

**IN THE SUPREME COURT OF OHIO**

**ROSS J. LINERT and** )  
**BRENDA LINERT,** )  
 ) Supreme Court Case No. 14-1940  
Plaintiffs/Appellees )  
 )  
 ) On Appeal from the Mahoning County  
v. ) Court of Appeals, Seventh Appellate District  
 )  
**FORD MOTOR COMPANY,** )  
 ) Court of Appeals Case No. 11 MA 189  
Defendant/Appellant )  
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**MERIT BRIEF OF APPELLEES**  
**ROSS J. LINERT AND BRENDA LINERT**

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## STATEMENT OF FACTS

Around 1986, Ross John Linert (“Officer Linert”) became a police officer in Ohio. *Tr. p. 1796:7-16*. In March of 1992, Officer Linert joined his hometown Austintown Township Police Department (“ATPD”), where he worked until November 11, 2007. *Tr. p. 1797:11-23*. While driving a 2005 Ford Crown Victoria Police Interceptor (“2005 CVPI”) on November 11, 2007, Officer Linert suffered severe burn injuries when the crimp securing the CVPI’s fuel tank sender unit failed—creating an intense, gasoline-fed fire. *Ex. 492; Tr. pp. 1079:13-1081:2; 1801:21-1802:8; Tr. pp. 1039:10-1045:5*. After skin grafts to repair his burns, 60-70% of Officer Linert’s skin was injured from the fire. *Tr. pp. 1107:6-1108:10*.

**CVPI Tank Location.** The CVPI was part of Ford’s Panther Platform vehicles, which included the Ford Crown Victoria, the Mercury Grand Marquis, and the Lincoln Town Car. *Tr. pp. 1332:10-21*. The Panther Platform vehicles utilized a vertical, behind-the-rear axle fuel tank. *Id.* Ford initiated that behind-the-axle fuel tank location in 1979. *Tr. pp. 2397:13-2398:3*. A vertical, behind-the-rear axle fuel tank location is in the “crush zone,” “the area of the vehicle that’s being deformed,” during a rear impact. *Tr. pp. 1681:22-1684:8*.

By 1989, Ford’s preferred practice was to locate fuel tanks forward of the rear axle. *Tr. pp. 1690:18-1691:11, 2398:20-2399:11; Ex. 706*. In fact, every new Ford vehicle platform since 1981 has placed the fuel tank forward of the rear axle. *Tr. 2401:9-12*. By 2005, Ford had moved the tank location on every vehicle platform—other than the Panther Platform—from behind-the-axle to forward-of-the-axle. *Tr. pp. 2400:3-2403:18*.

**Crimp Connection.** The CVPI's fuel tank has a fuel delivery module (a/k/a sender unit) that delivers fuel to the engine and sends a signal to the gas gauge. *Tr. pp. 2144:16-2145:8.* The sender unit plate is bolted to a sender ring, and the sender unit is secured to the fuel tank by crimping sheet metal over the top of the sender ring. *Tr. pp. 555:18-556:11; 569:2-14; 624-18-625:6; 871:18-872:11; 1275:2-15; 2146:3-8.* The crimp is the only feature that secures the sender unit to the fuel tank. *Tr. pp. 871:18-872:11; 2212:5-10.* With more crimp overlap, the sender unit is less likely to separate from the fuel tank. *Tr. pp. 896:19-898:12; 908:20-909:7.*

Ford manufacturers and assembles its fuel tanks and sender units based upon a Ford Engineering Specification. *Tr. p. 2114:10-17; Ex. 111.* Ford's Engineering Specification contained specific dimensional information and tolerances for the fuel tank and sender unit. *Ex. 111; Tr. pp. 1702:19-1705:20; 2147:1-17; 2149:5-17.* There are two acceptable methods to determine the amount of required crimp overlap. *Tr. pp. 709:21-711:22; 1706:2-2215:23-2218:12.* One way is to use the other dimensions on the Ford Engineering Specification, and the other way is to scale it. *Tr. pp. 887:18-890:4; 1706:2-1711:11; 2215:23-2218:12.* The Ford Engineering Specification calls for a crimp overlap of 4.3 mm based upon dimensions, *Tr. pp. 709:21-711:22,* or at least a 4.1 mm crimp overlap by scaling the drawing. *Tr. pp. 2218:13-2223:16.*

Ford manufactured and assembled fuel tanks for the Panther Platform vehicles in its Dearborn Engine and Fuel Tank plant. *Tr. 2135:22-2136:1.* After Ford crimped the sender ring to the fuel tank, Ford visually checked that the crimp had metal-to-metal contact, did not exceed the boss height, and did not have any fractures, splits, or cracks. *Tr. pp. 2174:4-2175:21; 2224:13-2227:9; 2256:10-12; Ex. 111.* Ford neither tested the

concentricity (the uniformity of crimp around the perimeter of the sender ring), *Tr. pp. 2171:9-2172:17*, nor measured the amount of crimp overlap. *Tr. p. 2208:16-22.*

**Ford's Fuel Tank Testing.** Ford trained its employees to design and test fuel tanks that prevent fires as a result of a rear impact, and to protect the occupant from fire. *Tr. pp. 1671:15-1678:6.* Ford knew that its consumers want protection from fires. *Tr. pp. 1663:3-1665:19.* According to Ford, police vehicles are **1,000 times more likely** to be involved in high-speed, rear impacts. *Tr. p. 1639:5-17.*

To test the integrity of the crimp, Ford conducts “burst testing” and an “air under water test.” *Tr. pp. 667:12-668:1; 2159:18-2160:9.* Burst testing is the process of increasing the internal pressure of the fuel tank until it fails or leaks. *Tr. pp. 670:10-19.*

To test its fuel tanks in crash situations, Ford performed 35 mph and 50 mph crash tests pursuant to NHTSA Federal Motor Vehicle Safety Standard 301. *Tr. pp. 1666:15-1668:8; 1685:16-1686:1; 1695:5-1696:21.* Safety Standard 301, however, is a minimum safety standard. *FMVSS 301; Tr. pp. 1493:15-1496:7 2396:3-8; 2093:23-2094:15.*

On March 4, 2002, the Arizona Attorney General sent a letter to Ford concerning fuel-fed fires on CVPIs after rear-end collisions at high speeds. *Ex. 707.* In response, Ford developed a 75-mile-an-hour crash test. *Tr. p. 2297:7-10.* Ford designed and tested CVPIs according to its safety design guidelines that required no punctures or continuing leakage in gas tanks on vehicles involved in 75 mph rear offset crashes. *Tr. pp. 1639:18-1640:7; 1685:16-1686:1; 1689:2-6.* The impact from a rear offset crash test is more severe than the impact from a rear inline crash. *Tr. pp. 1641:20-1642:17.*

**Ford's Fire Suppression System.** In addition to developing a 75 mph crash test in 2002, Ford also started to develop a fire suppression system *specifically* for the CVPI.

*Cupka Offer of Proof at p.29; Tr. pp. 1050:8-1054:4; 1625:21-1633:3; 1822:17-1825:17.*

Richard Cupka (“Cupka”), Ford’s CVPI technical task force leader, hosted “suppression conferences” in 2002 after meetings with the Arizona Attorney General. *Id. at 10.*

The purpose of Ford’s fire suppression system was to reduce the risk of injury to police involved in high-energy, rear impact crashes. *Cupka Offer of Proof at 16-17.* The fire suppression system allows a police officer time to escape from a fire. *Id. at 15.* The system was designed to deploy automatically, but it also had a switch to activate it manually. *Id. at 15-16.*

Q. And Ford has developed that system, the fire suppression system, for the purpose of reducing the risk of injury in high-energy crashes, is that true, rear crashes?

