

IN THE SUPREME COURT OF OHIO

ROSS J. LINERT, et al., :
 :
 :
 Plaintiffs/Appellees, : **Case No. 2014-1940**
 :
 :
 vs. : **ON APPEAL FROM THE**
 : **MAHONING COUNTY COURT OF**
 FORD MOTOR COMPANY, : **APPEALS, SEVENTH APPELLATE**
 : **DISTRICT**
 :
 Defendant/Appellant. :
 : **Court of Appeals**
 : **Case No: 2011 MA 00189**

**REPLY BRIEF OF APPELLANT
FORD MOTOR COMPANY**

Richard A. Abrams (0014382)
(COUNSEL OF RECORD)
GREEN HAINES SGAMBATI CO., L.P.A.
National City Bank Building
Suite 400
P.O. Box 849
Youngstown, Ohio 44501

Robert W. Schmieder II
Robert J. Evola
SL CHAPMAN LLC
330 North Fourth Street, Suite 330
St. Louis, Missouri 63102

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

October 26, 2015

Elizabeth B. Wright (0018456)
(COUNSEL OF RECORD)
Conor A. McLaughlin (0082524)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
(216) 566-5500 (Telephone)
(216) 566-5800 (Facsimile)
Elizabeth.Wright@ThompsonHine.com
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 (Telephone)
(513) 361-1201 (Facsimile)
pierre.bergeron@squirepb.com
larisa.vaysman@squirepb.com

Counsel for Appellant Ford Motor Company

Jonathan R. Stoudt (0083839)
(COUNSEL OF RECORD)
Robert P. Miller (0073037)
ROURKE & BLUMENTHAL, LLP
495 South High Street, Suite 450
Columbus, Ohio 43215
(614) 220-9200 (Telephone)
(614) 220-7900 (Facsimile)
jstoudt@randbllp.com
rmiller@randbllp.com

*Attorneys for Amicus Curiae
Ohio Association for Justice*

John P. Palumbo (0012313)
Benjamin C. Sasse (0072856)
(COUNSEL OF RECORD)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, Ohio 44113
(216) 592-5000 (Telephone)
(216) 592-5009 (Facsimile)
john.palumbo@tuckerellis.com
benjamin.sasse@tuckerellis.com

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

Yvette McGee Brown (0030642)
Chad A. Readler (0068394)
(COUNSEL OF RECORD)
Kenneth M. Grose (0084305)
JONES DAY
325 John H. McConnell Boulevard
Suite 600
P.O. Box 165017
Columbus, Ohio 43216
(614) 469-3939 (Telephone)
(614) 461-4198 (Facsimile)
ymcgeebrown@jonesday.com
careadler@jonesday.com
kmgrose@jonesday.com

*Attorneys for Amici Curiae Chamber of
Commerce of United States of America,
National Association of Manufacturers,
National Federation of Independent Business
Small Business Legal Center, Ohio Chamber
Of Commerce, and Ohio Manufacturers'
Association*

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	2
I. Plaintiffs Misrepresent The Seventh District’s Judgment And Rely On “Facts” Rejected By The Jury.....	2
A. Plaintiffs’ Claim That The Seventh District Reversed The Jury Verdict On Pre-Sale Failure To Warn Is Disingenuous	2
B. Plaintiffs Continue To Allege Defects In The Design And Manufacturing Of The 2005 CVPI, Contradicting The Jury’s Verdict	3
II. <u>Reply In Support Of Proposition Of Law No. I: A “Risk” That Triggers A Post-Marketing Duty To Warn Under Ohio Revised Code 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</u>	5
A. There Is No Duty To Give A Warning Of All “Known Risks.”.....	5
B. Liability For Failure To Warn Post-Sale Cannot Be Based On A Risk That Does Not Require A Pre-Sale Warning	8
1. <u>Additional Post-Marketing Incidents Simply Reaffirm Existence Of Previously Known Risk</u>	8
2. <u>The Crimp Tooling Project Did Not Establish Any Post-Sale Knowledge Of Increased Risk, But Only Ford’s Desire To Reduce An Already Known And Remote Risk</u>	10
3. <u>The Fire Suppression System Offered No New Post-Marketing Knowledge Regarding The Likelihood Of Post-Collision Fire</u>	11
C. There Is No Duty To Warn If A Warning Will Not Avert The Harm	12
III. <u>Reply In Support Of Proposition Of Law No. II: A Product Manufacturer’s Implementation Of A Post-Marketing Product Improvement Does Not Trigger A Post-Marketing Duty To Warn</u>	14
CONCLUSION.....	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bouher v. Aramark Servs.</i> , 181 Ohio App.3d 599, 2009-Ohio-1597, 910 N.E.2d 40 (1st Dist.).....	6
<i>Evans v. Toledo Neurological Assocs.</i> , 2014-Ohio-4336, 20 N.E.3d 333.....	5
<i>Kesler v. Crown Equip. Corp.</i> , W.D.Va. No. 93-0644-R, 1994 U.S. Dist. LEXIS 20126 (July 3, 1994).....	13
<i>Mandile v. Clark Material Handling Co.</i> , 131 F. App'x 836 (3d Cir.2005)	13
<i>Mathews v. Univ. Loft Co.</i> , 387 N.J. Super. 349, 903 A.2d 1120 (App.Div.2006)	7
<i>McFarland v. Bruno Mach. Corp.</i> , 68 Ohio St. 3d 305, 626 N.E.2d 659 (1994)	15, 16
<i>Mitchell v. City of Warren</i> , ___F.3d ___ Cir. No. 14-2075, 2015 U.S. App. LEXIS 14700 (Aug. 21, 2015).....	6, 17
<i>Pontsler v. Kiefer Built, Inc.</i> , 3d Dist. Mercer No. 10-06-06, 2006-Ohio-4842	7
<i>Seley v. G.D. Searle & Co.</i> , 67 Ohio St. 2d 192, 423 N.E.2d 831 (1981)	12
<i>York v. Am. Med. Sys., Inc.</i> , 6th Cir. Case No. 97-4306, 1998 U.S. App. LEXIS 30105 (Nov. 23, 1998), (see Pl. Br. 22)	10
<i>York v. Am. Med. Sys. Inc.</i> , S.D. Ohio No. C1-94-824, 1997 U.S. Dist. LEXIS 24212 (Oct. 16, 1997), <i>aff'd</i> , 166 F.3d 1216 (6th Cir. Nov. 23, 1998).....	10
Statutes	
R.C. 2307.76	4, 5, 7, 8, 10, 15, 16

