

No. 14-1940

---

## In the Supreme Court of Ohio

---

APPEAL FROM THE COURT OF APPEALS  
SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY, OHIO  
CASE NO. 2011 MA 00189

---

ROSS J. LINERT, et al.,  
*Plaintiffs-Appellees,*

v.

FORD MOTOR COMPANY,  
*Defendant-Appellant.*

---

### BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF APPELLANT FORD MOTOR COMPANY

---

Robert W. Schmieder II (PHV)  
Robert J. Evola (PHV)  
SL CHAPMAN LLC  
330 North Fourth Street, Suite 330  
St. Louis, MO 63102  
(314) 588-9300 (phone)  
(314) 588-9302 (facsimile)  
[robs@slchapman.com](mailto:robs@slchapman.com)  
[roberte@slchapman.com](mailto:roberte@slchapman.com)

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

John P. Palumbo (0012313)  
Benjamin C. Sassé (0072856)  
(COUNSEL OF RECORD)  
TUCKER ELLIS LLP  
950 Main Avenue, Suite 1100  
Cleveland, OH 44113-7213  
(216) 592-5000 (phone)  
(216) 592-5009 (facsimile)  
[john.palumbo@tuckerellis.com](mailto:john.palumbo@tuckerellis.com)  
[benjamin.sasse@tuckerellis.com](mailto:benjamin.sasse@tuckerellis.com)

*Attorneys for Amicus Curiae Product  
Liability Advisory Council, Inc.*

Richard A. Abrams (0014382)  
GREEN HAINES SGAMBATI CO., L.P.A.  
100 Federal Plaza East, Suite 800  
P.O. Box 849  
Youngstown, OH 44501  
(330) 743.5101 (phone)  
(330) 743-3451 (facsimile)  
[rabrams@green-haines.com](mailto:rabrams@green-haines.com)

*Additional Counsel for Appellees  
Ross J. Linert and Brenda Linert*

Elizabeth B. Wright (0018456)  
COUNSEL OF RECORD  
Conor A. McLaughlin (0082524)  
THOMPSON HINE LLP  
127 Public Square, Suite 3900  
Cleveland, Ohio 44114  
(216) 566-5500 (phone)  
(216) 566-5800 (facsimile)  
[Elizabeth.Wright@ThompsonHine.com](mailto:Elizabeth.Wright@ThompsonHine.com)  
[Conor.McLaughlin@ThompsonHine.com](mailto:Conor.McLaughlin@ThompsonHine.com)

Pierre H. Bergeron (0071402)  
Larisa M. Vaysman (0090290)  
SQUIRE PATTON BOGGS (US) LLP  
221 East Fourth Street, Suite 2900  
Cincinnati, Ohio 45202  
(513) 361-1200 (phone)  
(513) 361-1210 (facsimile)  
[pierre.bergeron@squirepb.com](mailto:pierre.bergeron@squirepb.com)  
[larisa.vaysman@squirepb.com](mailto:larisa.vaysman@squirepb.com)

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

*Attorneys for Appellant Ford Motor  
Company*

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
II. STATEMENT OF FACTS.....	2
III. LAW AND ARGUMENT.....	3
Proposition of Law No. 1:.....	3
To establish a claim for inadequate post-marketing warnings, a plaintiff must show that (a) the manufacturer knew, or in the exercise of reasonable care should have known, of a risk of harm manifesting post-sale that caused the plaintiff's injuries; (b) the likelihood and seriousness of that harm justified the burden of providing a warning; (c) those who would be warned are identifiable and reasonably assumed to be unaware of the risk; (d) the warning could be effectively communicated to and acted on by those warned; (e) the manufacturer failed to provide the post-sale warning a reasonable manufacturer would have under the circumstances; and (f) the allegedly inadequate warning was a proximate cause of plaintiff's claimed injuries. (R.C. 2307.76(A)(2), construed; R.C. 2307.73(A)(2), construed; Restatement of the Law 3d, Torts: Products Liability, Section 10 (1998), followed.).....	3
A. The History and Structure of R.C. 2307.76 Confirm Post-Marketing Failure-to-Warn Claims Are Distinct From Time-of-Sale Failure to Warn Claims. ....	4
B. The Elements of Proof For a Post-Marketing Failure-to-Warn Claim.....	8
1. Actual or constructive knowledge of a risk of harm manifesting post-sale that caused the claimed injury.....	8
2. The likelihood and seriousness of the harm justified the burden of providing a warning.....	10

	<u>Page</u>
3. Those who would be warned are identifiable and reasonably assumed to be unaware of the risk.....	12
4. The warning can be effectively communicated to and acted on by those warned.....	14
5. The manufacturer failed to provide the post-sale warning a reasonable manufacturer would have under the circumstances.....	16
6. The allegedly inadequate warning was a proximate cause of plaintiff’s claimed injuries.....	17
C. The Plaintiffs’ Failure to Establish a Post-Marketing Failure-to-Warn Claim.....	18
Proposition of Law No. 2: .....	21
A product manufacturer’s implementation of a post-marketing product improvement does not trigger a post-marketing duty to warn. (R.C. 2307.76(A)(2), construed; Restatement of the Law 3d, Torts: Products Liability, Section 10 (1998), followed.) .....	21
IV. CONCLUSION.....	24
PROOF OF SERVICE.....	26