A. Yes, to -- it was developed as an additional safety measure in the event of a high-speed high-energy rear crash, yes.

Q. And the purpose behind that safety measure is to reduce the likelihood of injury to the police officer?

A. Correct. It was never intended to be something that saves the equipment or anything because in that type of crash, usually there's, you know 20, 30 inches of crush; the vehicle is totaled. So we're not concerned about the vehicle; we are only concerned about giving the officer sufficient time to get out of the vehicle.

Q. And I think you previously brought it up. It's designed to protect the officer in high-energy rear crashes, correct?

A. Correct.

Q. Those high-energy rear crashes are situations that involve I think, as you said earlier, high speeds?

A. Typically, yes. It's actually -- our system measures energy, so it can be -- it could be a very -- it's the amount of energy transmitted into our fire suppression module. That could be a small car at really high speeds, it could be an intermediate car at, you know, 55, 75, on up.

*Id. at 16-17.* Because officers are frequently stopped at the side of a highway, the task force was asked to design a fire suppression system for impacts involving speeds of “55, 75, on up.” *Id.* Ford started testing its fire suppression system on July 29, 2003. *Id. at 152-53.*

**Crimp Decreases Over Time.** Ford installed the tooling in its Dearborn Engine and Fuel Tank plant back in 1994. *Tr.* 625:12-17; *Ex.* 178. As that tooling aged and wore down, the crimp overlap securing the sender unit to the fuel tank decreased: May 8, 1998 (2.74 mm); June 1, 1998 (2.85 mm); June 15, 1998 (2.35 mm); Dec. 7, 2004 (2.56 mm.); Feb. 24, 2005 (1.94 mm); March 22, 2005 (1.61 mm); March 23, 2005 (1.52 mm); April 1, 2005 (1.40 mm); April 11, 2005 (1.58 mm); April 18, 2005 (1.40 and 1.72 mm); April 29, 2005 (1.35 mm). *Tr.* pp 559:17-567:14; 718:5-21; 898:13-899:9; *Exs.* 610-613, 615, 618-622, 627, 640-641, 666.

On May 2, 2005, Ford manufactured the fuel tank for the subject 2005 CVPI at the Ford Dearborn Engine and Fuel Tank plant. *Tr.* pp. 870:19-871:9; 1269:5-13; 2135:16-2136:1; *Ex.* 111. During that time, the crimp continued to diminish: May 5, 2005 (1.73 mm); June 2, 2005 (1.45 mm); June 3, 2005 (1.35 mm); June 17, 2005 (1.26 mm). *Tr.* pp. 559:17-567:14; 718:5-21; *Exs.* 617, 623-626, 629, 640-641, 666. None of these tanks complied with Ford's Engineering Specification for the amount of crimp overlap. *Tr.* pp. 716:22-717:7.

**ATPD Purchases 2005 CVPI.** The 2005 CVPI has a vertical, behind-the-rear axle fuel tank location. *Tr.* pp. 2277:7-12; 2403:19-23. At that time, the CVPI was the only police-use vehicle offered by any automobile manufacturer that had a vertical, behind-the-axle fuel tank location. *Tr.* pp. 2403:19-2404:21.

Ford advertised that the 2005 CVPI was designed and tested to withstand a 75 mph rear, offset crash with no puncture to the fuel tank and no continued leakage. *Tr.* pp. 1640:11-21. According to its brochure, Ford conducted that testing "to confirm that the fuel systems meet the most rigorous standards in the industry." *Pl.* *Ex.* 682; *Tr.* pp.

1565:12 – 1566:2. On June 8, 2005, ATPD purchased the 2005 Ford CVPI.

After that purchase, Ford offered the fire suppression system option at the end of that model year. *Cupka Offer of Proof at 33-34, 55.* Ford even sought patent protection for its fire suppression system. *Ex. 21.* In the patent application, which was published on September 28, 2006, Ford stated that “[t]he present fire suppression system is designed advantageously to help reduce the risk of injury in high-speed rear impacts.” *Id.*

Ford also learned about three Panther Platform fires in 2005 involving injury or death. *Ex. 681.* In 2006, Ford learned about three more Panther Platform fires. *Id.* The December 17, 2006 fire involved a 2005 CVPI. *Id.* These real-world incidents involved sender unit dislodgments. *Tr. pp. 2254:23-2255:5.*

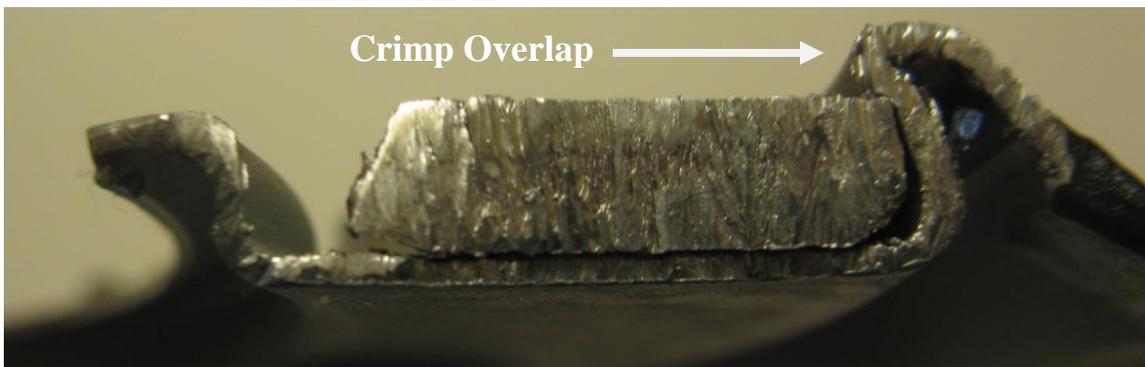
Ford design analysis engineer Jon Olson (“Olson”) learned of these “real-world incidents” involving a failure of the crimp, Olson notified other officials at Ford. *Tr. pp. 2253:22-2254-7; Tr. pp. 2255:9-13.* Olson requested that Ford “go back and to take a look at all of their manufacturing processes, all of their procedures, inspection processes, and to ensure that they were meeting those standards” with regard to the crimp. *Tr. pp. 2254:8-12.* Olson visited the Ford Dearborn Engine Plant with photographs of two or three sender unit dislodgments to discuss the problem with people at the plant. *Tr. pp. 2255:23-2255-5.* As a result of his investigation into sender unit dislodgments and the collaboration that followed, Ford decided to take corrective action through the Crimp Improvement Project. *Tr. pp. 2255:6-8.*

**Ford’s Crimp Improvement Project.** By January of 2007, Ford decided to improve the crimp. *Tr. pp. 653:17-19; 662:18-22; 2254:17-19; Ex. 178.* By March 1, 2007, Ford received a request to spend \$38,000 on the Crimp Improvement Project.

