

ORIGINAL

No. 2015-0114

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# In the Supreme Court of Ohio

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

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WESTGATE FORD TRUCK SALES, INC.,  
Individually, and on behalf of Plaintiff Class,  
*Plaintiff-Appellant,*  
v.  
FORD MOTOR COMPANY,  
*Defendant-Appellee.*

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## APPELLEE FORD MOTOR COMPANY'S MEMORANDUM OPPOSING RECONSIDERATION

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The motion for reconsideration filed by appellant Westgate Ford Truck Sales, Inc. (“Westgate”) is meritless. Its premise is that the Ohio court system has not yet given Westgate’s claims of contractual breach a sufficiently “close[] look.” Mot. 1. That premise is absurd. To start, Westgate’s claims were subjected to an *eleven-day trial* and its evidence was *heard by a jury*, which rejected Westgate’s claims as factually baseless. After the trial court remarkably and erroneously granted Westgate’s motion for judgment notwithstanding that jury verdict, Westgate had another day in court on appeal before the Eighth District, which unanimously found Westgate’s objections to the jury verdict to be legally baseless. And after that appellate decision, Westgate sought review in this Court, which of course carefully evaluated Westgate’s arguments and declined review. Even Westgate concedes that a motion for reconsideration may not “simply reargue the case.” Mot 1. But that is all Westgate does—indeed, it seeks to reargue not only this Court’s considered decision declining jurisdiction, but also the Eighth District’s unanimous decision reinstating the jury verdict, and ultimately the jury verdict itself. Westgate does not seek reconsideration, but re-re-reconsideration. And as on every previous occasion, Westgate again describes only its side of the evidence, without fairly representing the full trial record actually considered by the jury and actually reviewed on appeal.

That record is fully rehearsed in the briefs submitted by Ford to the Eighth District, and is summarized in Ford’s memorandum opposing jurisdiction. It is enough to say here that the contention in Westgate’s motion that the jury verdict lacked evidentiary support is an utter, complete fantasy. To see why, the Court need simply review—yet again—Ford’s appellate and jurisdictional submissions.

For present purposes, only a few points bear emphasis:

- This appeal involves the meaning of a private contractual provision—¶ 10 of the Sales and Service Agreement (“SSA”)—that is governed by Michigan law. There is no issue of Ohio law involved—much less an issue of public or great general importance in Ohio. The contract rights of “businesses all over the country” (Mot. 8) under Michigan law are not properly at issue here (Ford’s objections to class certification have not been finally adjudicated) and should not be of concern to this Court in any event.

- The trial below was framed by a prior Eighth District decision reversing a grant of summary judgment in Westgate’s favor and holding that SSA ¶ 10 ambiguous, that both parties’ interpretations of ¶ 10 were reasonable, and that a jury trial was necessary to resolve the ambiguity. *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 96978, 2012-Ohio-1942, 971 N.E.2d 967, ¶ 22 (“*Westgate II*”). The jury simply reviewed the evidence relevant to resolving that ambiguity under Michigan law and resolved the ambiguity in Ford’s favor. Contrary to Westgate’s assertion (Mot. 5), Ford’s memorandum opposing jurisdiction did not argue that the trial evidence concerning ¶ 10’s meaning was essentially the same as the evidence in the first *damages trial*; Ford’s point was that the trial record was essentially the same as the prior *summary judgment* record, which the Eighth District already held required resolution by a jury. Ford Opp. Mem. 12-13. As Ford pointed out, Westgate’s counsel urged the trial court to grant JNOV on the basis of the same evidence that was insufficient to justify summary judgment. *Id.* “[I]f that evidence did not justify summary judgment before trial,” Ford argued, “the same evidence could not justify JNOV after trial.” *Id.* at 13. Westgate’s motion has no answer. In fact, Westgate affirmatively concedes that if the evidence addressed in *Westgate II*

was the same as the trial evidence below—as it was, in fact—“Ford’s argument may make sense.” Mot. 5. Indeed it does.

- Ford’s evidence included, but was *not* limited to, the longstanding course of conduct evidence mentioned in Westgate’s motion. Ford’s evidence *also* showed that its interpretation of ¶ 10 advanced the core purposes of the SSA, consistent with the jury’s instruction—required under Michigan law—to consider ¶ 10 in the context of the SSA as a whole. Ford Opp. Jur. 7-8; Ford 8th Dist. Br. 21-23. As that evidence demonstrated, only Ford’s construction furthered the SSA’s expressly stated objective of ensuring competitive pricing for dealers by allowing them to obtain individualized prices quickly to close specific sales in a fiercely competitive marketplace. Westgate’s motion does not mention that uncontradicted evidence of contractual purpose.

- Westgate does address the course of conduct evidence, but it mainly makes jury arguments about the evidence already rejected by the actual jury. Ford has already addressed Westgate’s false contention that its course of conduct evidence was “unrefuted.” Mot. 3. If anything, it was *Ford’s* evidence that Westgate and others for years relied on Appeal CPA—as Ford construed and implemented it—that was uncontradicted. Ford Opp. Jur. 7; Ford 8th Dist. Br. 23-25.

Apart from restating—now for the fourth time—its failed jury argument about why the parties’ course of conduct is not persuasive evidence supporting Ford’s position, Westgate’s motion suggests a novel legal argument about the relevance of such evidence to contractual interpretation. According to Westgate, such evidence should be deemed irrelevant to the resolution of an ambiguous provision unless the parties *testify* that they performed in a consistent manner “*because*” (emphasis Westgate’s) they understood the ambiguous provision contract to have the meaning reflected by the performance. Mot. 4. Westgate cites no Michigan law

holding any such thing, and it makes no sense: if the parties testified as to what their understanding was, there would be *no need* for course of conduct evidence. The point of such evidence, as stated repeatedly in the controlling Michigan precedents—all completely ignored by Westgate—is that it provides objective, neutral evidence of how the parties understood the contract when they were actually operating under it, as opposed to the kind of self-serving claims parties make when they file lawsuits. *See, e.g., Klapp v. United Ins. Group Agency, Inc.*, 468 Mich. 459, 479, 663 N.W.2d 447 (2003) (“one of the best indications” of parties’ understanding is “practical interpretation” adopted by parties “while engaged in their performance and before any controversy has arisen concerning them”); Ford 8th Dist. Br. 20 (citing Michigan precedents).

For the foregoing reasons, and for all the reasons stated by Ford in previous submissions, Westgate’s motion for reconsideration should be denied.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Appellee Ford Motor Company's Memorandum Opposing Reconsideration** was served by regular U.S. Mail, postage prepaid, this 30th day of July, 2015 upon the following:

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