**APPENDIX**

**Appx. Page**

List of PLAC’s Corporate Members .....	1
--	---

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brown v. Ford Motor Co.</i> , 306 Ill.App.3d 314, 714 N.E.2d 556 (1999) .....	23
<i>Collins v. Hyster Co.</i> , 529 N.E.2d 303 (Ill. App. 1988) .....	22
<i>Cover v. Cohen</i> , 461 N.E.2d 864 (N.Y.1984).....	5, 7
<i>Cuntan v. Hitachi KOKI USA, Ltd.</i> , E.D.N.Y. No. 06-CV-3898, 2009 WL 3334364 (Oct. 15, 2009) .....	18
<i>Dodd v. Croskey</i> , _ Ohio St.3d _, 2015-Ohio-2362.....	4
<i>Flax v. DaimlerChrysler Corp.</i> , 272 S.W.3d 521 (Tenn. 2008) .....	9, 10, 19
<i>Hauser v. Dayton Police Dept.</i> , 140 Ohio St.3d 268, 2014-Ohio-3636.....	4, 5
<i>Jones v. Bowie Indus., Inc.</i> , 282 P.3d 316 (Alaska 2012) .....	11, 14, 18
<i>Koken v. Black &amp; Veatch Constr., Inc.</i> , 426 F.3d 39 (1st Cir. 2005).....	16, 18
<i>Kozlowski v. John E. Smith's Sons Co.</i> , 275 N.W.2d 915 (Wis.1979).....	10
<i>Lewis v. Ariens Co.</i> , 729 N.E.2d 323 (Mass.App.Ct.2000).....	13
<i>Lewis v. Ariens Co.</i> , 751 N.E.2d 862 (Mass.2001).....	13
<i>Lovick v. Wil-Rich</i> , 588 N.W.2d 688 (Iowa 1999).....	5, 7

	<u>Page</u>
<i>Lynch v. McStome &amp; Lincoln Plaza Assoc.</i> , 548 A.2d 1276 (Pa.Super.Ct.1988) .....	23
<i>McAuliffe v. W. States Import Co., Inc.</i> , 72 Ohio St.3d 534, 1995-Ohio-201 .....	4
<i>McFarland v. Bruno Mach. Corp.</i> , 68 Ohio St.3d 305 (1994) .....	22
<i>Morgen v. Ford Motor Co.</i> , 797 N.E.2d 1146 (Ind.2003) .....	16, 18
<i>Patton v. Hutchinson Wil-Rich Mfg. Co.</i> , 861 P.2d 1299 (Kan. 1993) .....	10, 11, 19, 22
<i>Volz v. Volz</i> , 167 Ohio St. 141 (1957).....	4
<i>Wusinich v. Aeroquip Corp.</i> , 843 F.Supp. 959 (E.D.Pa.1994) .....	23

**Rules**

Evid.R. 407 .....	22
-------------------	----

**Statutes**

R.C. 2307.73(A)(2) .....	17
R.C. 2307.76 .....	6, 9, 16, 18
R.C. 2307.76(A)(1) .....	6, 8, 10
R.C. 2307.76(A)(2) .....	passim
R.C. 2307.76(B).....	14

Other Authorities

Darling, *The Meaning of Defect in Ohio Product Liability Law Before and After 1987 House Bill 1*, Ohio Trial (Winter 1990) .....5

Henderson & Twerski, *ALI Products Liability Reporters' Response*, 10 Kan. J.L. & Pub. Pol'y 137 (2000) .....3, 4

Henderson & Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 Wm.Mitchell L.Rev. 7, 29 (2000) .....9

Restatement of the Law 3d, Torts: Products Liability (1998) ..... passim

Robertson, *The Common Sense of Cause in Fact*, 75 Tex.L.Rev. 1765, 1770 (1997) ..... 17

Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U.L.Rev. 892 (1983)..... 5, 6, 7

**I. STATEMENT OF INTEREST OF AMICUS CURIAE**

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 105 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,050 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an appendix.

PLAC members have broad experience in failure-to-warn litigation across the country. PLAC submits this brief to offer guidance on fair and workable standards for post-marketing failure-to-warn claims. This appeal calls upon this Court to construe post-marketing failure-to-warn liability under Ohio's Product Liability Act, and the flexible language employed in the Act supports incorporation of the wisdom of other jurisdictions while accomplishing this task. That wisdom is collected in the Restatement of the Law 3d, Products Liability (1998), which contains balanced

standards for post-marketing failure-to-warn claims. This Court should adopt the Restatement's guidance and reverse the judgment of the court below, which erroneously concluded that the trial court should have charged the jury on an alleged post-marketing failure to warn where plaintiff failed to establish any of the elements of such a claim, much less that such a post-marketing warning would have prevented the plaintiff's car from catching fire after being rear-ended by a vehicle travelling at speeds of over 100 mph.

**II. STATEMENT OF FACTS**

PLAC adopts and incorporates the Statement of Facts contained in the Merit Brief of Defendant-Appellant Ford Motor Company.

### III. LAW AND ARGUMENT

#### Proposition of Law No. 1:

To establish a claim for inadequate post-marketing warnings, a plaintiff must show that (a) the manufacturer knew, or in the exercise of reasonable care should have known, of a risk of harm manifesting post-sale that caused the plaintiff's injuries; (b) the likelihood and seriousness of that harm justified the burden of providing a warning; (c) those who would be warned are identifiable and reasonably assumed to be unaware of the risk; (d) the warning could be effectively communicated to and acted on by those warned; (e) the manufacturer failed to provide the post-sale warning a reasonable manufacturer would have under the circumstances; and (f) the allegedly inadequate warning was a proximate cause of plaintiff's claimed injuries. (R.C. 2307.76(A)(2), construed; R.C. 2307.73(A)(2), construed; Restatement of the Law 3d, Torts: Products Liability, Section 10 (1998), followed.)