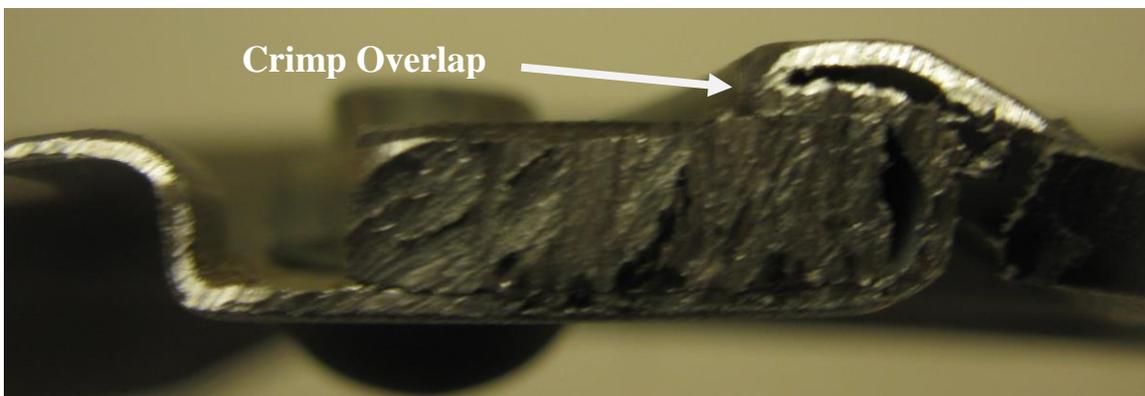
*Ex. 178.* The purpose of the Crimp Improvement Project was to “refurbish the tooling used to crimp the sender ring in the top panel of the EN/FN [Ford Crown Vic] fuel tank to maintain product quality and robustness,” or to get “more metal folded over the top of the sender ring.” *Ex. 178; Tr. pp. 622:9-15; 662:2-4.*

By July 30, 2007, there was another Panther Platform fire. *Ex. 681.* This Panther Platform fire again involved a 2005 CVPI. *Id.*

On October 21, 2007, Ford finally implemented the Crimp Improvement Project in the manufacturing plant. *Tr. 653:17-19; 662:18-22; 2254:17-19; Ex. 178.* Before the Crimp Improvement Project:



*Ex. 686* (showing a 2005 exemplar before the Crimp Improvement Project). After the Crimp Improvement Project:



*Ex. 689* (showing a 2008 exemplar after the Crimp Improvement Project). The Crimp

Improvement Project increased the “metal folded over the top of the sender ring” by a “millimeter to a millimeter and a half.” *Tr. pp. 622:2-4; 663:18-20; 1277:23-1278:11.* It was important to have “more metal folded over the top of the sender ring” because it made the sender unit attachment to the fuel tank stronger, safer, and more crashworthy. *Tr. pp. 663:20-667:7; 1284:22-1285:4.*

After the Crimp Improvement Project, there was much greater crimp overlap. *Tr. pp. 559:17-567:14; 718:5-21; 910:8-911:5; Exs. 614, 616, 628-629, 640-641, 666.* On average, the amount of crimp increased by 180%. *Id.* In addition, the amount of force

needed to push  
the sender ring  
out of the  
crimp  
drastically  
increased. *Tr. pp.572:12-581:6; Exs. 660, 664.*  
The crimp’s

	Crimp Overlap (mm)	Push Load (lbs)
5/8/1998	2.74	2711
6/1/1998	2.85	2732
6/15/1998	2.35	2982
4/1/2005	1.4	1868
4/11/2005	1.58	2032
4/18/2005	1.4	1871
4/18/2005	1.72	1789
4/29/2005	1.35	1642
6/17/2005	1.26	1561
11/1/2007	4.45	3359
4/8/2008	3.76	3658
5/8/2008	2.74	2711
5/15/2008	3.79	3527
6/1/2008	2.85	2732
6/15/2008	2.35	2982
Before	1.85	1022.44
After	3.32	3161.50
<b>Change</b>	<b>180%</b>	<b>309%</b>

Test Date	Pressure (PSI)
12/16/2004	47.3
12/16/2004	49.2
12/16/2004	55.5
12/16/2004	52.1
11/11/2005	30
12/4/2006	50.4
10/17/2007	102.83
10/17/2007	75.16
10/17/2007	90.74
10/18/2007	101.99
10/18/2007	104.05
10/18/2007	95.12
Before	47.42
After	94.98
<b>Change</b>	<b>200%</b>

resistance to force increased by 309%. *Id.* As a result, the burst testing results dramatically improved because the increased crimp made the joint stronger. *Tr. pp. 666:6-667:7.* Ford’s own burst testing results improved by 200%. *Id.* In fact, no crimp created after the Crimp Improvement Project has failed. *Tr. p. 2261:16-20.*

Despite its efforts to correct the crimp problem, Ford never sent a warning or notification regarding fuel tank sender unit failures. *Tr. pp. 2261:21-2262:1*. Further, Ford never sent a warning to owners of existing CVPIs that in high-speed, high-energy rear impacts that the fuel tank has been known to puncture and cause fire. *Tr. p. 1645:7-23*.

**The Crimp Fails—Causing a Fire.** On November 11, 2007, Officer Linert was on-duty and assigned to Car 83, the 2005 CVPI. *Tr. pp. 1801:21-1802:8; Ex. 492*. While on patrol around 1:00 a.m., Officer Linert was dispatched to the area of North Meridian Road near Interstate I-680 to check on a report of an intoxicated driver. *Tr. p. 1806:9-15*. Officer Linert was traveling on North Meridian Road in the left-hand lane at approximately 30-35 mph when the 2005 CVPI was struck from behind by a 1995 Cadillac DeVille. *Tr. pp. 784:18-22; 804:2-9; 1807:1-5; 1998:9-13; Ex. 492*. The Cadillac was moving around 100 mph before hitting the 2005 CVPI. *Tr. pp. 804:2-13; 1999:3-15*.

After the accident, the Ohio State Highway Patrol concluded that the closing speed<sup>1</sup> was between 60 mph and 72 mph. *Ex. 492*. Calspan on behalf of the National Highway Traffic Safety Administration-Office of Defects Investigation concluded that the closing speed was between 55 mph and 70 mph. *Ex. 501*. While Ford's expert opined that the closing speed was 80 mph, *Tr. pp. 2043:11-2044:6*, the Linerts' expert agreed with the governmental findings that the closing speed was between 70 mph and 75 mph,

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<sup>1</sup> Closing speed is the rate at which the vehicles are approaching each other. *Tr. pp. 780:18-781:14*. The crash test speeds are measured by closing speeds (*i.e.*, a 75 mph crash test involves a 75 mph difference in vehicle speeds at the time of collision). *Tr. p. 1982:1-21; 2082-83*.

*Tr. p. 804:2-13.* The impact from the rear-end collision broke Officer Linert's ribs. *Tr. pp. 2002; 2465; 2492.*

Even though Officer Linert only suffered broken ribs from the impact, the crimp then failed and the sender unit dislodged. *Tr. pp. 897, 905, 1039, 1952-54.* The resulting hole in the fuel tank was aimed at the back of Officer Linert. *Tr. p. 1039-41.* The gasoline shot out of that hole and into the 2005 CVPI and was ignited and exploded, engulfing Officer Linert in flames. *Tr. pp. 1807:11-1808:15.* The 2005 CVPI traveled over a concrete median into the southbound lanes before striking a ditch off the left side of the road and coming to rest in a grassy area. *Tr. pp. 785:4-788:3; Ex. 492.* When the 2005 CVPI came to rest in the grassy area, Officer Linert exited the driver side door of the vehicle while he was still burning. *Tr. p. 1808:1-3.* The burn injuries that Officer Linert suffered are a result of the sender unit dislodging from the gas tank on the 2005 CVPI. *Tr. pp. 1039:10-1045:5.*

## ARGUMENT

Ford’s arguments all start with a flawed premise—that the jury heard all of the evidence and was properly instructed on the law. The trial court,<sup>2</sup> however, erroneously excluded evidence of Ford’s development of a fire suppression system designed *specifically for* the CVPI. On top of that, the trial court then refused to instruct the jury on the Linerts’ post-marketing failure to warn claim. Yet, Ford persists that the jury verdict should somehow still control the outcome here. As the Seventh District held, those errors require remand and a new trial. *Ford’s Appx. 12, 23-25, 50-51.*

The evidence here mirrors the all-to-common and continuous reports of automotive manufacturers’ malfeasance. Ford learned of an increased risk of harm to police officers in CVPIs, developed and sought patent protection for a fire suppression system, learned of “real world” crimp connection failures, discovered that the crimp overlap (the only connection securing the fuel sender unit to the fuel tank) had decreased, and embarked on a secret Crimp Improvement Project to fix the new fuel tanks—never alerting anyone about that risk in the old CVPIs. Of course Ford doesn’t want the jury to hear all the evidence and decide whether Ford should have issued a warning. But that isn’t for Ford or even a court to decide—it’s for the jury.

