IN THE SUPREME COURT OF OHIO

DONALD E. ZANG, et al.,	)	**Ohio Supreme Court Case No. 15-1576**
	)	
Plaintiffs-Appellees,	)	**On Appeal from the**
	)	**First Appellate District,**
v.	)	**Hamilton County**
	)	
MATTHEW CONES, et al.,	)	**Court of Appeals**
	)	**Case No. C-140274**
Defendants-Appellants.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE, OHIO MANUFACTURERS ASSOCIATION, IN SUPPORT OF APPELLANT MOTOROLA, INC

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STATEMENT OF AMICUS INTEREST AND INTRODUCTION

The Ohio Manufacturers' Association ("OMA") is a statewide nonprofit trade association whose membership consists of over 1,400 manufacturing companies employing approximately 660,000 Ohioans. The OMA aims to enhance the competitiveness of manufacturers and improve living standards of Ohioans by shaping a legislative and regulatory environment conducive to economic growth in Ohio. In this regard, OMA members need to know the laws and rules that apply to their businesses so that they understand what is required and plan to comply with them. When courts stray from established law and/or interpret statutes and rules contrary to their intended purposes, it creates instability and uncertainty in Ohio's business and manufacturing sectors. This is not good for Ohio businesses and, in turn, is not good for Ohio's economy.

The First District's decision herein does just that—it creates instability and uncertainty in the manufacturing sector of Ohio's economy and beyond. First, it disregards well-established Ohio products liability law, which requires a feasible alternative design in product liability cases based on a design defect. Second, it ignores that (1) expert testimony is needed in sophisticated product liability cases, and (2) designated "expert" witnesses cannot automatically become lay witnesses where they have no personal knowledge or experience with the product at issue. If the First District's decision is permitted to stand, a plaintiff could ask anyone—despite a complete lack of knowledge of the product—to render opinion testimony on the design of any sophisticated product in order to establish liability against a manufacturer. That is not what the Ohio Rules of Evidence or our civil justice system permit, nor should they.

For these reasons, this case is extremely important to manufacturers doing business in Ohio.

THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case is of public and great general interest because it destabilizes the legal landscape for all manufacturers doing business in Ohio—both those with facilities here and those who sell their products in Ohio but are based elsewhere. Ohio's more than 1,400 manufacturers play a vital role in Ohio's economy; they employ hundreds of thousands of Ohioans and account for 17% of Ohio's gross domestic product.[1] In today's globally competitive environment, American manufacturers are highly regulated, with state and federal regulators imposing a range of safety, production, sales and other requirements. Additionally, manufacturers face obligations imposed through state products liability law.

Ohio's products liability law (R.C. 2307.01 *et seq.*) is a comprehensive statutory scheme designed to balance the rights of consumers of products with those of the manufacturers of such products. Ohio's product liability statutes impose obligations on manufacturers, including duties to design and manufacture products to make them safe for consumers. And, these statutes also set forth clear requirements for imposing liability on manufacturers for allegedly defective products. Thus, both Ohio consumers and manufacturers doing business in Ohio are affected by judicial decisions that fundamentally alter Ohio's products liability law.

The statute at issue here, R.C. 2307.75, is applicable where a plaintiff alleges that a product was defective due to its design. In order to prevail in a products liability design defect case, a plaintiff must establish that there is a defect and that there was a technically and economically feasible alternative design. R.C. 2307.75. The First District fundamentally altered R.C. 2307.75. The plain language of the statute clearly requires that a feasible alternative design be considered as part of a products liability claim. R.C. 2307.75(C)(2); R.C. 2307.75(F). If no

[1] The Ohio Manufacturer's Association, *2014 Ohio Manufacturing Counts*, http://www.ohiomfg.com/ManufacturingCounts2014.pdf (accessed Sept. 28, 2015).

feasible alternative design exists, then the plaintiff's claim necessarily fails. *See, e.g., Nationwide Mut. Ins. Co. v. ICON Health & Fitness, Inc.*, 10th Dist. Franklin No. 04AP-855, 2005-Ohio-2638, ¶ 5. Ohio and federal courts have consistently interpreted the statute in this manner, and they have all placed the burden on the plaintiff to show the existence of a feasible alternative design. *See, e.g., Yanovich v. Sulzer Orthopedics, Inc.*, N.D. Ohio No. 1:05 CV 2691, 2006 U.S. Dist. LEXIS 90332, *39–40 (Dec. 13, 2006). Further, Ohio and federal courts have held that mere theory and speculation about an alternative design is not enough to survive summary judgment. *See, e.g., Pruitt v. Gen. Motors Corp.*, 74 Ohio App.3d 520, 526, 599 N.E.2d 723 (10th Dist. 1991).