A fundamental flaw in the Seventh District's analysis is its failure to articulate the specific elements necessary to determine whether a manufacturer breached any post-marketing obligations under R.C. 2307.76(A)(2), and particularly its obligation to exercise "reasonable care." Articulating these elements is critical "to make sense" of a post-marketing failure-to-warn claim. Henderson & Twerski, *ALI Products Liability Reporters' Response*, 10 Kan. J.L. & Pub. Pol'y 137, 138 (2000).<sup>1</sup> They help "a court in a very shaky post-sale warning case to make the right decision on a motion" for summary judgment, directed verdict or judgment notwithstanding the verdict.

---

<sup>1</sup> Professors James A. Henderson, Jr. and Aaron D. Twerski were the reporters for the Restatement of the Law 3d, Torts: Products Liability.

*Id.* Absent a list of such elements, the analysis is “too sloppy” and courts “run the risk that [post-marketing warning claims] will eat up the system.” *Id.* The above proposition of law provides fair and workable standards, based on fundamental negligence concepts and principles necessarily incorporated into Ohio law when the General Assembly created a post-marketing duty to warn, which this Court should adopt.

**A. The History and Structure of R.C. 2307.76 Confirm Post-Marketing Failure-to-Warn Claims Are Distinct From Time-of-Sale Failure to Warn Claims.**

The goal of statutory interpretation “is to ascertain and give effect to the intention of the General Assembly.” *Dodd v. Croskey*, \_\_ Ohio St.3d \_\_, 2015-Ohio-2362, ¶ 24. To do so, this Court does not “pick out one sentence and dissociate it from the context.” *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, ¶ 9. Instead, it analyzes the statute as a whole, “based on how one would have reasonably understood the text ‘at the time’ it was enacted.” *Id.*, citing *Volz v. Volz*, 167 Ohio St. 141, 146 (1957). This inquiry turns on the “historical context of the words chosen by the General Assembly[.]” *Id.*

Ohio’s post-marketing failure-to-warn statute, R.C. 2307.76(A)(2), has a unique history. It is part of the Ohio Product Liability Act adopted in 1987. But it is unlike other product liability claims, which were codified and modified by the Act. *See McAuliffe v. W. States Import Co., Inc.*, 72 Ohio St.3d 534, 538, 1995-Ohio-201. The post-marketing failure-to-warn claim is the only claim that lacks an Ohio

common law antecedent. *See, e.g., Darling, The Meaning of Defect in Ohio Product Liability Law Before and After 1987 House Bill 1*, Ohio Trial (Winter 1990) 14 (acknowledging the absence “of any reported Ohio decision imposing liability for lack of adequate post-marketing warning” prior to the Act).

Thus, the historical context of post-marketing failure-to-warn liability comes not from Ohio law, but from the law of other jurisdictions. *Cf. Hauser, 2014-Ohio-3636*, ¶ 10-11 (looking to federal law to determine whether statutory term used by General Assembly had already acquired “a particular meaning in the context of employment-practices legislation”); *accord Lovick v. Wil-Rich*, 588 N.W.2d 688, 693-696 (Iowa 1999) (the law of other jurisdictions and the Restatement informed the court’s analysis of the statutory post-sale duty to warn).

By 1987, an emerging minority of jurisdictions recognized a common law post-sale duty to warn. *See, e.g., Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y.1984) (collecting cases recognizing a post-sale duty to warn); Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U.L.Rev. 892, 893 (1983) (discussing evolution of a post-sale duty to warn). At the time, those jurisdictions were grappling with two theoretical questions concerning the scope of any post-sale duty: (1) whether the post-sale duty included product recall or replacement; and (2) whether the distinction between that duty and time-of-sale duties “should be obliterated.” Schwartz, 58 N.Y.U.L.Rev. at 893. The latter question stemmed from a small number of cases holding “a manufacturer

liable for failing to issue warnings at the time of sale even though, given the contemporary state of the art, the product hazards were undiscoverable until later.”

*Id.* This holding, of course, eliminated the knowledge-of-the-risk element (actual or constructive) that had always been a part of failure-to-warn liability. *Id.*

The General Assembly answered both of these questions “no” by enacting R.C. 2307.76. The statute does not require recall or replacement following post-sale discovery of a new risk of harm. Nor does it eliminate the distinction between time-of-sale and post-sale duties. Rather, R.C. 2307.76(A)(1) and (2) adopt *separate* time-of-sale and post-sale standards that require at least constructive knowledge of the risk of harm and focus on the reasonableness of a manufacturer’s conduct in each specific context as it relates to warnings.

With respect to risks of harm manifesting post-sale, R.C. 2307.76(A)(2) adopts a reasonable care standard:

[A product] is defective due to inadequate post-marketing warning or instruction if, at a relevant time after it left the control of its manufacturer, both of the following applied:

(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 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.

R.C. 2307.76(A)(2)(a)-(b). Once again, history shows this “reasonable care” standard has always applied differently post-sale.

At the time the Ohio Product Liability Act was adopted, there was an emerging consensus that “reasonable care” applied differently to post-marketing conduct. *E.g., Cover*, 161 N.E.2d at 871-872 (listing factors relevant to reasonableness of post-marketing conduct). The difference stemmed from practical difficulties associated with post-sale warnings. Unlike time-of-sale warnings, a post-sale warning “cannot be attached to the product because the product has already been sold.” Schwartz, 58 N.Y.U.L.Rev. at 895. Post-sale efforts to warn also encounter other unique obstacles, such as difficulties in locating the product and identifying its users. *Id.* These obstacles become more burdensome over time, making the cost of identifying and contacting current product users intolerable in some cases. *Id.* The key insight in post-sale duty-to-warn litigation, which was apparent by 1987 and remains true today, is that the “reasonableness standard is flexible” and “what is reasonable in the point-of-sale context need not be reasonable in the post-sale context.” *Id.* at 896; *see also Lovick*, 588 N.W.2d at 694 (explaining that, “while the rationale for post-sale and point-of-sale duties to warn [is] nearly identical, the parameters of those duties must be separately identified”).