Ford abandons matching evidence to elements of the claim in favor of broad propositions untethered to facts to avoid a jury altogether—arguing that the jury

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<sup>2</sup> The trial court owned a Panther Platform vehicle, which he drove to court each day and parked in a reserved parking space at the base of the courthouse steps of the only public entrance where the jurors entered and exited. *Tr. pp. 1384-1387.* The trial court never told the parties that he owned a Panther Platform vehicle—even though jurors were excused for that very reason. *Id.* The Linerts’ attorneys discovered this undisclosed fact in the middle of trial. *Id.* While the Seventh District determined that it lacked authority over that issue, justice demands that this Court understand the backdrop of the trial court’s evidentiary and instructional rulings.

“basically” decided it already. In doing so, Ford fails to even acknowledge the legal standard that governs whether a jury instruction must be given:

It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 75 O.O.2d 331, 348 N.E.2d 135. However, the corollary of this maxim is also true. “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 (Ohio 1991).

The failure to instruct on a theory supported by the evidence is reversible error. Murphy, 61 Ohio St. 3d at 591.

The simple question before this Court is whether Officer Linert and Brenda Linert submitted sufficient evidence to warrant a jury instruction on post-marketing failure to warn.<sup>3</sup> The appellate court correctly found that “Ford’s failure to warn of a known risk associated with the CVPI’s fuel tank could constitute a defect. Thus, a jury instruction on post-marketing failure to warn was warranted regardless of the jury’s finding on appellant’s manufacturing defect.” *Ford’s Appx. 12*. Accordingly, the failure of the trial court to give such an instruction was reversible error.

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<sup>3</sup> The appellate court clearly found that the improperly excluded evidence of Ford’s fire suppression system should have been admitted on both the Linerts’ failure to warn and post-marketing failure to warn claims. Per the Seventh District, the evidence went to Ford’s knowledge which was “an element of appellants’ failure to warn claim and post marketing warning claims.” *Ford’s Appx. p. 24*. Proof of Ford’s knowledge was required “to prevail on either of those claims.” *Id.* The appellate court found reversible error when the trial court excluded that evidence. *Id.* In its conclusion, the Seventh District failed to reference the new trial for the failure to warn claim. Inasmuch as the appellate court described the failure to admit fire suppression evidence as Appellants’ tenth assignment of error when it was in fact Assignment of Error No. 11, the lack of comment in the Conclusion was an oversight. As a result, the Linerts already have a new trial on the failure to warn claim -- as Ford did not appeal and this Court did not accept review.

**I. PROPOSITION OF LAW NO. I - The Trial Court Failed To Instruct The Jury That The Product Could Be Defective Due To Lack Of A Post-Marketing Warning Or Instruction.**

The Linerts' claim for failure to provide a post-marketing warning is a statutory claim pursuant to R.C. § 2307.76(A)(2), which expressly provides that a product may be defective based on a manufacturer's inadequate post-marketing warning or instruction where both of the following apply:

(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.

Contrary to R.C. § 2307.76, the instruction given to the jury in this case on failure to warn, Instruction 28,<sup>4</sup> only addressed the failure to warn and failed entirely to advise the jury that a post-marketing warning or instruction case was available under Ohio law.<sup>5</sup>

In this case, there was extraordinary evidence of post-sale knowledge and a very real risk of injury in that after the sale of the subject vehicle, Ford engineers looked into real-world incidents involving the vehicle, Ford found that the tooling used to create the crimp joint had degraded over time, and Ford decided that it should change its crimp

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<sup>4</sup> The jury instructions given by the trial court, including Instruction 28, may be found in Document 144 of the Docket Record of Filings.

<sup>5</sup> The Linerts objected to the failure of Instruction 28 to include instruction on a post-sale duty to warn. *Tr. pp.2367:2 – 2370:11*. The Linerts tendered an instruction, CV 451.07 Statutory failure to warn, which included a complete recitation of the elements of post-marketing defect under R.C. § 2307.76, but it was refused by the Court. *Id.*

tooling to create a “more robust” crimp on the fuel tank. After the Crimp Improvement Project There is no evidence of failures of crimp joints manufactured. *Tr. p. 2261.*

Under these circumstances, R.C. § 2307.76 requires a jury to consider whether a reasonable manufacturer would have not only secretly fixed its product but whether a reasonable manufacturer would have also provided a post-marketing warning or instruction given Ford’s knowledge, the likelihood of the harm and the seriousness of the harm.

**A. Liability For Post-Sale Failure To Warn Is A Separate Analysis From Failure To Warn At The Time A Product Leaves The Control Of The Manufacturer.**

Ford argues that the jury verdict on the failure to warn claim at the time the vehicle left its control means that there can be no defect based on post-sale failure to warn. This argument ignores the language of R.C. § 2307.76 and that Seventh District found that the trial court committed reversible error by improperly excluding evidence that Ford developed a fire suppression system for the CVPI. After the sale, there is additional evidence of Ford’s actual knowledge of a problem with the crimp along with Ford’s determination that action was required to create a more robust crimp.

**1. The Jury’s Verdict On Failure To Warn Was Reversed Because The Trial Court Improperly Excluded Evidence Of Ford’s Fire Suppression System For The CVPI.**

Ford now seeks to bootstrap the jury’s decision on the failure to warn claim into victory on post-marketing failure to warn. Though this is improper as the two are separate claims as set forth below, it is also improper because the trial court improperly excluded evidence that Ford developed a fire suppression system for the CVPI that was designed to lessen the risk of injury by fire to officers in high energy rear impact crashes

like the one at hand. The Seventh District ruled that the trial court abused its discretion by refusing to admit evidence of the fire suppression system:

{¶89} But the trial court failed to consider the other purpose for which appellants offered the evidence of the fire suppression system, which was to show that Ford had notice of a potential fire risk in the CVPI. This knowledge was *an element of appellants' failure to warn claim and post marketing warning claims*. To prevail on *either of those claims*, appellants had to prove that Ford knew or should have known about a risk that associated with the CVPI that allegedly caused Linert's burn injuries. R.C. 2307.67(A). [sic]

{¶90} Cupka stated in his deposition that the Technical Task Force was formed in 2002. (Cupka dep. 10-11.). He stated the Technical Task Force developed the fire suppression system "as an additional safety measure in the event of a high-speed high-energy rear crash" to reduce the likelihood of injury to polic officers. (Cupka dep. 10, 16). Cupka also stated that they were performing crash tests o the fire suppression system in 2004. (Cupka dep. 46-47).

{¶91} Evidence of Ford's pursuit of the fire suppression system as early as 2002, was *relevant to appellants' failure to warn claims*. As appellants assert, this evidence could demonstrate that Ford was cognizant of the risk of fires in high-speed, high-energy, rear-impact crashes. This evidence was relevant for this purpose. Relevant evidence is generally admissible. Evid.R. 402.

{¶92} Because Fire suppression evidence was relevant and because it *went directly to one of the elements appellants had to prove*, the trial court abused its discretion in excluding this evidence.