INTRODUCTION

The Seventh District's rule, that a risk need only be "known" in order for a post-marketing claim to proceed to the jury, broadens the scope of the duty to warn beyond anything contemplated by the General Assembly or recognized by any other state. Rather than dispute the Seventh District's position as an extreme outlier or address the questions of law on which this Court granted review, Plaintiffs "respond" to arguments that Ford never made and attempt to resurrect design and manufacturing defect claims that were *rejected* by the jury.

Fundamentally, Plaintiffs cannot explain away two overarching problems with the Seventh District's ruling on post-marketing failure to warn. First, the Seventh District conducted an incomplete analysis, concluding that the mere "known" risk of post-collision fire sufficed to send the post-marketing failure to warn claim to the jury. Its analysis ignored the statutory language regarding reasonableness and likelihood of harm, neglected to compare post-marketing knowledge with pre-marketing knowledge, and failed to consider the futility of a warning regarding the possibility of being struck from behind at a high enough speed to cause gas leakage and a post-collision fire. Second, the Seventh District equated attempts to reduce a known risk with knowledge of an increased risk, a false equivalence that, if permitted to stand, will discourage innovation and improvements.

Further illustrating the Seventh District's statutory interpretation errors, Plaintiffs cannot articulate any potential warning that a reasonable manufacturer would have given that would have averted the harm in question. Rather, they retreat to claiming that Ford should have made design alterations to the vehicle—in defiance of the jury's rejection of their manufacturing and design defect claims. The fact that, after proceeding through all three levels of Ohio's judicial system, Plaintiffs still cannot even describe an appropriate warning renders this Court's task an easy one. This Court should reverse the Seventh District's decision on post-marketing warning.

ARGUMENT

I. Plaintiffs Misrepresent The Seventh District’s Judgment And Rely On “Facts” Rejected By The Jury.

In an effort to salvage the Seventh District’s result, Plaintiffs misrepresent what occurred below and ignore the record, proceeding as if their design and manufacturing claims had never been resolved, even though the jury rejected these claims. But this Court’s grant of jurisdiction on two propositions of law was not an open invitation to the parties to re-litigate the entire case. Nevertheless, Plaintiffs posit that their pre-marketing warning claim remains—despite the Seventh District’s explicit affirmance of the jury’s verdict rejecting this claim. Plaintiffs’ focus on claims they already lost highlights the fundamental problems with the Seventh District’s decision regarding the post-marketing warning.

A. Plaintiffs’ Claim That The Seventh District Reversed The Jury Verdict On Pre-Sale Failure To Warn Is Disingenuous.

Plaintiffs inexplicably claim that the jury’s verdict on pre-marketing failure to warn “was reversed” on appeal, and that they “already have a new trial” on this claim. (Pl. Br. 12 n.3, 15.) To the contrary, the Seventh District surveyed the evidence on the pre-marketing duty to warn and *upheld* the jury’s verdict: “Ford presented competent, credible evidence to support the jury’s finding on appellants’ inadequate warning at the time of marketing claim.” (Appx. 034.) The Seventh District then explicitly held:

For the reasons stated above, the trial court’s judgment is hereby reversed as to the post-marketing failure to warn claim. The matter is remanded to the trial court for further proceedings *on this claim only*. The court’s judgment granting summary judgment to Ford on appellants’ punitive damages claim is also reversed. . . . *The judgment is affirmed in all other respects.*

(Appx. 050-051 (emphasis added); *see also* Appx. 004 (Judgment Entry).) Plaintiffs’ efforts to convince this Court (which rejected their cross appeal) that the Seventh District reached a different result patently mischaracterizes the appellate court’s holding. The only issue before

this Court is whether Plaintiffs were entitled to a post-marketing failure to warn instruction.¹

B. Plaintiffs Continue To Allege Defects In The Design And Manufacturing Of The 2005 CVPI, Contradicting The Jury’s Verdict.