In short, the history and structure of R.C. 2307.76 confirm that: (1) a manufacturer's post-marketing duties are distinct from its time-of-sale duties; and (2) the "reasonable care" standard in R.C. 2307.76(A)(2) should be interpreted flexibly while recognizing the unique problems posed by post-marketing efforts to warn. In undertaking this task, the Restatement of the Law 3d, Torts: Products Liability (1998), which embodies the collective wisdom of courts and scholars that have wrestled with these problems over time, serves as a useful guide.

**B. The Elements of Proof For a Post-Marketing Failure-to-Warn Claim.**

Based on the plain language of R.C. 2307.76 and a sensible construction of the "reasonable care" standard contained in that statute, this Court should hold that a plaintiff must prove the following elements to establish a post-marketing failure-to-warn claim.

**1. Actual or constructive knowledge of a risk of harm manifesting post-sale that caused the claimed injury.**

First, a threshold element is proof that the risk of harm causing the plaintiff's injury manifested post-sale. Time-of-sale warning claims spring from risks a manufacturer exercising reasonable care should know about *when the product leaves its control*. See R.C. 2307.76(A)(1) (framing defect inquiry around what the manufacturer should know "when [the product] left [its] control"). Post-marketing claims, on the other hand, concern risks manifesting later: risks a manufacturer exercising reasonable care should know about only *after the product left its control*.

See R.C. 2307.76(A)(2) (framing defect inquiry around what the manufacturer should know “after [the product] left [its] control”).

Fidelity to the structure of R.C. 2307.76 requires strict adherence to this distinction. The General Assembly necessarily rejected the position that point-of-sale and post-marketing duties are identical when it adopted separate statutory provisions to govern those duties. See pp. 5-6, *supra*. Keeping these duties distinct requires limiting post-marketing claims to their “true function,” which “is to provide a remedy for a plaintiff who was not warned about a risk or risk-avoidance measure when that information was not available at the time of original sale.” Henderson & Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 Wm.Mitchell L.Rev. 7, 29 (2000); see also *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 541-542 (Tenn. 2008) (explaining a post-marketing claim “arises when the manufacturer or seller becomes aware that a product is defective or unreasonably dangerous after the point of sale” and “courts apply the traditional failure to warn claim when a manufacturer or seller had knowledge of a defect at the time of sale”). After all, if time-of-sale and post-marketing claims could be based on the same allegedly known (or knowable) risk, the post-marketing claim would be purely redundant, and hence legally unnecessary. Henderson & Twerski, 27 Wm.Mitchell L.Rev. at 29.

In short, this Court should confirm that Ohio courts must undertake a threshold inquiry as to whether the plaintiff's claim is rooted in a risk of harm

known to (or knowable by) the manufacturer when the product left its control. If so, the claim should be analyzed under the standards for time-of-sale warnings in R.C. 2307.76(A)(1). *Accord Flax*, 272 S.W.3d at 542 (“If a defendant negligently fails to warn at the time of sale, that defendant does not breach any new duty to the plaintiff by failing to provide a warning the day after the sale.”). Only those claims that identify a risk of harm unknowable at the time of sale, which “allegedly caused harm for which the claimant seeks to recover compensatory damages,” may be pursued under R.C. 2307.76(A)(2). *Accord Flax*, 272 S.W.3d at 542; *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1314 (Kan. 1993) (holding that “[e]ach plaintiff must make an initial showing that the manufacturer acquired knowledge of a defect present but unknown and unforeseeable at the point of sale”).

2. **The likelihood and seriousness of the harm justified the burden of providing a warning.**

Second, a plaintiff must introduce evidence demonstrating that the likelihood of this harm and its seriousness is sufficiently great to justify the burden of providing a warning. *See* R.C. 2307.76(A)(2)(b).

Because of the enormous burdens associated with post-marketing warning efforts (*see* pp. 11-13, *infra*), some courts limit a manufacturer’s post-marketing warning obligations to particular products or industries in which a manufacturer likely will be able to identify current product users. *E.g.*, *Kozlowski v. John E. Smith’s Sons Co.*, 275 N.W.2d 915, 923-924 (Wis.1979) (holding that, while “[i]t is beyond reason and good judgment to hold a manufacturer responsible for a duty of annually

warning of safety hazards on household items,” a “sausage stuffer and the nature of that industry” is sufficiently different to justify the imposition of a post-sale duty to warn); *see also Patton*, 861 P.2d at 1312 (noting “[s]ome courts have elected to further limit the scope of the applicable duty to warn to particular contexts”).

The General Assembly took a different path. Instead of limiting post-marketing obligations by industry or product, it limited them, among other ways, based on “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.” R.C. 2307.76(A)(2)(b). Jurisdictions taking this path typically require proof of a risk that “is potentially life-threatening” to establish a post-marketing failure-to-warn claim. *Jones v. Bowie Indus., Inc.*, 282 P.3d 316, 335 (Alaska 2012); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 61 P.2d 1299, 1313 (Kan. 1993); Restatement, Section 10(b)(4) (requiring proof of a substantial risk of harm that “is sufficiently great to justify the burden of providing a warning”). *Jones*, for example, involved the risk that a worker would get caught in a hydromulcher, losing life or limb. 282 P.3d at 322.