{¶93} Based on the above discussion, appellants' second assignment of error has merit as it relates to evidence of the fire suppression system.

*Ford's Appx. 24-25 (emphasis added)*. As a result, the verdict of the jury on the failure to warn claim was flawed, was reversed, and cannot foreclose a post-marketing claim that will be tried with this additional relevant evidence. In light of the error, the case was remanded for a jury decision on both claims.

The addition of evidence of development of the fire suppression system transforms the case from one where it was claimed that Ford should have been aware of a defect in its product to one where Ford had actual knowledge of the increased risk of fire after a high-speed rear-end collision. Richard Cupka, who was at the relevant time the leader of the CVPI technical task force, testified that his group developed a fire suppression system for the vehicle. *Cupka Dep.* at 10. He testified that there were fire suppression conferences in June of 2002 when he was named leader of the task force. *Id.* at 11. The fire suppression system was envisioned as being a system that would detect a high-speed high-energy rear crash and, if there was leakage and ignition, suppress the fire in a localized area so that the officer would have time to get out of the vehicle. *Id.* at 15. The system was designed to deploy automatically, but it also had a switch to allow it to be activated manually. *Id.* at 15-16. The purpose of the system was to reduce the risk of injury to officers involved in high-energy rear impact crashes. *Id.* at 16-17. Because officers are frequently stopped at the side of a highway, the task force was asked to designing a system for impacts involving speeds of 75 mph. *Id.* at 18. As a result, the system was set to deploy during impacts above 55 mph. *Id.* at 20. In other words, the fire suppression system was designed to address collisions like the one at hand. The fire suppression system began being tested in multiple tests from as early as July 29, 2003. *Id.* at 152-3.

Since no jury has ever heard this evidence or been instructed as to post-marketing failure to warn, Ford's argument against remand is akin to a request for a directed verdict and should be held to a similar standard. In considering a directed verdict, a court's task is "to construe the evidence presented most strongly in favor of the nonmoving party and,

after doing so, determine whether reasonable minds could conclude only against the nonmoving party.” Abbott v. Jarrett Reclamation Serv., Inc., 132 Ohio App. 3d 729, 738, 726 N.E.2d 511, 517 (1999). Here, the evidence of a fire suppression system, by itself provides some evidence of Ford’s knowledge of an increased risk that required remedial action of some type. Whether Ford’s conduct was what a reasonable manufacturer would have done, should have been a question for the jury.

**2. A post-marketing claim for failure to warn pursuant to R.C. § 2307.76(A)(2) is an individual statutory claim not precluded by a jury finding under R.C. § 2307.76(A)(1).**

Ford argues that the jury “by rejecting Plaintiffs’ pre-sale warning claim, found that a reasonable manufacturer would *not* warn about the known, remote risk of post-collision fires.” Ford’s Brief, p. 8. Put another way, Ford argues that if a jury finds no failure to warn under R.C. § 2307.76(A)(1) for pre-sale failure to warn, then there can be no liability under R.C. § 2307.76(A)(2) for post-marketing failure to warn. Even disregarding the fact that the failure to warn verdict was reversed because the trial court improperly excluded evidence of the fire suppression system, the language of the statute has no such requirement. Instead, a product is rendered defective under section (A)(2) if the conditions of that section are met completely without regard to section (A)(1).

Even the most cursory reading of the statute explains why--sections (A)(1) and (A)(2) address different time periods. Section (A)(1) applies to warning defects in a product “when it left the control of its manufacturer” while section (A)(2) applies to “a relevant time after it left the control of its manufacturer.” Ford’s knowledge was much different at the time of the sale versus post-sale such that the jury’s verdict on failure to warn claim says nothing about whether it might find liability if properly instructed on

post-marketing failure to warn. It is admittedly elementary but bears repeating because Ford's argument denies that it is true: at different times (at the time of sale versus post-sale) a manufacturer, like Ford, may have different knowledge about the risk involved, or different knowledge about the likelihood of harm, so that a "manufacturer exercising reasonable care" as required by R.C. § 2307.76(A) might well make different choices as to warning or instruction at different times. The accumulation of knowledge regarding a risk may occur over time so that it exists on a continuum. Though a jury may have believed that Ford had knowledge of the risk of fire at the time of sale, it may not have believed that the knowledge and understanding of the risk rose to a sufficient level as to create liability under R.C. § 2307.76. Had the jury considered post-marketing warning, the same jury might have inferred a much greater knowledge post-sale regarding the risk, particularly after the Crimp Improvement Project, so that on balance of the relevant factors, it deemed the product defective.

Under the facts of this case, it was critical to instruct the jury on post-marketing defects in warning because of evidence that, after the sale of the subject CVPI but prior to the accident, Ford gained actual knowledge of the (1) increased risk of fire in the CVPI and/or (2) insufficient crimp on the sender ring and failed to provide any post-marketing warning or instruction, even though a reasonable manufacturer would have warned. In the post-marketing time frame, there is extensive testimony in this case that Ford itself determined that CVPI tanks were being manufactured with insufficient crimp overlap and undertook a Crimp Improvement Program to correct the issue. The investigation by Ford and the resultant Crimp Improvement Program did not happen until after the manufacture of the fuel tank in question, and, therefore, says little about Ford's knowledge of the risk

prior to the sale. But it speaks volumes about Ford's post-marketing internal attempts to secretly fix the issue without notifying any of its customers. In fact, thousand of CVPIs are still being used today, and Ford has never warned the registered owners who purchased CVPIs manufactured pre-Crimp Improvement Project.

Ford's Corporate Representative, Jon Olson, a design analysis engineer, testified that, after seeing real-world incidents involving the CVPI where the crimp securing the sender ring had failed, he went to Ford engineers to ask them to review Ford's manufacturing process.<sup>6</sup> The outcome of that review was Ford's Crimp Improvement Project, initiated in January of 2007 and implemented in October of 2007 prior to the accident. *Tr. pp. 653:17-654:19; 662:18-22; 2254:17-19; Ex. 178.* Regarding the Crimp Improvement Project, Olson testified that:

- as a Ford employee of doing “the kind of things that design engineers do,” he notified others at Ford about real-world incidents involving sending unit dislodgements, *Tr. p. 2254,*
- he showed others at Ford photographs of sending unit dislodgements in those accidents, *Tr. p. 2255,*
- he requested that others at Ford review their manufacturing processes to ensure that they were meeting all the relevant standards, *Tr. p. 2254,*
- after others at Ford reviewed the information and photographs he provided, the outcome of the collaboration was Ford's Crimp Improvement Project. *Tr. p 2254.*

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<sup>6</sup> The Linerts introduced evidence of six other similar rear-end accidents involving Panther Platform vehicles with failed crimps between the time that the CVPI in question was manufactured and the Crimp Improvement Project. *Ex. 681.*

The subject CVPI was sold on June 8, 2005 and its tank was manufactured on May 2, 2005. *Tr. pp. 870:19-871:9; 1269:5-13; 2135:16-2136:1.* According to Ford's own Executive Summary describing the issue in order to authorize funding,

- the purpose of the Crimp Improvement Project was to “refurbish the tooling used to crimp the sender ring in the top panel of the EN/FN [Ford Crown Vic] fuel tank to maintain product quality and robustness,” or to get “more metal folded over the top of the sender ring.” *Ex. 178; Tr. pp. 622:9-15; 662:2-4.*
- the age of the existing tooling was the reason for the condition of the crimp: “the tooling used to perform the crimping process has been in use since 1994.” *Ex. 178.*

Per Ford's manufacturing process engineers, Steven Haskell and David Sanchez, the Crimp Improvement Project increased the “metal folded over the top of the sender ring” by a “millimeter to a millimeter and a half.” *Tr. pp. 622:2-4; 663:18-20; 1277:23-1278:11.* Per Ford's engineers Haskell and Sanchez, it was important to have “more metal folded over the top of the sender ring” because it made the sender unit attachment to the fuel tank stronger, safer, and more crashworthy. *Tr. pp. 663:20-667:7; 1284:22-1285:4.* Though Ford denies any problem with the crimp and characterizes the Crimp Improvement Project as merely preserving existing quality, the evidence is that there have been no known failures on tanks manufactured after the worn out tooling was replaced:

**Q** Last question I have, Mr. Olson, isn't it true that there's never been a tank since the change of that crimp improvement project where a sender unit's failed?