The First District ignored R.C. 2307.75's plain language and the well-established case law interpreting it, but did not stop there. After recognizing (1) that the Plaintiffs' expert was not qualified to render expert opinion testimony on the size and placement of the emergency radio button at issue, *Zang v. Cones*, 1st Dist. Hamilton No. C-140274, 2015-Ohio-2530, ¶ 31, and (2) that the Plaintiffs had not presented a "precise alternative design" as required, *id.* at ¶33, the First District converted Plaintiffs' expert's opinion into lay witness opinion testimony and held that this lay testimony could be construed to present an alternative feasible design. In doing so, the First District eliminated the alternative design requirement embedded in the statute's plain language (and reinforced by state and federal case law) and created an exception so broad that anyone can now offer lay opinion testimony to establish liability in a products liability design defect case. This judicial amendment of an important, unambiguous Ohio products liability statute is of public and great general importance.

This case also involves another important issue that is of utmost importance in products liability lawsuits, but can arise in any lawsuit filed in Ohio: who is qualified to render opinion

testimony to establish liability. Lay witnesses offering opinion testimony must have personal knowledge of the matter to which they are testifying. The personal knowledge requirement has always been embedded in Evid.R. 701 and is fundamental to the American trial system. The First District gutted this requirement. Because lay witness testimony could occur in any case, the First District's elimination of Evid.R. 701's personal knowledge requirement is of public and great general interest.

The First District's decision also implicates practical concerns that are important beyond the parties to this case. It is critical that Ohio's businesses and OMA's members be able to conduct business according to well-established judicial precedent in Ohio's economic climate. Because the First District's opinion dramatically altered well-established Ohio law regarding the elements of proof necessary for a products liability claim and the personal knowledge requirement for lay witness testimony, it undermines this interest in several respects.

First, the First District's opinion drastically shifts the balance of power, from an evidentiary perspective, in products liability cases. Products liability cases routinely hinge on expert witnesses giving an opinion regarding an alleged design flaw or the availability and feasibility of an alternative design. Even in those rare cases when a lay witness may opine on these issues, Evid.R. 701 requires the lay witness to base any opinion on personal knowledge. That did not happen here. The effect: the First District's decision allows any plaintiff in a products liability action to survive summary judgment with a baseless lay witness opinion. The decision thus puts businesses, and particularly manufacturers, at even greater risk of facing protracted and cost-prohibitive litigation based on an unqualified opinion that lacks foundation; and it unnecessarily makes Ohio a less friendly place to do business.

Second, the First District's decision as to R.C. 2307.75 has the same effect. The First District lowered the bar for a plaintiff to survive summary judgment in a products liability action by eliminating R.C. 2307.75's alternative design requirement in contravention of a litany of countervailing precedent. As a result, a plaintiff can bring a products liability action and survive summary judgment without offering anything more than an unsubstantiated, indirect lay witness thought about why a product's design might not be ideal. No less than its decision eliminating the personal knowledge requirement under Evid.R. 701, this aspect of the First District's decision greatly increases the exposure of businesses and manufacturers to products liability litigation in Ohio.

These consequences particularly affect a state like Ohio. The OMA's membership includes companies that manufacture police and fire equipment, like that involved here. This equipment plays a particularly important and ever-present role in the life of Ohioans. Ohio is one of the most populous states in the country, meaning its police and fire departments are regularly involved in the everyday life of nearly 11 million people. Because the First District's decision significantly lowers the bar for a products liability plaintiff at summary judgment, it serves as a signal to the manufacturers of police and fire equipment that they are exposed to even more liability than they originally knew. This signal is amplified by the nature of the work that police and fire departments perform—work that is dangerous and can involve the loss of life.

In short, the impact of the First District's decision goes well beyond the parties in this case. OMA members desire fairness, predictability, and stability in the interpretation of long-established statutes, evidentiary rules, and in the administration of justice. Any case that judicially amends a products liability statute or dramatically redefines evidentiary rules in products liability cases is of great interest and concern to manufacturers doing business in Ohio

and impacts scores of Ohio businesses and individuals. The OMA urges the Court to accept this discretionary appeal and clarify (1) what a plaintiff must prove to meet R.C. 2307.75's alternative feasible design requirement and (2) the proper use of lay witness opinion testimony in product design defect cases.

STATEMENT OF THE CASE AND FACTS

The OMA adopts the statement of the case and facts set forth in Motorola's memorandum in support of jurisdiction.