Plaintiffs present a factual recitation that shows little fidelity to the record below in an effort to create the illusion of some factual dispute that necessitates a new trial. But this portrayal does not withstand scrutiny.

For example, Plaintiffs attempt to re-hash their design claim regarding the tank location in the 2005 CVPI, (*see* Pl. Br. 1, 5), but the jury found that Ford’s choice of fuel tank location was not a design defect because there was no “practical and technically feasible alternative design for the fuel tank location that would have prevented [Mr. Linert’s] injuries.” (Appx. 017.) Plaintiffs *did not appeal* this portion of the verdict, (*see* Appx. 025), and they cannot re-litigate the question of fuel tank location—however implicitly—before this Court.

Plaintiffs also ignore the jury’s verdict rejecting Plaintiffs’ manufacturing defect claim, (*see* Appx. 053), by insisting Ford had a dimensional specification for crimp overlap and that the crimp on fuel tanks deteriorated over time. (*See, e.g.*, Pl. Br. 2, 5, 21.) However, in upholding the jury’s verdict, the Seventh District specifically noted that “*Ford’s Specification does not include a dimension for the crimp overlap.*” (*See* Appx. 029-030 (emphasis added).) Similarly, Plaintiffs cite selected measurements taken from a small sampling of tanks that were manufactured over eight years, (*see* Pl. Br. 5), but in affirming the jury’s verdict, the Seventh District noted that Plaintiffs’ failure analysis expert “could not tell the jury how an additional length of crimp would correlate to what a fuel tank would do under pressure in an accident,” (Appx. 029), and that it “would be difficult” to draw conclusions from this “very small

¹ The reversal on punitive damages merely directed the trial court to reconsider the issue of punitive damages under Ohio, rather than Michigan, law and is moot if this Court reverses the failure to warn decision. (*See* Appx. 045-049, 051.)

sampling.” (Appx. 030.)²

Plaintiffs continue to imply that the leakage of fuel in the subject accident violated a Ford performance requirement in 75 mph “crashes,” (*see* Pl. Br. 3, 5), even though the evidence established that this requirement related to a specific *crash test* mode conducted in connection with the development of the 2005 CVPI and the Seventh District recognized that the “accident occurred under different circumstance [sic] than the crash test” and “[t]here was no evidence that had Linert’s CVPI undergone the identical crash test that it would have failed.” (*See* Appx. 010.) Notably, Plaintiffs do not dispute the relative safety advantage of the CVPI over competitive vehicles.

Undeterred by their loss at trial *and* on appeal on the questions of crimp manufacturing defect, Plaintiffs persist in highlighting the same evidence in support of the same rejected allegations, except this time in service of their post-marketing failure to warn claim. Ford does not, as Plaintiffs imagine, maintain that “a plaintiff must be able to prove a manufacturing defect . . . or a design defect . . . as a prerequisite to proving a warning case under R.C. § 2307.76.” *See* Pl. Br. 24. But where the jury rejects manufacturing and design defect claims, a plaintiff’s failure to warn claim cannot be simply derivative of these claims, relying on factual premises that the jury rejected. The fact that Plaintiffs take such pains to escape the balance of the Seventh District’s decision—going so far as to rewrite it—demonstrates the incompatibility of the reversal on post-marketing failure to warn with the record.

² When all of the measurements were taken consistently and compared to Mr. Linert’s CVPI’s fuel tank, there was no significant variation. (*See* TR. 1875-1880, 1889-1891.) Plaintiffs make other claims regarding the effect of a longer crimp that are either inaccurate (*e.g.*, that the burst testing results improved after the crimp tooling project, (*see* Pl. Br. 8; TR. 975-976, 2194-2195)), or inconsistent with the jury’s defense verdict.

II. Reply In Support Of Proposition Of Law No. I: A “Risk” That Triggers A Post-Marketing Duty To Warn Under Ohio Revised Code 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.

To effectuate all provisions in R.C. 2307.76(A), the Seventh District should have considered (1) the extremely low likelihood of the risk of fire and extent to which the risk was common knowledge; (2) whether Ford’s post-marketing knowledge of the risk significantly exceeded the knowledge available pre-sale that had failed to generate a duty to warn; and (3) whether any warning could have averted the harm in question. Plaintiffs do not meaningfully respond to these points, instead insisting that the Seventh District could safely ignore the balance of the statute because it simply involves a “jury question” of reasonableness. In effect, Plaintiffs concede the accuracy of Ford’s first proposition of law.