A If there is, I don't know about it.

*Tr. p. 2261.*

Yet despite Ford's internal response to the increased risk of post-collision fire in the Panther Platform vehicles after the sale of the subject CVPI (namely the investigation, photographs of fuel sending unit dislodgements, internal discussions, determinations that the Crimp Improvement Project was necessary, and subsequent actions to secretly change the tooling) despite having actual knowledge of real world incidents (including photographs of sending unit dislodgements and making a determination that the Crimp Improvement Project was necessary) between the time the subject CVPI was sold and the accident, no warning was ever sent. *Tr. pp. 2261:21 – 2262:1.* Ford never sent a warning regarding this danger.

Ford's suggestion that there was no evidence in support of the post-sale warning claim is, at best, merely Ford's characterization of evidence presenting a jury question. Although Ford denies that there was any dimensional specification for crimp overlap or that the crimp overlap is significant, the jury certainly heard evidence to the contrary. The jury heard that crimp overlap effects the strength of the joint (more is stronger)(*tr. 896-898*), that the crimp overlap was much smaller on the subject tank than others manufactured before (*tr. 898-899*), that Ford's specification called for a crimp overlap of 4.3mm (*tr. 709-711*), and that after observing crimp failures Ford instigated the Crimp Improvement Project. That Ford itself decided that the project should be changed to be brought back up to standards, is not only evidence of knowledge but also the fact of increased risk. Finally, those facts must be considered in light of the relative ease with which the appropriate warning or instructions could have been sent to registered owners

whose contact information is readily accessible. Ford's assertion that there was no evidence in support of the claim ignores the testimony of the Linerts' expert witnesses and other evidence presented. The jury should have been instructed on post-sale duty to warn so that it could decide.

The cases cited by Ford to propose that a risk must be unknown to the defendant at the time of sale are inapposite and improperly add an element that is not present in the statute. For example, the Sixth Circuit held, not that additional similar instances of harm cannot trigger post-marketing failure to warn, but that post-marketing failure to warn is inapplicable where an adequate pre-sale warning was already given:

American Medical Systems provided warnings about leakage and folds before the sale. ***Thus, because it has already provided a warning*** that the prosthesis is prone to leakage, ***providing post-market warnings*** that it received complaints that the 700CX leaked ***would serve little purpose. The post market warning provision is simply inapplicable here.*** Such a requirement is necessary when the manufacturer becomes aware of a defect or risk about which it did not previously warn customers.

York v. Am. Med. Sys., Inc., 166 F.3d 1216 (6th Cir. 1998)(emphasis added). The issue in York was not the timing of when the manufacturer learned of the risk, but rather that an adequate warning had already been provided at the time of sale. The situation is completely opposite of the one here where Ford ***never*** provided any warning or instruction. *Tr. pp. 2261:21 – 2262:1*

Ford's suggestion that mere "discussions" of a risk do not support an instruction for post-marketing failure to warn, citing Fisher v. Ford Motor Co., 224 F.3d 570, 576 (6th Cir. 2000), is similarly inapplicable. The Linerts do not contend that a mere discussion of the risk would support the instruction at issue because in this case there was so much more evidence before the court: development of a fire suppression system,

internal investigation into dislodged sender units, and ultimately a retooling project that changed the crimp joint--a critical component responsible for the increased fire risk--to make it more “robust.” The situation is factually distinct from Fisher where “testimony indicated that such internal discussions only began at Ford in May 1996 and were still ongoing, inconclusively, towards the end of that year. Ford was investigating but did not ‘know’ of the risks to short drivers.” 224 F.3d at 576. Here, Ford knew of the risk before the November 11, 2007 fire.

By failing to advise the jury that it could find Ford liable for failure to provide a proper post-marketing warning, the Court improperly narrowed the scope of the jury’s inquiry to Ford’s knowledge only at the time of the sale. Instruction 28 required the jury to assess Ford’s knowledge “[w]hen the 2005 Ford Crown Victoria Police Interceptor left the control of Ford.” Instruction 28, paragraph (1). And the evidence of Ford’s pre-sale knowledge was handicapped by improperly excluded evidence of Ford’s fire suppression system. Under Ohio law, the jury could have found a post-marketing defect based on the evidence before it, but the instructions to the jury in this case advised the jury, contrary to Ohio law, to determine Ford’s duty only at the time the CVPI left the manufacturer’s control.

As a consequence, the jury was instructed to ignore evidence of Ford’s post-sale knowledge despite the statute’s requirement to the contrary. Even if the jury found post-sale knowledge required additional warning or instruction, the instructions given required the jury to find for Ford. A jury instruction that instructed the jury to find no defect, when the law and the facts of the case would support a verdict under Ohio law, materially prejudiced the Linerts so that a new trial must be granted. Failure to do so is reversible

error in this case because the jury instructions that were incorrect and incomplete, and because that error materially prejudiced the Linerts. Klem v. Consol. Rail Corp., 2010-Ohio-3330, ¶ 58, 191 Ohio App. 3d 690, 706, 947 N.E.2d 687, 699 (finding reversible error where a court refused to instruct on violations of administrative regulation).

**B. The Linerts Have Never Argued Nor Did The Appellate Court Find That There Is A Duty To Warn Of All “Known Risks.”**

While Ford complains about the statutory construction of the Seventh District, it is Ford who is attempting to graft an entirely new requirement into R.C. § 2307.76. Ford argues that there can be no duty to warn without a predicate defect. Ford argues that a “risk” (the actual term used in R.C. § 2307.76(A)) cannot support a failure to warn claim where there is no underlying defect. In other words, per Ford, a plaintiff must be able to prove a manufacturing defect as in R.C. § 2307.74 or a design defect as in R.C. § 2307.75 as a prerequisite to proving a warning case under R.C. § 2307.76. Of course, the statute has no such requirement.

As this Court interprets the statute, “[i]ntent is determined by giving effect to the words used by the legislature in the statute, not adding or deleting words.” State v. Chessman, 2010-Ohio-3239, ¶ 10, 188 Ohio App. 3d 428, 431, 935 N.E.2d 887, 889. Had the legislature intended to require a prerequisite manufacturing or design defect, it would have written as much. Instead, R.C. § 2307.76 *defines* a product as defective due to inadequate warning where, to paraphrase, a manufacturer has knowledge of a risk and fails to provide the post-marketing warning or instruction that a reasonable manufacturer would have, in light of the likelihood of harm and the likely seriousness of that harm.

Prior courts interpreting R.C. § 2307.76 have adhered to the statutory language that there must be a risk rather than requiring any underlying manufacturing or design

defect: “Courts have restated the above statutory language as requiring three elements “each of which must be satisfied: (1) a duty to warn against reasonably foreseeable risks; (2) breach of this duty; and (3) an injury that is proximately caused by the breach.” Monroe v. Novartis Pharm. Corp., 29 F. Supp. 3d 1115, 1125 (S.D. Ohio 2014); Lykins v. Fun Spot Trampolines, 2007-Ohio-1800, ¶ 14, 172 Ohio App. 3d 226, 232, 874 N.E.2d 811, 815. Of course not every risk requires a warning--a manufacturer need only provide the warning or instruction that a manufacturer exercising reasonable care would have provided given the risk involved.

