ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2014-1940

ROSS J. LINERT, et al.
Plaintiffs-Appellees

-v-

FORD MOTOR COMPANY
Defendant-Appellant

On Appeal from the Seventh District Court of Appeals, Mahoning County, No. 2011 MA 00189

AMICUS CURIAE BRIEF OF THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This Amicus Curiae represents the interests of the Ohio Association for Justice ("OAJ"), an organization of attorneys which focuses on representing individual plaintiffs in personal injury cases and other civil litigation within the state of Ohio. OAJ and its members are dedicated to protecting the rights of individuals who have been harmed via the negligence and wrongful conduct of others, and in the improvement and promotion of public confidence in the civil justice system.

In furtherance of this mission, the OAJ and its members advocate against any interpretation of Ohio's product liability statutes, including those claims brought under Ohio Revised Code 2307.76, which would go beyond the plain language of the statute and which result in taking additional cases away from determination by the trier of fact In this case, the Seventh District Court of Appeals properly held that Appellees Ross and Brenda Linert had produced sufficient evidence as to a risk associated with the subject vehicle to warrant a jury instruction on the post-marketing duty to warn. As such, the OAJ respectfully requests that this Court uphold the decision of the Seventh District Court of Appeals.

STATEMENT OF CASE AND FACTS

The OAJ adopts the statement of the case and the statement of facts set forth in the Merit Brief of Plaintiffs-Appellees.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Proposition of Law No. 1: A "risk" that triggers a post-marketing duty to warn under R.C. 2307.76 is not merely any "known danger," but must be a risk about which a reasonable manufacturer would warn in light of the likelihood and likely seriousness of harm.

I. Appellant's Proposition of Law seeks a ruling from this Court which would improperly intrude upon the fact-finding function of the jury.

The Seventh District Court of Appeals below correctly found that the evidence produced in this matter warranted a jury instruction as to the post-sale failure to warn by Appellant Ford Motor Company ("Ford"), pursuant to R.C. 2307.76(A)(2). *See Linert v. Foutz, et al.*, 20 N.E.3d 1047, 2014-Ohio-4431 (7th Dist.). The statute reads in pertinent part as follows:

> [A] product is defective due to inadequate warning or instruction if either of the following applies ***
>
> (2) It 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). In utilizing this "reasonable care" standard, the statute "codifies the common-law understanding that 'the duty imposed upon a manufacturer in a strict liability action for failure to warn is the same as that imposed upon the manufacturer in a negligence action for failure to warn.'" *Brown v. McDonald's Corp.*, 101 Ohio App.3d 294, 299, 655 N.E.2d 440 (9th Dist.1995); quoting *Hanlon v. Lane*, 98 Ohio App.3d 148, 153, 648 N.E.2d 26 (9th Dist. 1994); *see also Crislip v. TCH Liquidating Co.*, 52 Ohio St.3d 251, 556 N.E.2d 1177 (1990). As such, much like in standard negligence cases, in order to set forth a prima facie cause of action under the statute, the plaintiff must produce evidence demonstrating both that the manufacturer had a duty to warn, and that the duty was breached. *See Brown*, 101 Ohio App.3d at 299; quoting *Hanlon*, 198 Ohio App.3d at 152.

Of course, what constitutes "a manufacturer exercising reasonable care" is not defined in the statute, as it is inherently a factual determination to be made by the jury. The statute plainly states that said determination is to be made "in light of" the likelihood and seriousness of the risks involved, but "reasonable care" nonetheless derives from common usage and the common law. *See State ex rel. Russell v. Thornton*, 111 Ohio St.3d 401, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 11; citing *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, ¶ 25; R.C. §1.49(D). As such, in construing the statute, the term necessarily encompasses what an "ordinarily careful and prudent person would exercise or observe **under the same or similar circumstances**." (Emphasis added.) *Di Gildov. Caponi*, 18 Ohio St.2d 125, 127, 247 N.E.2d 732 (1969); citing *Thompson v. Ohio Fuel Gas Co.*, 9 Ohio St.2d 116, 224 N.E.2d 131 (1967).