The reason for sharply curtailing liability in this fashion in the post-marketing context is that “the costs of providing post-sale warnings are typically greater” — “identifying those who should receive a warning and communicating the warning to them can require large expenditures.” Restatement, Section 10, Comment i. Thus, even where the risk of harm is substantial, this Court should recognize that a

manufacturer “owes a duty to warn after the time of sale only if the risk of harm is sufficiently great to justify the cost of providing a post-sale warning.” *Id.*

3. **Those who would be warned are identifiable and reasonably assumed to be unaware of the risk.**

Third, a plaintiff must show that those who would receive the post-marketing warning are both identifiable and unaware of the alleged risk of harm. A manufacturer exercises reasonable care by warning only those that it can identify of risks of harm they do not know about. It simply is not reasonable to require manufacturers to issue warnings to end users they cannot identify concerning risks of which they already are aware.

“The problem of identifying those to whom product warnings might be provided is especially relevant in the post-sale context.” Restatement, Section 10, Comment e. Time-of-sale warnings are by nature included with the product’s packaging, or on the product itself, making it a relatively simple task to communicate warnings to end users. *Id.* That is not true of post-marketing warnings, which must reach users who frequently **no longer** have a relationship with the manufacturer.

**In** many cases, the manufacturer does not know the identity of *any* end purchaser of its product. **In** others, it knows only a fraction of them — such as those who registered their product for purposes of a warranty. **Unknown** end purchasers can be identified by the manufacturer, if at all, only by contacting the numerous downstream independent sellers that offer its product — and hoping they have the

ability and inclination to scour their purchase records and databases to identify those to whom they sold the manufacturer's product. Of course, many original purchasers may have resold their products, requiring further efforts to trace the product through the original purchaser. If a manufacturer cannot identify those who are currently using its product with reasonable efforts, "the seller's inability to identify those for whom warnings would be useful may properly prevent a post-sale duty to warn from arising." Restatement, Section 10, Comment e.

This common-sense principle is necessary to avoid unfair liability for failing to communicate post-marketing warnings to users of products that have changed hands multiple times. In *Lewis v. Ariens Co.*, for example, a user of a 22-year-old snow blower, who had purchased the item used from the sister of a friend, sued the manufacturer for failing to communicate post-marketing warnings concerning certain risks associated with its use. 751 N.E.2d 862 (Mass.2001). The Massachusetts Supreme Judicial Court sensibly ruled that the plaintiff could not establish a post-marketing failure-to-warn claim under these circumstances, noting he was "a 'member of a universe too diffuse and too large for manufacturers or sellers of original equipment to identify.'" *Id.* at 867, quoting *Lewis v. Ariens Co.*, 729 N.E.2d 323 (Mass.App.Ct.2000).

Even if the universe of product users is identifiable, of course, post-marketing warnings should only be required if those users are reasonably assumed to be unaware of the risk of harm. "[E]ven if knowledge of the risk reasonably becomes

available to the seller only after the original sale, if users and consumers are at that time generally aware of the risk a post-sale warning is not required.” Restatement, Section 10, Comment f. A duty to exercise reasonable care does not require post-marketing warnings that inform users of generally known risks. R.C. 2307.76(B) (“A product is not defective \*\*\* as a result of the failure of its manufacturer to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge.”).

4. **The warning can be effectively communicated to and acted on by those warned.**

Fourth, a plaintiff must show the post-marketing warning could be effectively communicated to and acted on by those warned.

Effective communication is related to but distinct from the problem of tracking down users of a product post-sale. Direct communication is only possible if original sales records or some other item “indicate[s] which individuals are probably using and consuming the product in question[.]” Restatement, Section 10, Comment g. Absent direct communication, a manufacturer must use “the public media to disseminate information regarding risks of substantial harm.” *Id.* Needless to say, the cost and effectiveness of this effort turns on the size of the group to be warned.

For example, specialty items, produced in smaller quantities for specific markets, may lend themselves to warnings in trade publications in which the manufacturer advertises. *See Jones*, 282 P.2d at 336. Household goods, on the other

hand, do not. There is no easy answer to the problem of effectively communicating with a user of household products. Internet postings, while inexpensive, typically are ineffective — they reach an audience of persons already aware of a problem and hence looking for information about it. The same is true of press releases, which typically are ineffective because they are not deemed sufficiently newsworthy to attract publicity. And buying time on public airwaves, or placing advertisements in newspapers and other widely-distributed print-media, is quite costly and, in today's day and age, may not reach the many persons who are turning away from "linear" television<sup>2</sup> and cancelling print subscriptions in favor of online content.

In short, "[a]s the group to whom warnings might be provided increases in size, costs of communicating warnings may increase and their effectiveness may decrease." Restatement, Section 10, Comment g. In order to establish that a manufacturer failed to exercise reasonable care, a plaintiff must present evidence that a hypothetical warning could be effectively communicated to its target audience.

Relatedly, a plaintiff should be required to present evidence showing that those who would receive the warning can effectively act to reduce the risk. "To justify the potentially high cost of providing a post-sale warning," "those to whom

---

<sup>2</sup> "Linear" television, as used here, means "[t]elevision service where the viewer has to watch a scheduled TV program at the particular time it's offered, and on the particular channel it's presented on," as opposed to using "DVRs, VCRs or Video on Demand." See [http://www.itvdictionary.com/definitions/linear\\_tv\\_definition.html](http://www.itvdictionary.com/definitions/linear_tv_definition.html).

such warnings are provided must be in a position to reduce or prevent product-caused harm.” Restatement, Section 10, Comment h. After all, the entire point of providing warnings is to mitigate the risk of harm, and a product user who fails to heed warnings, or cannot act in a manner that reduces risk, does not benefit from a post-marketing warning.

5. **The manufacturer failed to provide the post-sale warning a reasonable manufacturer would have under the circumstances.**

Fifth, in order to establish product defect under R.C. 2307.76, the plaintiff also must introduce evidence establishing “the post-marketing warning or instruction that a manufacturer exercising reasonable care would have provided” under the circumstances. R.C. 2307.76(A)(2)(b).