The evaluation or balancing of whether a risk requires additional warning is statutorily mandated by section (A)(2)(b) of the statute: “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. “This definition of ‘defect’ introduces negligence concepts of reasonableness, foreseeability, and risk. It 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, 443 (1995). The Seventh District did not ignore this aspect of the statute, but rather properly left it for a jury to decide. The balancing of the risk, the likelihood of harm, and the nature of the harm is uniquely a jury issue and was not for the Seventh District to pass upon:

It asks whether a manufacturer exercising reasonable care would warn of that risk in light of both the *likelihood* and the seriousness

of the potential harm. Within this framework, whether the plaintiff's harm was unusual or not would be a factor in calculating whether a manufacturer exercised reasonable care in its decision not to warn. The incidence of the kind of harm at issue in the case is only one factor *a jury would consider* in finding a duty to warn.

*Id.* at 300 (emphasis added). A mere finding of no manufacturing or design defect at the time of sale simply does not speak to the issues that the jury must decide when evaluating a post-marketing failure to warn claim under R.C. § 2307.76.

Ford's reliance on the open and obvious doctrine incorporated into R.C. § 2307.76(B) also fails because it is not the basic flammability of fuel that is at issue in the case. Rather, the issue is whether the increased risk of fire after high-speed rear-impact crashes due to the eroded crimp joint is open and obvious. Hidden away under the car, there is no way that an owner of the vehicle can appreciate this particular risk presented by the CVPI. This case is not like Sapp, cited by Ford as interpreting R.C. § 2307.76(B), where "the danger which arises is not associated with the product but, rather, is the result of the conduct of the consumer." Sapp v. Stoney Ridge Truck Tire, 86 Ohio App. 3d 85, 99, 619 N.E.2d 1172, 1181 (1993). In Sapp, plaintiff suggested a warning was required against over inflation of the subject tire--an issue of consumer conduct rather than product risk. Here, no one is claiming that Officer Linert used the product improperly. Further, contrary to the single sentence, quoted without context, from an unpublished Alaskan criminal opinion,<sup>7</sup> the evidence of Ford's 75 mph crash testing of the CVPI

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<sup>7</sup> Ford cited Bowley v. State, No. A-8855, 2009 WL 50130, at \*3 (Alaska Ct. App. Jan. 7, 2009) for the proposition that "[i]t would appear to be a matter of common knowledge that a gasoline-powered motor vehicle could catch fire if it is subjected to the amount of impact present in this case." This case is unpublished and, even in Alaska, its citation is discouraged for purposes other than establishing res judicata, estoppel, or the law of the case. Alaska R. App. P. 214. Considering that the issue in Bowley was whether a drunk driver's conduct supported an aggravated charge where his vehicle, perched on its side

believes any argument that it might be “common knowledge” that it would erupt in flames. Indeed, the crasher here was not even outside the speed ranges that Ford touts as “the most rigorous in the world.” *Ford’s Brief*, p. 2. The investigating government entities and the Linerts’ experts concluded that the closing speed was less than the 75 mph crash test that Ford touted. *Ex. 492; Ex. 501; Tr. p. 804:2-13*. Only Ford’s litigation expert calculated a closing speed in excess of 75 mph. *Tr. pp. 2043:11-2044:6*. Even then, the crash was less than Ford’s 100 mph crash test with a 1996 CVPI and Ford knew that police were at risk of crashes of “55, 75, on up.” *Cupka Offer of Proof*, pp. 16-17.

Ford asks this Court to essentially repeal legislation and find that in the absence of a manufacturing defect, there can be no liability under R.C. § 2307.76 for failure to warn. According to Ford, since the jury found no manufacturing defect, failure to warn is immaterial. The statute, however, does not require any sort of predicate defect—merely a “risk.” Per the statute, a product is defective due to inadequate post-sale warning if the manufacturer knew or should have known “about a risk” and failed to provide a warning that a reasonable manufacturer would have provided “concerning a risk.” *Id.* In other words, the *risk* that is required to be warned of need not, apart from not existing or being inadequate, rise to the level of a defect. Under the statute, failure to warn of a known risk constitutes its own defect, regardless of whether the risk is an independently actionable defect under the law.

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post-impact, endangered rescuers, Ford’s reliance on the case in a products liability setting is arguably more than inapposite and unpersuasive. Further, the Linerts note that despite an estimated impact speed in Bowley of 70 to 80 mph, the opinion mentions neither actual fuel leakage nor any actual fire from the Ford or the Dodge vehicle involved in that accident.

**C. There Is A Presumption That An Adequate Warning, If Given, Will Be Read And Heeded.**

The presumption that an adequate warning, if given, will be read and heeded is known as the “read and heed” rule. “If an inadequate warning is given, however, a rebuttable presumption arises that the failure to adequately warn was a proximate cause of the plaintiff’s injuries.” Boyd v. Lincoln Elec. Co., 2008-Ohio-6143, ¶ 38, 179 Ohio App. 3d 559, 571, 902 N.E.2d 1023, 1032. Initially, it should be noted that Ford ignores Ohio law on this point in favor of a case from New York and comments from secondary sources. In truth, its argument is that there is no way to eliminate the risk of an auto accident and no way to eliminate the risk of a subsequent fire. This argument ignores that this is a crashworthiness case that argues not that car accidents should be prevented but that “the risk of severe injury due to fire” could have been reduced had a proper warning been provided. The Linerts’ complaint was not about Officer Linert’s broken ribs, but rather about the burn injuries from the gasoline fed fire. Critically, Ford’s reliance on Officer Linert’s testimony that he could not choose to drive a different vehicle on his shift falls well short of meeting their burden of rebutting the presumption that an adequate warning would have been heeded.

Ford references Officer Linert’s testimony that he had no choice in what vehicle to drive on a given shift to suggest that the risk of post-collision fire could not be changed by any warning, *Ford’s Brief*, p. 17, but in so doing Ford narrows the inquiry too much. If Officer Linert was not the decision-maker (ie. if someone in a supervisory capacity made that decision) then Ford should have put in evidence about what the decision-maker would or would not have done. Ford has no evidence of what the ATPD would have

done if Ford had provided a proper warning about the increased risk of fire from high-speed, rear-end collisions.

Without evidence in the record, Ford speculates about all drivers generally trying to avoid reckless drivers. *Ford's Brief*, p. 17. Where “only speculation can support the assumption that an adequate warning, properly communicated, would not have influenced the course of conduct” of those involved, a defendant fails to rebut the presumption that a warning would have been heeded. Seley v. G. D. Searle & Co., 67 Ohio St. 2d 192, 201, 423 N.E.2d 831, 839 (1981). There no evidence in this case to show that if Ford provided a proper warning of post-collision fires from high-speed, rear-impact crashes in CVPI's manufactured prior to the Crimp Improvement Project, that the Ford CVPI in question would have been assigned to Officer Linert on that day because there is no evidence from the ATPD. Given that patrol vehicles are **1,000 times more likely** to be involved in high-speed, rear impacts than non-patrol vehicles, *tr. p. 1639:5-17*, the ATPD may have removed it from patrol duty, sold the 2015 CVPI, and/or made alterations such as replacing the tank or welding the existing sender unit to the tank to address the crimp overlap problem.