Ford has argued that the Court of Appeals "effectively rewrote the statute" by allowing the trier of fact the ability to weigh evidence as to whether Ford exercised "reasonable care" in failing to provide a post-sale warning concerning the crashworthiness of the subject 2005 Crown Victoria Police Interceptor. Appellees' claim for relief in this regard was predicated on Ford's knowledge of inadequate crimp overlap and the resulting increased risk of fuel tank and sender unit separation, which led to the Crimp Improvement Project following the sale of the subject vehicle. Ford argues that the court of appeals heightened a manufacturer's duty to give post-sale warnings of "all known risks" rather than those of which a reasonable manufacturer would warn. (See Merit Brief of Appellant, p. 7). However, nothing in the opinion of the court of appeals mandates such a result. As recognized therein, "the failure to warn of unreasonable dangers associated with the product constitutes the defect" in R.C. 2307.76 actions such as this, and therefore the lack of a warning regarding the "known risk associated with the CVPI's fuel tank *could* constitute a defect." (Emphasis added.) *Ross*, 2014-Ohio-441, ¶ 25; quoting *Sapp v. Stoney Ridge Truck Tire*, 86 Ohio App.3d 85, 98, 619 N.E.2d 1172 (6th Dist. 1993).

Despite the arguments of Ford and the *amici curiae* writing in support of its Propositions of Law, there is no indication in this case that the holding of the Seventh District Court of Appeals heightens the duties and liabilities of manufacturers beyond the longstanding negligence standards codified in R.C. 2307.76 and of pre-existing common law. Nothing in the appellate decision requires a manufacturer to warn of all known risks or otherwise be subjected to liability. The lower court merely re-affirmed the principle that the "reasonable care" standard is to be determined by jury. While a "known risk"

may not necessarily give rise to liability for failure to warn in a particular case, the knowledge thereof, and the appreciation of likeliness and severity of harm, nonetheless constitutes part of the "like or similar circumstances" to be taken into consideration by a jury when weighing a manufacturing defendant's conduct.

II. The rejection of a pre-sale inadequate warning claim by the trier of fact does not necessarily preclude a finding of liability regarding the manufacturer's post-sale failure to warn.

Ford also argued that "liability for failure to warn post-sale cannot be based on a risk that does not require a pre-sale warning," and that the holding of the Seventh District should thus be reversed as the jury ultimately rejected the Appellees' pre-marketing failure to warn claim under R.C. 2307.76(A)(1). In doing so, Ford oversimplifies the inquiry and asserts that a post-sale warning in this case could only survive if "there was evidence that the risk known to Ford after sale was so much greater than the risk known to Ford before sale." (Merit Brief of Appellant, p. 13).

This Court should not accept the invitation to adopt the bright-line rule proposed by Ford in this regard. As stated above, the level of the risk involved, i.e., the "likelihood" and "severity" of harm, is not all-encompassing but only part of the consideration of "like or similar circumstances" to be determined by the trier of fact. The extent to which the risk is known or observed by a defendant, similar to the concept of "notice" in premises liability actions, is also a vital component in determining the reasonableness of a manufacturer's course of conduct. *See Presley v. Norwood*, 36 Ohio St.2d 29, 31, 303 N.E.2d 81 (1973); *Anaple v. Standard Oil Co.*, 162 Ohio St. 537, 541, 124 N.E.2d 128 (1955). Indeed, it is not difficult to imagine scenarios similar to the case at hand where reasonable minds could find that a manufacturer was not negligent in

failing to warn of a risk present at the time of sale, but that additional notice and awareness of the very same risk following sale would lead an ordinarily prudent manufacturer to issue a post-sale warning.

As noted by Ford, one of the basic principles of statutory interpretation requires a court to consider relevant sections of a statute "in conjunction with each other and [give] effect to all sections." (Merit Brief of Appellant, p. 8). *See State ex rel. Brothers v. Bd. of Putnam Cnty. Comm'rs*, 3rd Dist. No 12-13-05, 2014-Ohio-2717, ¶ 51; R.C. 1.42. R.C. 2307.76 does not state that post-sale failure to warn claim is barred in the event that a pre-sale claim should fail, or vice versa. Indeed, by delineating separate causes of action in subsections (A)(1) and (A)(2) for these claims, it can be assumed that the General Assembly foresaw situations such as this in which a finding of negligence could differ pre-sale or post-sale. If these causes of action were truly intertwined as Ford argues, there would be no need for separate classifications. Rather, the statute could merely state that a product "is defective due to inadequate warning of instruction **at any relevant time if,** both of the following applied: (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk***; and (b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk***." By separating these causes of action, the legislature acknowledged that a jury's answer to the ultimate question of fact can differ as to pre-sale marketing and post-sale marketing. The format of R.C. 2307.76 demonstrates that facts and circumstances can change. What constitutes "reasonable care" under those facts and circumstances can change as well.