LAW AND ARGUMENT

Proposed Proposition of Law No. 1: To survive summary judgment, R.C. 2307.75 requires a plaintiff in a products liability case to establish the availability of a technically and economically feasible alternative design.

This case involves a claim that a radio used by firefighters was defective due to its design. Product design defects claims are governed by Ohio's comprehensive product liability law. This statutory scheme is the exclusive means for bringing a product liability action in Ohio. Design defect claims are governed by R.C. 2307.75. Under this statute and case law construing it, a products liability claim fails without supporting evidence (beyond speculation) of a technically and economically feasible alternative design. Here, the First District inferred the existence of an alternative design even though the Plaintiffs did not present any evidence of a "precise alternative design." *Zang*, 2015-Ohio-2530, at ¶ 33. The First District eliminated the alternative design requirement from R.C. 2307.75 and broke with the other Ohio and federal courts that have held otherwise. This Court should grant jurisdiction to clarify what a plaintiff must establish to meet R.C. 2307.75's alternative feasible design requirement.

A. R.C. 2307.75's "Feasible Alternative Design" Requirement

Two subsections of R.C. 2307.75 require evidence of an alternative design in design defect cases. R.C. 2307.75(A) states that a product is defective in design if the benefits of the

design, "as determined pursuant to division (C) of this section," do not outweigh the foreseeable risks associated with the design. To this end, division (C)(2) of R.C. 2307.75 states that the benefits of a design "shall be determined" in part by "[t]he technical and economic feasibility. . . of using an alternative design or formulation." Stated another way, the plain language of the products liability statute necessarily includes the feasibility of an alternative design as part of the balancing test to determine whether a product is defective.

R.C. 2307.75(F) further reinforces the requirement for evidence of a feasible alternative design. It reads in relevant part: "A product ***is not defective in design*** or formulation ***if***, at the time the product left the control of its manufacturer, ***a practical and technically feasible alternative design or formulation was not available***." (Emphasis added.) *Id.* As the statute provides, a product is not defective unless a practical and feasible alternative design existed for the product at issue, and the designer or manufacturer still chose not to use that alternative design.

Three aspects of the case law interpreting sections 2307.75(C)(2) and (F) are significant and further underscore the importance of the feasible alternative design requirement. First, although this Court has not addressed the issue, lower Ohio and federal courts agree that R.C. 2307.75(C)(2) and (F) require evidence of an alternative design, and have placed the burden of proof for this element on the plaintiff. *See, e.g., Nationwide Mut. Ins. Co. v. ICON Health & Fitness, Inc.*, 10th Dist. Franklin No. 04AP-855, 2005-Ohio-2638, ¶ 5 ("Additionally, a plaintiff in a design defect case bears the burden to demonstrate that a practical and technically feasible alternative design or formulation was available at the time the product left the manufacturer that would have prevented the harm caused without substantially impairing the usefulness or intended purpose of the product."); *Yanovich v. Sulzer Orthopedics, Inc.*, 2006 U.S. Dist. LEXIS 90332

(N.D.Ohio Dec. 14. 2006), at *39–40 ("Because plaintiffs have no evidence of the existence of a safer alternative design that would have prevented Yanovich's injuries, defendants are entitled to judgment on the design defect claim. O.R.C. § 2307.75(F).").[2]

Second, Ohio and federal courts interpreting these provisions of 2307.75 have consistently held that a lack of a viable alternative design dooms a products liability claim. *See, e.g., Nationwide*, 2005-Ohio-2638, at ¶ 15 (reversing a judgment in favor of the plaintiffs on a design defect claim where they "did not present any evidence to establish a technically feasible alternative design" for the product at issue); *Bloomer v. Van-Kow Ents.*, 8th Dist. Cuyahoga No. 64970, 1994 Ohio App. LEXIS 1937, *7 (May 5, 1994) (affirming summary judgment in the defendant's favor against a products liability claim where the plaintiff "did not offer any evidence to establish that a galvanized, stainless or coated steel design would have been mechanically or economically feasible").[3]

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[2] *See also McGrath v. Gen. Motors Corp.*, 26 F. App'x 506, 510 (6th Cir.2002) ("[R.C. 2307.75] does not state whether the plaintiff or defendant bears the burden of production of an alternative design. Under Ohio case law, plaintiffs bear the burden of production."); *Jacobs v. E.I. du Pont de Nemours & Co.*, 67 F.3d 1219, 1242 (6th Cir.1995) (holding that the plaintiffs could not sustain a design-defect claim because they had "not offered any evidence that there was an alternative design for [the product in question] that would have avoided the injuries in this case").