Courts have recognized that evidence of the specific content and placement of the post-marketing warning “[is] indispensable \* \* \* to a rational conclusion that the product was defective and unreasonably dangerous to the user without warnings, *and* a rational conclusion that such unreasonably dangerous condition was the proximate cause of the accident and injury.” *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146, 1152 (Ind.2003) (emphasis sic); *accord Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39, 46 (1st Cir. 2005) (noting the “particularized analysis” required in failure-to-warn cases “places a premium on defining the claimed risk and the warning that should have been provided so that the issues of duty to warn and causation can be addressed intelligently”).

Failing to require proof of the specific warnings that allegedly should have been given is fundamentally unfair because it allows the plaintiff to argue for a more forceful warning in the abstract while ignoring real-life monetary and other costs that more forceful warnings would generate. Those real-life costs include not just obvious delivery costs, but also costs associated with information overload: additional warnings may result in a glut of information that exceeds the capacities of foreseeable product users to understand and respond effectively. In short, considerations such as the manner in which the post-marketing warning should have described the risk, its size and prominence, and the means of communication are crucial in deciding whether it would have been practically useful.

6. **The allegedly inadequate warning was a proximate cause of plaintiff's claimed injuries.**

Finally, a post-marketing failure-to-warn claim requires proof that the allegedly inadequate post-marketing warnings were “a proximate cause of harm for which the claimant seeks to recover compensatory damages.” R.C. 2307.73(A)(2).

The causation inquiry “is launched by fixing as precisely as possible the piece of conduct — the exact act or omission — with which the defendant is charged.” Robertson, *The Common Sense of Cause in Fact*, 75 Tex.L.Rev. 1765, 1770 (1997). In the context of a post-marketing failure-to-warn claim, this means beginning with the specific post-marketing warning the plaintiff claims should have been given and asking whether the injuries plaintiff experienced still would have occurred had that warning been given. Absent proof of the specific post-marketing warning that

allegedly should have been given, a plaintiff not only fails to establish a defect under R.C. 2307.76 but also cannot establish causation. *Morgen*, 797 N.E.2d at 1152; *Koken*, 426 F.3d at 46; *see also Cuntan v. Hitachi KOKI USA, Ltd.*, E.D.N.Y. No. 06-CV-3898, 2009 WL 3334364, at \*17 (Oct. 15, 2009) (plaintiff “has to at least propose an alternative warning that would have caused him to take notice and prevented the accident”).

C. **The Plaintiffs’ Failure to Establish a Post-Marketing Failure-to-Warn Claim.**

Here, the court below erred by failing to require plaintiffs to produce evidence on *any* of these elements, let alone all of them. Absent proof of each of these elements, the jury should not be instructed on a post-marketing failure-to-warn theory. *Jones*, 282 P.2d at 335 (noting courts must “make an initial determination that some evidence has been introduced to support each factor before instructing a jury on the question”). A proper analysis of each confirms the trial court correctly declined to charge the jury on a post-marketing failure-to-warn theory in this case.

First, Plaintiffs’ post-marketing failure-to-warn claim failed at the threshold because there was no evidence of a risk of harm that first manifested post-sale. The Ford Crown Victoria Police Interceptor involved in the accident caught on fire after being rear-ended by a 4,100 pound Cadillac DeVille travelling over 100 mph. (*See App. Op.* at ¶ 2.) The only “risk of harm” identified in this case was the risk of a post-collision fire. (*Id.* at ¶¶ 124, 130.) But Plaintiffs’ *own evidence* showed that:

- The risk of a post-collision fire is rare (*see id.* at ¶ 130);
- Ford knew about it prior to the accident (*see id.* at ¶¶ 74, 128);  
and
- It exists in *all* police vehicles of any make or model (*see id.* at ¶ 130).

Plaintiffs claimed “Ford continued to acquire knowledge of the fire risk” *after* the Crown Victoria at issue was sold. (*Id.* at ¶ 124.) But continuing information concerning an *already known* risk does not support a post-marketing warning claim. *See Flax*, 272 S.W.3d at 541-542; *Patton*, 861 P.2d at 1314.

It was irrelevant that Ford allegedly acquired knowledge post-sale that the Crown Victoria’s fuel “tanks were being manufactured with insufficient crimp” — i.e., that the “crimp” for attaching the sending unit to the fuel tank was purportedly too short. (App. Op. at ¶ 24.) Plaintiffs introduced no evidence showing that this alleged defect created any risk of harm *other than* the already known fire risk, or that this claimed defect *materially increased* that risk. The Seventh District correctly observed that “[a] failure to warn claim involves failure to warn of a ‘risk,’ not a failure to warn of a ‘defect.’” (*Id.* at ¶ 25.) That observation, however, should have led the court of appeals to conclude that Plaintiffs stated (at most) a traditional, time-of-sale failure to warn claim. And, of course, the jury rejected any claim of a crimping defect in any event.

Second, Plaintiffs failed to introduce evidence that would establish the other elements of a post-marketing claim. Plaintiffs could not show that the likelihood

and seriousness of the alleged risk of harm justified the burden of providing a post-marketing warning, because there was no evidence the allegedly “insufficient crimp” increased the likelihood or seriousness of the general risk that “exists with all vehicles \* \* \* for post-collision fire.” (App. Op. at ¶ 130.) Plaintiffs introduced no evidence showing that police officers were unaware of the risk of post-collision fires associated with high-speed, rear-end collisions. Finally, Plaintiffs offered no evidence of the specific content or placement of the post-marketing warning a reasonable manufacturer purportedly would have provided under the circumstances, much less evidence that such a warning would have enabled Officer Linert to avoid being rear-ended by a large car traveling over 100 mph.

