ford's arguments, a call that is relegated to trial judges because it is trial judges, and not the courts of appeals, that see the witnesses and have the ability to evaluate their credibility.

Trial judges must be afforded deference regarding such decisions, which is why appellate review of post-trial order includes two doctrines that were largely ignored by the court below: (1) when a trial court grants a new trial, the appellate court must consider the record with deference to the trial court's ruling and not with deference to the jury's decision, and (2) an appellate court may overturn a trial judge's order granting a new trial only if there is *no* evidence supporting it. Ford remarks that Judge Corrigan did not set out in his written ruling all the evidence on which he based his decision. But the more pertinent criticism may be leveled at the court below, for not setting out the evidence it claims shows that Corrigan's ruling was somehow wrong. The fact of the matter is that such evidence simply does not exist.

CONCLUSION

This is the largest business case in Ohio state history, and one of the twenty largest such cases in U.S. history. It has been the subject of no fewer than fifty national news stories. It is a class action impacting thousands of businesses all over the country, hundreds of which are located in Ohio. Unfortunately, the decision below rests on at least three serious errors of law. Leaving that decision in place is certain to cause confusion among Ohio courts, as well as litigants and attorneys, as to the appropriate handling of post-trial motions for years to come. In short, this is a paradigmatic example of a case of “public or great general interest” justifying this Court’s review. Accordingly, Westgate respectfully urges the Court to grant reconsideration and accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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