Ford invites this Court to rule that it need not warn if a warning would not be 100% effective, but the cases it cites do not support such a rule. Ford's citation to Liriano v. Hobart Corp., 92 N.Y.2d 232, 242, 700 N.E.2d 303 (1998) is inapposite to the causation issue it is cited for in that it merely references that open and obvious dangers need not be warned against. In Boyd, it was certainly stated that a “warning is adequate if it reasonably discloses all inherent risks and if the product is safe when used as directed.” Boyd v. Lincoln Elec. Co., 2008-Ohio-6143, ¶ 28, 179 Ohio App. 3d 559, 569,

902 N.E.2d 1023, 1030. However, the court did not, as implied by Ford, rule that lack of a warning is excused if the warning would not render the product safe. *Id.* Similarly inapposite is the Florida case, Am. Motors Corp. v. Ellis, 403 So. 2d 459, 466 (Fla. Dist. Ct. App. 1981). That the case is from Florida is significant because Florida lacks the “read and heed” rule applicable in Ohio, such that the Ellis court refused to speculate about how plaintiff might meet his burden on causation. *Id.* In this case, Ohio’s presumption that a proper warning would be read and acted upon shifts this burden to Ford. Boyd, 179 Ohio App. 3d at 571.

In the end, the Court need not speculate about what might have happened had Ford provided a warning because it was Ford’s burden to offer evidence to rebut the presumption that the warning would have been heeded, and Ford failed to do so. Officer Linert’s comments about lack of discretion at the beginning of his shift only add up to Ford asking the wrong person about what might have been changed.

**II. PROPOSITION OF LAW NO. II: A Product Manufacturer’s Implementation Of A Post-Marketing Product Improvement May, Along With Other Evidence, Trigger A Post-Sale Duty To Warn.**

Neither the Linerts nor the Seventh District have suggested that every instance of post-marketing product improvement will trigger post-marketing duty to warn. However, an investigation and manufacturing overhaul such as the one that Ford undertook in this case, coupled with real-world failures causing burning injuries and/or death, may certainly be some evidence that a jury may consider in reaching a decision that a reasonable manufacturer would have provided some warning to its consumers. As detailed in the section above, the Crimp Improvement Program and the internal

investigation leading up to it, were just one part of evidence. In this case, there continued an accrual of failures and apart from the Crimp Improvement Program Ford was separately developing a fire suppression system to protect against the inherent risk of fire with the CVPI during the relevant period. Neither the parties nor the Seventh District has suggested that mere post-sale product improvement, as a bright line test, triggers a post-sale duty to warn, and this case does not present that factual scenario.

Further, the fact that Ford undertook secret efforts to reduce the risk of post-collision fire in future manufactured Panther Platform vehicles cannot relieve it of liability for post-marketing failure to warn regarding the existing Panther Platform vehicles which did have an increased risk. The issue involves similar policy issues to those considered when this Court held that evidence of a manufacturer's subsequent remedial measures should have been admitted into evidence in product liability cases. McFarland v. Bruno Mach. Corp., 1994-Ohio-62, 68 Ohio St. 3d 305, 626 N.E.2d 659. There, a maintenance mechanic sued manufacturer of die cutting press in strict products liability. Based on policy reasons similar to those asserted by Ford here, that permitting liability with any basis in post-marketing product improvements discourages product improvement, this Court found that a jury should hear the evidence. *Id.*

Finally, we are aware of the contention by some that the introduction of evidence of subsequent remedial measures in a strict products liability case could be highly prejudicial to a defendant-manufacturer. While this contention may have some validity, an equally plausible assertion can be made on behalf of an injured plaintiff if such evidence is excluded. Without question, all evidence going to the heart of an issue is, to some extent, “prejudicial” to someone. That is the very essence of “evidence” and our adversary system. ***Let the jury decide!***

*Id.* at 312 (emphasis added). Rather than the technical distinction between negligence and strict liability, this decision was based on realities of modern manufacturers:

When the context is transformed from a typical negligence setting to the modern products liability field, however, the ‘public policy’ assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability.

*Id.* at 310-11, quoting Ault v. International Harvester Co., 13 Cal.3d 113, 119-20, 528 P.2d 1148, 1151-52 (1974). In this case, the only issue is whether a jury should be able to be instructed as to post-marketing failure to warn based on the facts. This Court need not even address the “bright line” rulings suggested by Ford, other than to find, consistent with R.C. § 2307.76(A), that a jury can hear the evidence in this case and decide if Ford acted as a reasonable manufacturer would have under the circumstances.

Ford cites Kansas law for the proposition that a manufacturer need not notify past customers about changes in the state of the art. Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (1993). The evidence in this case does not show a change to the state of the art in crimp technology--the evidence shows deterioration Ford’s manufacturing process that was creating an increased risk of post-collision fire. Again, that proposition is not at issue in this case, where Ford was developing a fire suppression system to try to avoid injuries like the one at issue, and where Ford investigated real-world failures of its product, subsequently determined that wear to its ageing tooling was causing insufficient crimp, and took action to refresh the tooling to create a more robust crimp. Because Ford’s recognition of the problem with its crimp and effort to fix that

deficiency is not a “new, safety enhancing device” or a “later developed safety device” the extra-jurisdictional cases addressing new safety devices are not informative on the issues before the Court. *See Williams v. Monarch Mach. Tool Co.*, 26 F.3d 228, 232 (1<sup>st</sup> Cir. 1994)(no duty to advise of new, safety enhancing products); *Romero v. Int’l Harvester Co.*, 979 F.2d 1444, 1446 (10<sup>th</sup> Cir. 1992)(no duty to notify regarding later developed safety devices).

Those cases holding that there is no liability for post-marketing failure to warn where there is merely a change to the state of the art or a newly developed safety device, explain why Ford’s suggestion that the Seventh District’s opinion forces manufactures to send out warnings for “each contemplated safety improvement, even to safe products, simply to reduce uncertainty and minimize liability exposure.” *Ford’s Brief*, p. 21. It’s incorrect because this case isn’t about a change to the state of the art or a new safety feature. This case is about whether Ford should have told users of the CVPI about an increased risk of fire when it learned that its tooling had deteriorated so that the crimp was not as robust as intended. In Ford’s own words it was to “refurbish the tooling used to crimp the sender ring in the top panel of the EN/FN [Ford Crown Vic] fuel tank to maintain product quality and robustness.” *Ex. 178*. Neither state of the art nor new safety devices are at issue for post-sale failure to warn.

Just as the Kansas court noted, post-marketing failure to warn is not decided with blanket rulings on the effect of post-sale product changes, “[t]he nature of the post-sale warning and where and to whom it should be given will involve a case-by-case analysis.” *Patton*, 253 Kan. at 761. This case does not present a change in the state of the art or a new safety device, the facts specific to this case describe a manufacturer, previously

suspicious but silent regarding an increased risk of post-collision fire, conducting an investigation and determining that its manufacturing process had deteriorated due to age, and refreshing its tooling to avoid the adverse consequences--insufficient crimp securing the fuel sending unit to the fuel tank.

### **CONCLUSION**

For all of the foregoing reasons, this Court should find that there is sufficient evidence from which a jury could conclude that Ford is liable for failing to provide a post-marketing warning under R.C. § 2307.76(A)(2) and affirm the Seventh District's decision remanding the case to the trial court for further proceedings on failure to warn and post-marketing failure to warn claims. No jury has ever heard all of the admissible evidence in this case, and no jury has ever been instructed to consider post-marketing failure to warn as they should have under the law. These are fundamental flaws in the proceedings in the trial court below. As this Court itself extolled in McFarland, "Let the jury decide!"

Date: October 6, 2015

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**CERTIFICATE OF SERVICE**

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