At the end of the day, the jury reasonably concluded (as the court of appeals recognized) “that there was no danger to warn regarding the placement of the fuel tank in the [Crown Victoria] because the location of the fuel tank was not a danger that required warning about.” (App. Op. at ¶ 132.) That sensible conclusion disposed of the only failure-to-warn claim that arguably existed in this case. Ford’s alleged continued accumulation of information concerning an already known risk of post-collision fires did not support a post-marketing failure-to-warn claim.

**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. (R.C. 2307.76(A)(2), construed; Restatement of the Law 3d, Torts: Products Liability, Section 10 (1998), followed.)**

The Seventh District ultimately ruled that Plaintiffs' post-marketing failure-to-warn theory should have been sent to the jury based on evidence that a "Crimp Improvement Project" resulting "in a stronger, more robust union of the sender unit to the fuel tank and a more crashworthy vehicle" went into effect approximately one month before the accident. (App. Op. at ¶ 29.) It necessarily follows from the above discussion that implementing such a project does *not* make a product defective under R.C. 2307.76(A)(2).

A post-marketing duty to warn turns, in part, on identification of a risk of harm that manifests itself post-sale. *See* pp. 8-10, *supra*. Manufacturers undertake improvement projects for many reasons, and the existence of such a project, standing alone, does not establish an awareness of a new risk of harm. For example, post-marketing improvement projects often are spurred by advances in the state of the art permitting new manufacturing techniques or design features. Such advances cannot reasonably be construed to imply a manufacturer gained knowledge of a previously unknown risk of harm present in products already sold.

Nor do post-marketing improvement projects, standing alone, establish any other element of a post-marketing failure-to-warn claim. See pp. 10-18, *supra* (detailing additional elements of the claim). A manufacturer's ability to improve its product, of course, says nothing about its ability to locate and effectively warn users of products already sold, much less whether those warned can effectively act on the warnings; whether the risk of harm justifies the expense of such an undertaking; the specific content and placement of any post-marketing warning the manufacturer allegedly should have given; or whether the absence of a specific post-marketing warning was the proximate cause of the plaintiff's claimed injuries. (*Id.*) In short, "the law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products based on increased design or manufacturing expertise that was not present at the time the product left its control." *Patton*, 861 P.2d at 1311, quoting *Collins v. Hyster Co.*, 529 N.E.2d 303 (Ill. App. 1988).

Further, imposing such an onerous duty would undermine the critical societal interest in encouraging advances in the state of the art and the product improvements that come with them. It is this very interest that animates Evid.R. 407, which excludes evidence of safety measures taken after an accident "based on the social policy of encouraging repairs or corrections." *McFarland v. Bruno Mach. Corp.*, 68 Ohio St.3d 305, 308 (1994). Imposing a broad post-marketing duty to notify end users of design improvements would have the "clear effect" of inhibiting

“manufacturers from developing improved designs that in any way affect the safety of their products.” *Lynch v. McStome & Lincoln Plaza Assoc.*, 548 A.2d 1276, 1281 (Pa.Super.Ct.1988); *see also Wusinich v. Aeroquip Corp.*, 843 F.Supp. 959, 961 (E.D.Pa.1994) (citing cases); *Brown v. Ford Motor Co.*, 306 Ill.App.3d 314, 318, 714 N.E.2d 556, 559 (1999).

A rule of law that imposed a post-marketing duty to warn of subsequent *product improvements*, as opposed to newly discovered risks of harm, would also be pointless. While it is reasonable to require a manufacturer to give post-marketing warnings about newly-discovered risks of harm that threaten a user’s safety, it is pointless and useless to force a manufacturer to hunt down and notify everyone who purchased a product in years past that there is now an improved design for a component of the product, absent a duty to recall or retrofit (which, as discussed above, Ohio law necessarily rejects, *see pp. 5-6, supra*). There is no risk-avoidance measure the owner could take based on this information, except buy a new product or pay, assuming a “kit” is available, to retrofit the old one. Adopting a rule of law on the theory that owners should be encouraged to buy new products or retrofitting kits every time there is an improved design makes no sense, because “the already sold products [may be], to the manufacturer’s knowledge, safe and functioning properly.” *Lynch*, 548 A.2d at 1281.

This case is stark illustration of the problem. It is telling Plaintiffs did not submit evidence of a specific warning Ford allegedly should have given concerning the crimp improvement project. As discussed, Plaintiffs introduced no evidence showing the allegedly “insufficient crimp” materially increased the general risk that exists with all vehicles for post-collision fire. So what warning should Ford have provided? Ford could not have said anything in a “warning” associated with this improvement project that would allow police officers such as Officer Linert to avoid being rear-ended by a driver travelling in excess of 100 mph. And telling municipalities across the country with limited budgets to invest in new police cruisers, or pay for retrofitting old ones, would have cost taxpayers millions of dollars with no appreciable safety benefit.

At the end of the day, the decision below imposes burdens on manufacturers that are “unacceptably great,” discourages the development of improved safety measures, and requires pointless undertakings. Restatement, Section 10, Comment a.

#### **IV. CONCLUSION**

No post-marketing warning would have prevented Officer Linert from being rear-ended by a large car travelling at over 100 mph, and there was no evidence that Officer Linert’s Crown Victoria posed any risk of harm newly-discovered (or discoverable post-sale), rather than simply the already known risk of rear-end collision fires that exists in all vehicles. The trial court thus properly refused to send

Plaintiffs' post-marketing failure-to-warn claim to the jury, and the Seventh District Court of Appeals erred in reversing its judgment.

