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IN THIS ISSUE

In Linert v. Foutz, the Supreme Court of Ohio construed Ohio's statutory postmarket duty to warn. This article discusses the facts of this complex case, the majority's analysis, and key takeaways for practitioners faced with failure-to-warn claims under Ohio law.

Ohio Supreme Court Considers Manufacturers' Postmarket Duty to Warn Consumers

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Even before reading the slip opinion in *Linert v. Foutz*, Case No. 2014-1940, it becomes apparent that this was a difficult case for the Justices. The case was "submitted"—i.e., argued—on Jan. 5, 2016, some 51 weeks before the opinion was issued on Dec. 29, 2016. Whether or not it explains the longer-than-average time the case was at issue, the majority found that the facts in the record were inextricably intertwined with the law regarding a manufacturer's postmarket duty to warn, and Justice O'Neill, in dissent, took the majority to task for its handling of those facts.

The Facts

On Nov. 11, 2007, Plaintiff Ross Linert, a veteran police officer, was on patrol in his department-issued 2005 Crown Victoria Police Interceptor (CVPI), manufactured by Defendant Ford Motor Company, when he was struck from behind by Defendant Adrien Foutz. Foutz, whose blood-alcohol content was more than three times Ohio's legal limit, was traveling at an estimated 90-110 miles per hour. The collision allegedly caused the CVPI's fuel-sender unit to separate from the fuel tank, creating a hole from which fuel was released. The fuel ignited and the fire spread from the rear of the CVPI into the passenger compartment. Linert escaped the vehicle, but sustained significant burns and is now disabled.

In addition to suing Foutz, Linert and his wife brought product-liability claims against Ford. After a two-week trial, the jury returned a verdict for Ford, finding that the plaintiffs had failed to prove that Ford had improperly designed the CVPI regarding the placement of the fuel tank, defectively manufactured the fuel tank, or failed to adequately warn Linert of the risks associated with the CVPI. The trial court entered judgment for Ford. The sole issue on appeal was whether the trial court erred when it refused to instruct the jury on R.C. 2307.76(A)(2), Ohio's statute governing manufacturers' postmarket duty to warn consumers of risks associated with a product that are not discovered until after the product is sold.

The Supreme Court discussed the background facts in unusual depth.

The CVPI used the "Panther platform," a design in which the fuel tank was in front of the trunk but behind the rear axle, a contrast to most Ford-manufactured passenger cars in which the fuel tank is forward of the axle. Ford had a history of "crashworthiness" litigation for this design. At trial, the plaintiffs' expert referenced 34 other accidents involving a Panther-platform vehicle in a rear-impact collision which sustained damage to its fuel-containment system, resulting in a fire and burn injury or death to the vehicle's occupant. Further, six of those accidents involved the dislodgment of the fuel-sender unit. There was also expert testimony that, having heard about "real-world" incidents like that here, two years after Linert's department acquired the CVPI, Ford's engineers increased the amount of sheet metal securing the retention ring to

the fuel tank to which the fuel-sender unit is bolted. Finally, the plaintiffs' expert discussed Ford's development of a "trunk pack," a plastic and Kevlar-reinforced trunk wall designed to prevent heavy items in the trunk from penetrating the trunk wall and puncturing the fuel tank.

The Court discussed the 7th District Court of Appeals' view of the nexus between a manufacturer's duty to warn and the risk posed by the product. The Court of Appeals concluded that the evidence presented to the jury demonstrating that Ford knew of some incidents of sender-unit dislodgments, including that it had reviewed those incidents, and had increased the amount of crimping to create a more crashworthy vehicle, entitled the plaintiffs to an instruction on the postmarketing failure-to-warn claim. The Court of Appeals also held that the trial court erred in refusing evidence regarding Ford's CVPI fire-suppression system being offered for sale after the purchase of Linert's CVPI. The 7th District reasoned that this evidence was offered to meet the plaintiffs' burden of establishing that Ford had notice of a potential fire risk in the CVPI, a risk about which a jury could find Ford had an obligation to warn.

The Majority's Analysis

Initially, the majority clarified that a claim for failing to warn after a product is sold is separate from a claim that a warning should have been given at the point of sale. The Court then offered two reasons why the plaintiffs' appeal failed.

First, evidence concerning the fire-suppression kit and trunk pack was irrelevant to the plaintiffs' postmarket failure-to-warn claim because Ford knew about the risk of fire from fuel-containment systems *before* it sold the CVPI.

Second, the plaintiffs failed to proffer sufficient evidence concerning the likelihood of the risk of harm, an essential aspect of proving a postmarket failure-to-warn case. The Court noted that the plaintiffs and their expert failed to place the six allegedly similar rear-end collision cases in sufficient context by explaining the facts and circumstances of those accidents. Further, there was no context from which the jury could reliably determine the likelihood of similar accidents. While the jury heard that the fuel tank manufacturer produced more than 2 million fuel tanks identical to the one in the CVPI, no evidence demonstrated how many CVPIs featuring those tanks were still in use when the other incidents occurred. And, although there was evidence in the record that 250,000 CVPIs were in use in 2005, there was no evidence of how many CVPIs were in use in 2007 when the accident occurred. The lack of context would have caused the jury to engage in improper speculation about the likelihood of the risk of fire from sender-unit dislodgments when a CVPI was struck from behind in a high-speed collision. Thus, the Court concluded that the trial court properly refused to instruct the jury on Ford's postmarket duty to warn. Accordingly, the Court reversed and

remanded with instructions to reinstate the judgment for Ford.

Justice O'Neill's Dissent

Justice O'Neill disagreed with the majority's view of the relevant facts, reasoning that the plaintiffs' evidence was more than enough for a jury to make an inference about the likelihood of a risk. Moreover, he wrote that it is merely fiction, not supported by the identical language in the statute creating the two causes of action for failure to warn, that Ford's knowledge of the risk associated with the CVPI's design acquired before the sale and the accident is irrelevant to a postmarketing failure-to-warn claim.

Key Takeaways

From a practical standpoint, the majority's opinion is interesting because, in discussing the two underpinnings of its decision on the merits, the majority cites only two Ohio authorities. The majority cites case law from other jurisdictions, including Kansas, New York, Tennessee, Iowa, Massachusetts, Illinois and the United States Court of Appeals for the 6th Circuit, in addition to two law review articles. One of those cases even relies explicitly on the Products Liability section of the Restatement (Third) of Torts, which the Ohio Supreme Court has not adopted and never previously cited.

In terms of substance, three points bear mention:

- A manufacturer's duty to warn of risks known at the time of marketing ceases once the product is sold.

- A postmarketing failure-to-warn claim requires evidence of a risk associated with a product of which the manufacturer acquires knowledge *after* the product is sold. In other words, even if an improvement designed to alleviate a product risk is marketed to consumers after the product is sold, as long as the manufacturer was aware of that risk *before* the product is sold, the improvement triggers no postmarket duty to warn. It is, however, relevant to the duty to warn at the time of marketing under R.C. 2307.76(A)(1).

- All failure-to-warn claims require a sufficient quantum of evidence to allow the jury to determine the *likelihood* that the product at issue would cause harm like that which the plaintiff suffered, the measure being dependent on the context in which such evidence is presented.

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