III. Sufficient evidence was produced to warrant a jury instruction as to Appellees' claim for post-marketing failure to warn.

"What is ordinary care, what is reasonable safety, and the like, are, in the first instance, usually questions for the determination of the jury under all the evidence and proper instructions by the court appropriate to the particular circumstances of each case and the issues thereof." *Gibbs v. Girard*, 88 Ohio St. 34, 38, 102 N.E. 299 (1913). In this case, the Seventh District relied upon the testimony of Steven Haskell, a manufacturing process engineer for Ford, and the design analysis engineer, Jon Olsen, to find that Ford became aware of "real-world incidents" involving sender unit dislodgements following the sale of the subject product, referred to as the CVPI, and that Ford understood the danger well enough to undertake the Crimp Improvement Project. *See Linert*, 2014-Ohio-4431, at ¶ 27-29. The appellate court correctly held that this change in circumstances, i.e., increased notice of the risk presented, could very well lead reasonable minds to conclude that a reasonable manufacturer would issue a post-sale warning to its consumers of this issue.

"Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction." *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991); citing Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed.1991) 860, Section 36:2; *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 275 N.E.2d 340 (1971). Given the evidence presented, the Seventh District correctly held that that trial court erred by failing to provide a jury instruction as to Appellees' claims for post-marketing duty to warn and for post-sale duty to warn.

<u>Proposition of Law No. 2:</u> A product manufacturer's implementation of a post-marketing improvement does not trigger a post-marketing duty to warn.

> **The implementation of a post-marketing improvement may constitute evidence of knowledge of a risk such that a manufacturer exercising reasonable care would issue a warning.**

Ford also attempts to argue that the Seventh District's holding in this matter "penalizes" manufacturers by imposing a duty to warn on manufacturers based upon a post-marketing product improvement. However, as set forth above, the Seventh District's decision was not solely based on this factor, and the adoption of a bright-line rule stating that a manufacturer's product improvements "cannot support a post-marketing duty to warn" is both unnecessary and potentially problematic. Nothing in the plain language of R.C. 2307.76 suggests such a rule. Evidence of post-marketing improvements such as the Crimp Improvement Project in this case can very well be relevant in determining a manufacturer's knowledge and appreciation of a risk, such that the burden of "reasonable care" would also require a corresponding warning or product recall.

Ford's argument that the lower court's decision in this matter "would impose liability for incremental safety improvements" lack basis. The decision of the Seventh District does not increase or alter a manufacturer's duties beyond the "reasonable care" standard that has existed for decades. Indeed, the current version of the Ohio Jury Instructions addresses this very issue: "[A] manufacturer need not instruct or warn (regarding the use of its product) unless and until the state of medical, scientific, and technical research and knowledge has reached a level of development that would make a reasonably prudent manufacturer aware of the unreasonable risks of harm created by the product and aware of the necessity to instruct or warn (ordinary users of the product)

against such risks of harm." O.J.I. 451.07(2). The standard remains the same: what a reasonably prudent manufacturer would warn of under like or similar circumstances. Such a determination should remain in the hands of the jury. *See Gibbs*, 88 Ohio St. at 38, 102 N.E. 299. Any insinuation that the Seventh District's holding "opens the floodgates" to increased liabilities or stifles innovation is wholly without merit and should not be entertained by the Court in this matter.

CONCLUSION

Based on the foregoing and the arguments of Appellees, this Court should find that the Seventh District correctly held that the trial court erred in failing to instruct the jury on the Appellees' post-marketing failure to warn claim pursuant to Revised Code §2307.76(A)(2). The OAJ and its members respectfully request that that the decision of the Seventh District be upheld, and that this matter be remanded to the trial court for the issue to be determined by jury.

Respectfully submitted,

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