A. There Is No Duty To Give A Warning Of All “Known Risks.”

While Plaintiffs appear to agree that there is no duty to warn of all known risks, they nevertheless marshal a defense of the Seventh District’s disregarding of the balance of the statute. (*See* Pl. Br. at 25 (“Of course not every risk requires a warning.”).) Under Plaintiffs’ theory, the statute can be safely ignored because “the likelihood of harm” was “uniquely a jury issue and was not for the Seventh District to pass upon.” (*See* Pl. Br. 25.) But such a rule would strip a court of any ability to engage in statutory analysis. A court has an obligation to ensure that all statutory elements of the claim—even those that will ultimately be decided by the jury—are supported by sufficient evidence for a reasonable jury to find liability *before* sending the claim to the jury. A trial court, which hears all the witnesses and sees all the evidence firsthand, enjoys discretion to decide “whether the evidence produced at trial warrants a particular jury instruction,” and its decision is reviewed only for abuse of that discretion. *Evans v. Toledo Neurological Assocs.*, 2014-Ohio-4336, 20 N.E.3d 333, ¶ 20 (6th Dist.) (citations omitted).

The Seventh District should have evaluated the evidence as to *all* statutory elements before concluding that the trial court abused its discretion. *See Bouher v. Aramark Servs.*, 181 Ohio App.3d 599, 2009-Ohio-1597, 910 N.E.2d 40, ¶ 18 (1st Dist.) (“Whether a warning is adequate or even necessary will not always be an issue of fact.”); *cf. Mitchell v. City of Warren*, ___F.3d ___, 6th Cir. No. 14-2075, 2015 U.S. App. LEXIS 14700, at *17 (Aug. 21, 2015) (affirming summary judgment on failure to warn where risk was remote and explaining that “[w]arnings cannot serve their purpose . . . unless they call the consumer’s attention to a danger that has a real probability of occurring”) (internal quotation marks and citation omitted). Although Plaintiffs insist that the Seventh District “did not ignore” the language in the statute regarding reasonableness and likelihood of harm, they cannot identify anywhere in the decision where the Seventh District actually engaged in the statutory analysis. (*See* Pl. Br. 25.) In violation of the plain statutory language, the Seventh District established that the risk of a fuel leak resulting in post-collision fire was “known,” and therefore concluded that it constituted a jury question. (*See* Appx. 012-013.) While, on the one hand, Plaintiffs do not dispute that statutory text must be read as a whole and interpreted in context, on the other, they offer no response to the Seventh District’s failure to do exactly that. The General Assembly’s specific requirements for a post-marketing duty to warn claim must be respected. It is the role of courts, not juries, to perform this kind of interpretive work. (*See* Product Liability Advisory Council (“PLAC”) Amicus Br. 8-18.)

Plaintiffs do not deny that the possibility of a post-collision fire is commonly known, but maintain that their claim focuses on the “[h]idden away” added risk due to the allegedly eroded crimp joint. (*See* Pl. Br. 26.) But Plaintiffs do not argue the necessary point: that the CVPI’s risk of a post-collision fire, including any allegedly “hidden” risk of fire, was any higher than the

risk of such a fire commonly known to be present in similar vehicles. *See Mathews v. Univ. Loft Co.*, 387 N.J. Super. 349, 362, 903 A.2d 1120 (App.Div.2006) (“We do not think that a ‘reasonably prudent person’ would see a need to warn users . . . about the obvious and generally known risks inherent to products that were not defectively designed as a matter of law.”). Ford presented evidence that the CVPI’s risk of a post-collision fire during a 75 mph rear-end crash test was *lower* than that of both peer police pursuit vehicles. (*See* Appx. 033-034 (discussing how the other two vehicles failed Ford’s 75 mph crash test).) And Plaintiffs never presented any evidence of any peer vehicles demonstrating a lower risk of post-collision fire. Regardless of the specific contribution of the crimp to fuel tank integrity, the only available evidence demonstrated that the CVPI’s total risk of post-collision fire was lower than that of peer vehicles, and therefore lower than what was commonly known to the average driver. *See Pontsler v. Kiefer Built, Inc.*, 3d Dist. Mercer No. 10-06-06, 2006-Ohio-4842, ¶ 7 (explaining that “[t]he average driver knows that high cross winds have an effect on a vehicle” and “[t]hus, the danger of hauling an empty trailer in high winds is a matter of common knowledge,” not requiring a warning). Because the Seventh District halted its analysis after establishing the risk of a post-collision fire was “known,” it never considered the extent to which the risk was “commonly known.”

Regardless of any passing acknowledgment by Plaintiffs of the balance of the statute, their arguments in practice support a rule that would send a post-marketing failure to warn claim to the jury whenever any “known” risk is identified. That would negate important protections and qualifications that the General Assembly included in R.C. 2307.76(A)(2). The codification of a post-marketing failure-to-warn claim *without* any requirement of a predicate defect in design or manufacture is already the “more expansive minority approach” to failure-to-warn claims. (*See* Chamber of Commerce of the United States, *et al.* Amicus Br. at 7.) To strip the courts of

any role in enforcing the statutory limiting factors (such as reasonableness) and send every known risk to the jury, as Plaintiffs and *amicus* Ohio Association for Justice (“OAJ”) invite, (*see* OAJ Amicus Br. 2-5), would leave Ohio in a minority of one, (*see* Chamber Amicus Br. at 8-9, 11-13 (collecting cases)), something the General Assembly surely never intended. Plaintiffs offer no response to this point. Therefore, the Seventh District erred in failing to consider the requirements embodied in R.C. 2307.76(A)(2)(b).