Respectfully submitted,

s/Benjamin C. Sassé

John P. Palumbo (0012313)

Benjamin C. Sassé (0072856)

(COUNSEL OF RECORD)

TUCKER ELLIS LLP

950 Main Avenue, Suite 1100

Cleveland, OH 44113-7213

(216) 592-5000 (phone)

(216) 592-5009 (facsimile)

[john.palumbo@tuckerellis.com](mailto:john.palumbo@tuckerellis.com)

[benjamin.sasse@tuckerellis.com](mailto:benjamin.sasse@tuckerellis.com)

*Attorneys for Amicus Curiae Product  
Liability Advisory Council, Inc.*

**PROOF OF SERVICE**

A copy of the foregoing was served on August 17, 2015 per S.Ct.Prac.R.

3.11(B) by regular U.S. Mail, postage prepaid, and by email to:

Robert W. Schmieder II  
Robert J. Evola  
SL CHAPMAN LLC  
330 North Fourth Street, Suite 330  
St. Louis, MO 63102  
[robs@slchapman.com](mailto:robs@slchapman.com)  
[roberte@slchapman.com](mailto:roberte@slchapman.com)

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

Richard A. Abrams  
GREEN HAINES SGAMBATI CO., L.P.A.  
100 Federal Plaza East, Suite 800  
P.O. Box 849  
Youngstown, OH 44501  
[rabrams@green-haines.com](mailto:rabrams@green-haines.com)

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

Elizabeth B. Wright  
Conor A. McLaughlin  
THOMPSON HINE LLP  
127 Public Square, Suite 3900  
Cleveland, Ohio 44114  
[Elizabeth.Wright@ThompsonHine.com](mailto:Elizabeth.Wright@ThompsonHine.com)  
[Conor.McLaughlin@ThompsonHine.com](mailto:Conor.McLaughlin@ThompsonHine.com)

*Attorneys for Appellant Ford Motor  
Company*

Pierre H. Bergeron  
Larisa M. Vaysman  
SQUIRE PATTON BOGGS (US) LLP  
221 East Fourth Street, Suite 2900  
Cincinnati, Ohio 45202  
[pierre.bergeron@squirepb.com](mailto:pierre.bergeron@squirepb.com)  
[larisa.vaysman@squirepb.com](mailto:larisa.vaysman@squirepb.com)

*Attorneys for Appellant Ford Motor  
Company*

Clay A. Guise  
DYKEMA GOSSETT PLLC  
39577 Woodward Ave., Suite 300  
Bloomfield Hills, MI 48304-2820  
CGuise@Dykema.com

*Attorneys for Appellant Ford Motor  
Company*

*s/ Benjamin C. Sassé*  
\_\_\_\_\_  
Benjamin C. Sassé  
*One of the Attorneys for Amicus Curiae  
Product Liability Advisory Council, Inc.*

# **APPENDIX**

# Corporate Members of the Product Liability Advisory Council

as of 6/8/2015

Total: 105

---

3M	Endo Pharmaceuticals, Inc.
Altec, Inc.	Exxon Mobil Corporation
Altria Client Services Inc.	Ford Motor Company
Ansell Healthcare Products LLC	Fresenius Kabi USA, LLC
Astec Industries	General Electric Company
Bayer Corporation	General Motors LLC
BIC Corporation	Georgia-Pacific Corporation
Biro Manufacturing Company, Inc.	GlaxoSmithKline
BMW of North America, LLC	The Goodyear Tire & Rubber Company
The Boeing Company	Great Dane Limited Partnership
Bombardier Recreational Products, Inc.	Harley-Davidson Motor Company
Boston Scientific Corporation	The Home Depot
Bridgestone Americas, Inc.	Honda North America, Inc.
Bristol-Myers Squibb Company	Hyundai Motor America
C. R. Bard, Inc.	Illinois Tool Works Inc.
Caterpillar Inc.	Isuzu North America Corporation
CC Industries, Inc.	Jaguar Land Rover North America, LLC
Celgene Corporation	Jarden Corporation
Chevron Corporation	Johnson & Johnson
Chrysler Group LLC	Johnson Controls, Inc.
Cirrus Design Corporation	Kawasaki Motors Corp., U.S.A.
Continental Tire the Americas LLC	KBR, Inc.
Cooper Tire & Rubber Company	Kia Motors America, Inc.
Crane Co.	Kolcraft Enterprises, Inc.
Crown Cork & Seal Company, Inc.	Lincoln Electric Company
Crown Equipment Corporation	Magna International Inc.
Daimler Trucks North America LLC	Mazak Corporation
Deere & Company	Mazda Motor of America, Inc.
Delphi Automotive Systems	Medtronic, Inc.
Discount Tire	Merck & Co., Inc.
The Dow Chemical Company	Meritor WABCO
E.I. duPont de Nemours and Company	Michelin North America, Inc.
Eisai Inc.	Microsoft Corporation
Emerson Electric Co.	Mine Safety Appliances Company

# Corporate Members of the Product Liability Advisory Council

as of 6/8/2015

---

Mitsubishi Motors North America, Inc.

Yokohama Tire Corporation

Mueller Water Products

Zimmer, Inc.

Novartis Pharmaceuticals Corporation

Novo Nordisk, Inc.

NuVasive, Inc.

Pella Corporation

Pfizer Inc.

Pirelli Tire, LLC

Polaris Industries, Inc.

Porsche Cars North America, Inc.

RJ Reynolds Tobacco Company

Robert Bosch LLC

SABMiller Plc

Shell Oil Company

The Sherwin-Williams Company

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Takeda Pharmaceuticals U.S.A., Inc.

TAMKO Building Products, Inc.

TASER International, Inc.

Techtronic Industries North America, Inc.

Teleflex Incorporated

Teva Pharmaceuticals USA, Inc.

TK Holdings Inc.

Toyota Motor Sales, USA, Inc.

TRW Automotive

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Wal-Mart Stores, Inc.

Western Digital Corporation

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.