B. Liability For Failure To Warn Post-Sale Cannot Be Based On A Risk That Does Not Require A Pre-Sale Warning.

Plaintiffs concede that a claim for post-marketing warning requires demonstrating the post-marketing accrual of “actual knowledge” of “increased risk,” well beyond what Ford knew at the time of marketing. (*See* Pl. Br. 18.) But, of course, the Seventh District did not evaluate this point, and instead directed that a post-sale claim be sent to a jury for the *same risk* of a post-collision fire that the jury already rejected for a pre-sale warning claim.

Rather than respond directly, Plaintiffs mischaracterize Ford’s position, portraying it as an iron-clad rule that a post-sale warning claim cannot be viable upon the failure of a pre-sale warning claim. (*See* Pl. Br. 17.) But Ford presented a different argument: if pre-sale knowledge of a risk did not require a warning, a post-sale duty to warn cannot arise without new knowledge indicating a substantially higher risk than before. On that point, Plaintiffs seem to agree, but all of their attempts to demonstrate that they meet this requirement rely on cumulative evidence that merely confirms the same points already conceded by Ford: that the 2005 CVPI, like all vehicles, carries a risk of post-collision fire and that Ford has attempted to reduce this risk.

1. Additional Post-Marketing Incidents Simply Reaffirm Existence Of Previously Known Risk.

Plaintiffs cite six instances of “Panther Platform fires” in 2005 and 2006 (only one of which involved a 2005 CVPI) as evidence of Ford’s post-marketing awareness of a much greater

risk of fire than known at the time of marketing. (*See* Pl. Br. 6, 19 n.6.) However, the evidence demonstrates that such fires occurred both before and after the time of sale, and even Plaintiffs' expert agreed that the risk of post-collision fuel tank failures and fires is present in all vehicles. (*See* Exh. 681; TR. at 1437-1440, Supp. at 29-32.). In fact, the trial court permitted Plaintiffs to offer 35 incidents of Panther Platform vehicles involved in a rear-end collision with failure of the fuel containment system and resulting death or injury from fire in support of their pre-marketing failure to warn claim, and yet the jury still rendered a defense verdict. (*See* Appx. 042-043.)

Additional incidents of uncertain similarity do nothing except demonstrate that an already-known and admittedly non-eliminable risk continues to exist. (*See* Appx. 043, (noting that Plaintiffs' expert did not note the speeds of vehicles or weights of striking vehicles in the other incidents).) As the Seventh District observed in rejecting a different assignment of error, "the continuous presentation of alleged similar incidents could well have been a needless presentation of cumulative evidence," where "Ford's knowledge of the risk of fire" had already been proven. (Appx. 044.) And as Ford explained in its opening brief, the mere occurrence of additional instances of injury from a risk already known to exist is not evidence of an *increased* risk. *See* Ford Br. 13-15 (citing *York v. Am. Med. Sys. Inc.*, S.D. Ohio No. C1-94-824, 1997 U.S. Dist. LEXIS 24212, *12-14 (Oct. 16, 1997), *aff'd*, 166 F.3d 1216 (6th Cir. Nov. 23, 1998) and *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 542-43, 558 (Tenn.2008)). Plaintiffs' own Exhibit 681, with the 35 incidents of post-collision fires in Panther Platform vehicles, contains no hint of the 2005 CVPI experiencing a higher rate of post-collision fire than earlier models. Exh. 681. Nor did Plaintiffs present any evidence that the 2005 CVPI experienced such fires at a higher rate than any peer vehicles.

In their effort to distinguish *York v. Am. Med. Sys., Inc.*, 6th Cir. Case No. 97-4306, 1998 U.S. App. LEXIS 30105 (Nov. 23, 1998), (*see* Pl. Br. 22), Plaintiffs miss the fundamental point. The Sixth Circuit recognized that additional post-sale incidents did not make the previously adequate warning inadequate and thereby require an additional post-sale warning. *See id.* at *20 (“[P]roviding post-market warnings that it received [post-sale] complaints that the 700CX leaked would serve little purpose.”). In the present case, the affirmance of the verdict rejecting Plaintiffs’ pre-sale failure to warn claim establishes that Ford’s non-warning at the time of sale was just as “adequate” as the time-of-sale warning issued in *York*. This is not a case where Ford “bec[ame] aware of a defect or risk” post-sale, *see id.*, but a case like *York*, where Ford was aware of the risk all along, had met all of its obligations under R.C. 2307.76(A)(1) at the time of sale, and merely received notice of additional instances of the same risk post-sale. The Seventh District, however, failed to evaluate any of this.

2. The Crimp Tooling Project Did Not Establish Any Post-Sale Knowledge Of Increased Risk, But Only Ford’s Desire To Reduce An Already Known And Remote Risk.

As with the fire suppression system, the crimp tooling project demonstrated only Ford’s desire to reduce an already known risk. Plaintiffs maintain that Ford “determined that CVPI tanks were being manufactured with insufficient crimp overlap,” with a “much smaller” overlap “than others manufactured before.” (*See* Pl. Br. 18, 21.) But this stands at odds with both the jury verdict and the Seventh District’s affirmance, which determined that the 2005 CVPI’s tank did not deviate from either its engineering specification (*i.e.*, had sufficient crimp), or from other tanks manufactured to that same specification (which would include the “others manufactured before”). (*See* Appx. 008-009, 026-027 (“As to the manufacturing defect claim, appellants contend . . . that the crimp overlap at issue degraded and changed over time.”), 030.) The fact that Ford explored alternatives and modified its tooling, (*see* Pl. Br. 20), shows at most that Ford

was willing to experiment with potential improvements to *future* vehicles (which manufacturers should be encouraged to do).

3. The Fire Suppression System Offered No New Post-Marketing Knowledge Regarding The Likelihood Of Post-Collision Fire.

Although the fire suppression system was conceived, developed, and tested *pre*-marketing, Plaintiffs feature it as evidence that Ford discovered a greater risk of post-collision fire *post*-marketing. (Pl. Br. 11, 16, 22, 31.) But as Plaintiffs themselves admit, Ford “started to develop” the fire suppression system in 2002 and began testing it in 2003. (*Id.* at 3-4.) Whatever knowledge of fire risk that Ford gleaned from the system’s development and/or testing was already in Ford’s possession by the time of the purchase of Mr. Linert’s 2005 CVPI. (*See* Ford Br. 15 n.3 (citing Appx. 025).) Plaintiffs do not explain how any post-marketing events—Ford’s offering of the system at the end of the 2005 model year or Ford’s patent application—added anything to the universe of Ford’s knowledge of the risk of fire. (*See* Pl. Br. 6.) Furthermore, the evidence cited by Plaintiffs demonstrates only that Ford’s development of the system sought to reduce the risk of fire in “high-energy rear impact crashes,” and does not show that Ford knew or should have known of any issue with the CVPI (crimp-related or otherwise) that posed an especially high or increased risk of such a fire. (*See* Pl. Br. 3-4 (citing and quoting Cupka Offer of Proof at 16-17).) All of this helps explain why, when the Seventh District discussed the evidence justifying an instruction on post-sale duty to warn, it did *not* mention the fire suppression system. (*See* Appx. at 013 (specifically enumerating three items related only to the crimp tooling project and concluding that “[t]his was adequate evidence to put appellants’ post-marketing failure to warn claim before the jury.”).)

C. There Is No Duty To Warn If A Warning Will Not Avert The Harm.

Plaintiffs do not contest Ford’s argument that “[w]here a product free of design and manufacturing defects has already been purchased, the statute does not compel a vain act of publishing a warning that will not render the product safer.” (Ford Br. 17.) Their response, relying entirely on the heeding presumption—which Ford acknowledged, *see id.*—obscures the point. Ford never argued that a warning had to be “100% effective,” (Pl. Br. at 29), or that Mr. Linert could not have acted on a warning by virtue of personal choice. *See, e.g., Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 201, 423 N.E.2d 831 (1981) (plaintiff chose not to disclose information that would have prompted the physician to communicate the manufacturer’s warning, if one had been issued). Rather, Ford explained that Plaintiffs have never actually identified the warning that a reasonable manufacturer would have given that *could* have made the 2005 CVPI safer to drive, even by the most willing and compliant adherent to warnings. (*See* Ford Br. 16-18.)

That point continues to stand unrebutted. After proceeding through all three levels of Ohio courts, Plaintiffs still cannot identify any warning that would have averted the harm. Because Plaintiffs cannot, even now, articulate an effective warning, no jury could find in their favor on a post-marketing warning claim. Further proving Ford’s point, after Plaintiffs mention several times a “proper warning” (which they never define or describe), they suggest that the solution was that the police department “may have removed [the CVPI] from patrol duty, sold the 20[0]5 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.” (Pl. Br. at 29.)

Both of the first two options would require replacing the CVPI with one of its competitor vehicles, even though Ford presented unrebutted evidence that the 2005 CVPI performed *better* in crash testing than its peers. (*See* Appx. 033-034 (explaining that Ford was the only police

vehicle manufacturer to implement a 75-mph crash test and that the Impala and Magnum both failed this test); Ford Br. 2-3 (detailing CVPI's extensive testing and superiority relative to competitor vehicles.)) Moreover, if the only solution that Plaintiffs can muster is not to use the vehicle, then they are effectively alleging that the vehicle was intrinsically unsafe for driving (as opposed to the typical warning claim, which alleges that a warning would have rendered the product safe for use). This is yet another effort to circumvent the design defect verdict. *See Kesler v. Crown Equip. Corp.*, W.D.Va. No. 93-0644-R, 1994 U.S. Dist. LEXIS 20126, at *10 (July 3, 1994) (holding that plaintiff's "'failure to warn' claim simply recasts her design defect claim" where the failure to warn claim "would, in effect, place a duty on [the manufacturer] to warn that [another design] was safer").

Likewise, Plaintiffs' arguments about incorporating "alterations such as replacing the tank or welding the existing sender unit to the tank," (Pl. Br. 29), collide with the jury's rejection of Plaintiffs' design and manufacturing claims. Indeed, Plaintiffs specifically claimed at trial and on appeal that Ford's failure to weld the sender ring to the tank was a design defect, but the Seventh District agreed that "there was *no evidence* that a TIG weld would have prevented Linert's injuries and a jury instruction on the TIG weld was not warranted." (Appx. 014) (emphasis added). Similarly, the argument that replacing the fuel tank—Plaintiffs do not reveal what would have been different about the replacement tank, but presumably it would have to be one of different design and/or manufacture—would have reduced the risk of fire is essentially a roundabout way of claiming that the CVPI's fuel tank was unsafe either in design or manufacture, which the jury rejected. *See Mandile v. Clark Material Handling Co.*, 131 F. App'x 836, 839-40 (3d Cir.2005) (affirming grant of judgment as a matter of law finding no post-sale duty to warn where plaintiff's theory was premised on the need to modify the product and the jury had

rejected the design defect claim: “[B]ecause the tow tractor was not defective absent the optional equipment, . . . [the manufacturer] had no duty to warn customers about the optional availability of such equipment.”).

As Ford explained in its opening brief, where a product is adequately designed *and* manufactured, a duty to warn should only arise where the warning will enable safer use. Finding a duty to warn customers away from that product entirely or to warn customers to replace the product (or a component thereof) with one of different design or manufacture collapses any distinction between defect and failure to warn claims.

III. Reply In Support Of Proposition Of Law No. II: A Product Manufacturer’s Implementation Of A Post-Marketing Product Improvement Does Not Trigger A Post-Marketing Duty To Warn.

Plaintiffs initially concede the reasonableness of Proposition of Law No. II. (*See* Pl. Br. 30 (“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, their theory of the post-marketing failure to warn claim is only viable under a regime that treats every attempt to improve a product or reduce associated risks as evidence that would require a duty to warn. Contrary to Plaintiffs’ suggestion, Ford does not maintain that evidence of product improvements is *inadmissible* in failure to warn cases, (*see* Pl. Br. 31-32), but only that it cannot be equated to the knowledge of an increased risk necessary to maintain a post-marketing failure to warn claim where a pre-marketing claim has already failed.

Underscoring these points, the only additional evidence Plaintiffs offer to consider alongside the attempted product improvements is either (1) cumulative evidence of an already-known risk, (*see* Pl. Br. 32 (referencing “real-world failures”)); or (2) precluded by the jury’s finding that the crimp did not deviate from either Ford’s specification or Ford’s other vehicles

manufactured to the same specification, (*see id.* (discussing alleged “deterioration” and “insufficient crimp”)).

Fundamentally, Plaintiffs ignore the realities of product improvement. Realistically, “real-world failures” will continue to accrue post-sale for any risk that is not completely eliminated. If a product improvement need only be joined by a handful of such post-sale incidents to propel a failure-to-warn claim to the jury, then *any* post-sale improvement which fails to completely eliminate the previously known risk will generate a viable claim under R.C. 2307.76(A)(2). Furthermore, Plaintiffs’ argument regarding “subsequent remedial measures,” (*see* Pl. Br. 31), presumes that any improvement attempt must have been spurred by the desire to remedy some newly discovered risk. Importing such an assumption into Ohio law, so that any failure-to-warn claim citing a post-sale product improvement is guaranteed to reach a jury, will discourage innovation and efforts to improve product safety.

Plaintiffs attempt to minimize any concerns about discouraging innovation, but their quotation from *McFarland v. Bruno Mach. Corp.*, 68 Ohio St. 3d 305, 626 N.E.2d 659 (1994), addresses a different scenario. (*See* Pl. Br. 31-32.) When this Court expressed doubt in *McFarland* about a manufacturer forgoing safety improvements due to potential liability exposure, it did so in the context of a manufacturer’s adoption of a known and certain safety improvement that would “prevent the kind of accident incurred by appellant.” *Id.* at 659. And perhaps that makes sense when a manufacturer *knows* an improvement will completely eliminate a risk, but it carries little resonance when a risk, such as that of post-collision fire in automobiles, is known to defy complete elimination, attempts to reduce it are uncertain and experimental, and the number of incidents is too small to accurately discern (or rule out) statistically significant trends. Moreover, *McFarland* is inapposite because it involved the admissibility of evidence

(which is not contested here), and plaintiff sought to support a claim of *design* defect with a subsequent change in design. As one of the courts quoted by this Court explained, “[p]olicy considerations in negligence cases . . . have little or no application in dealing with a design change because . . . ‘the seller is liable even though he has exercised all possible care.’” *See id.* at 663 (quoting *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119, 125 (Ky. 1991)).

But policy considerations do have a role to play in post-sale warning situations because the General Assembly deliberately engrafted them into the statute, which only requires a manufacturer to “exercis[e] reasonable care.” R.C. 2307.76(A)(2)(b). Even Plaintiffs acknowledge that the General Assembly drafted R.C. 2307.76(A) to embody “negligence concepts of reasonableness, foreseeability, and risk.” (*See* Pl. Br. 25 (quoting *Brown v. McDonald’s Corp.*, 101 Ohio App.3d 294, 299, 655 N.E.2d 440 (9th Dist.1995)).) While a change in design can be “probative of the quality” of the prior design, *see McFarland*, 626 N.E.2d at 664, an attempt to reduce an already-remote risk is not probative of whether the risk warrants a warning, particularly when it has already been held that a warning was not required at the time of sale.

Plaintiffs also try to distinguish the cases cited by Ford on the ground that those involve “new” safety enhancements, while Ford’s crimp tooling project sought to fix a “problem with its crimp.” (*See* Pl. Br. 32-33.) However, “problem with its crimp” is just another way of characterizing the manufacturing defect claim that the jury rejected. Given that the jury verdict precludes any allegations of “problem[s] with the crimp,” Plaintiffs cannot wield this attempted safety improvement as a means for triggering a post-marketing duty to warn.

Finally, Plaintiffs do not dispute what many courts have recognized: that an excess of warnings carries its own risks by crowding out legitimate warnings. If a previously “known”

risk, attempts to reduce that risk, and additional incidents (after the risk reduction attempts fail to eliminate the risk completely), are deemed sufficient to present a post-marketing failure-to-warn claim to a jury, the potential litigation costs and threat of liability will pressure manufacturers to issue warnings whenever they pursue improvements to product safety or conduct internal discussions of a potential issue. As a result, the most important warnings of the most significant risks will simply be “crowded out” by the multitude of total warnings. *See* Ford Br. 21-23; *see also Mitchell*, ___ F.3d ___, 2015 U.S. App. LEXIS 14700, at *17 (“One must warn with discrimination since the consumer is being asked to discriminate and to react accordingly.”) (quotation marks and citation omitted). The General Assembly did not intend for manufacturers to inundate customers with warnings about every incremental safety improvement. In addition to the costs that would impose, customers would end up ignoring, rather than heeding, such a parade of warnings.

CONCLUSION

For the above reasons, Ford respectfully requests that this Court reverse the decision of the Seventh District to remand for a new trial and uphold judgment for Ford.

Respectfully submitted,

/s Pierre H. Bergeron _____
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 (Telephone)
(513) 361-1201 (Facsimile)
pierre.bergeron@squirepb.com
larisa.vaysman@squirepb.com

Elizabeth B. Wright (0018456)
(COUNSEL OF RECORD)
Conor A. McLaughlin (0082524)

THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
(216) 566-5500 (Telephone)
(216) 566-5800 (Facsimile)
Elizabeth.Wright@ThompsonHine.com
Conor.McLaughlin@ThompsonHine.com

Attorneys for Appellant Ford Motor Company

CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief was served by regular U.S. mail and email this

26th day of October, 2015, upon the following:

Richard A. Abrams (0014382)
(COUNSEL OF RECORD)
GREEN HAINES SGAMBATI CO., L.P.A.
National City Bank Building
Suite 400
P.O. Box 849
Youngstown, Ohio 44501

Robert W. Schmieder II
Robert J. Evola
SL CHAPMAN LLC
330 North Fourth Street, Suite 330
St. Louis, Missouri 63102

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

Yvette McGee Brown (0030642)
Chad A. Readler (0068394)
(COUNSEL OF RECORD)
Kenneth M. Grose (0084305)
JONES DAY
325 John H. McConnell Boulevard
Suite 600
P.O. Box 165017
Columbus, Ohio 43216
(614) 469-3939 (Telephone)
(614) 461-4198 (Facsimile)
ymcgeebrown@jonesday.com
careadler@jonesday.com
kmgrose@jonesday.com

*Attorneys for Amici Curiae Chamber of
Commerce of United States of America,
National Association of Manufacturers,
National Federation of Independent Business
Small Business Legal Center, Ohio Chamber
Of Commerce, and Ohio Manufacturers'
Association*

Jonathan R. Stoudt (0083839)
(COUNSEL OF RECORD)
Robert P. Miller (0073037)
ROURKE & BLUMENTHAL, LLP
495 S. High Street, Suite 450
Columbus, Ohio 43215
(614) 220-9200 (Telephone)
(614) 220-7900 (Facsimile)
jstoudt@randblp.com
rmiller@randblp.com

*Attorneys for Amicus Curiae
Ohio Association for Justice*

John P. Palumbo (0012313)
Benjamin C. Sasse (0072856)
(COUNSEL OF RECORD)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, Ohio 44113
(216) 592-5000 (Telephone)
(216) 592-5009 (Facsimile)
john.palumbo@tuckerellis.com
benjamin.sasse@tuckerellis.com

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

/s Pierre H. Bergeron
Pierre H. Bergeron
Counsel for Appellant Ford Motor Company