[3] *See also Butts v. OMG, Inc.*, S.D. Ohio No. 1:11-cv-918, 2014 WL 4628496, *12 (Sept. 11, 2014) ("In summary of the 2307.75(C) factors, Plaintiff has not adduced evidence that there was a safe alternative design that does not impair the usefulness of the applicator and adhesive."); *Yanovich*, 2006 U.S. Dist. LEXIS 90332, at *39–40; *Gist v. Gen. Motors Corp.*, S.D.Ohio No. 02-cv-85, 2003 WL 23279783, at *8 (Dec. 18, 2003) ("Because Plaintiff has failed to set forth any evidence that a feasible, alternative design existed when the 1986 Fiero left Defendant's control, as required by Ohio Rev. Code § 2307.75(F), Plaintiff's product liability, design defect claim fails."); *Linert v. Foutz*, 2014-Ohio-4431, 20 N.E.3d 1047, ¶ 35 (7th Dist.) (affirming trial court's decision not to instruct the jury that they could find a design defect, despite the plaintiffs' expert offering opinions on the matter, under the following circumstances: "[The expert] testified he performed no analysis of a TIG weld design and that the method would have to be tested. [His] TIG weld theory is speculation, not evidence. Thus, 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.").

Third, Ohio courts have consistently held that the mere suggestion of an alternative design does not satisfy a plaintiff's burden under R.C. 2307.75(C) and (F). For example, in *Pruitt v. Gen. Motors Corp.*, 74 Ohio App.3d 520, 599 N.E.2d 723 (10th Dist.1991), the Tenth District affirmed the trial court's directed verdict in favor of the defendant. It did so in large part because the "plaintiff's expert ***failed to suggest any safer alternative designs or discuss the mechanical and economic feasibility***" of safer designs. (Emphasis added.) *Id.* at 526, 599 N.E.2d 723. Although, the plaintiff's expert stated that a safer design "was a 'possibility,'" this suggestion was not enough for the plaintiffs to meet their burden. As the Tenth District explained, the expert "did not provide any relevant detail; and while [he] claimed that defendant had implemented alternate designs in other models, he failed to elaborate thereon." *Id.*

As another example, the First District addressed a similar situation in *Sheets v. Karl W. Schmidt & Assocs.*, 1st Dist. Hamilton No. C-020726, 2003-Ohio-3198. The plaintiff in *Sheets* brought a product liability claim after his legs were crushed in a baling-machine accident. The First District affirmed summary judgment in the defendant's favor in part because the plaintiff only offered a theory—without any supporting evidence—regarding an alternative design. *Id.* at ¶ 21 ("Although Sheets casts the jamming as a design problem and posits alternative systems to prevent jamming, he cites no expert testimony or other competent evidence . . . .").

In sum, R.C. 2307.75(C)(2) and (F) require a plaintiff in a product liability action to provide proof—or introduce evidence—of a practical and technically feasible alternative design to the one at issue. Short of doing so, the plaintiff cannot, as a matter of law, defeat a defendant's properly supported motion for summary judgment.

B. The First District Eliminated the Feasible Alternative Design Requirement.

The Plaintiffs' expert witness, Neil Shirk ("Shirk"), did not, in fact, offer an alternative design. Here is the only thing he said to this point: "[P]ushing the emergency button on the

Motorola radio with gloved hands was extremely difficult, if not impossible, due to the small size and recessed location of the button." *Zang*, 2015-Ohio-2530, at ¶ 28.

In allowing the Plaintiffs to survive summary judgment on this statement, the First District's opinion ignores the well-established principles of R.C. 2307.75. Under those principles, sections 2307.75(C)(2) and (F) unequivocally require evidence of an alternative design; none was advanced here. Also under those principles, the burden to establish a feasible alternative design falls on the plaintiff; no evidence was presented to meet this burden. And under those principles, the failure to advance any alternative design evidence beyond speculation renders a product liability claim deficient at summary judgment, *see Linert*, 2014-Ohio-4431, 20 N.E.3d 1047, at ¶ 35; *Bloomer*, 1994 Ohio App. LEXIS 1937, at *7.

For these reasons, this Court should grant jurisdiction to make clear that Ohio's unambiguous products liability statute pertaining to design defect claims requires a plaintiff to prove an alternative feasible design, not to merely suggest that there may have been one. The requirements of R.C. 2307.75 are part of a carefully crafted statutory scheme governing all product liability actions in Ohio. They are mandatory and must be adhered to. Failure to meet the alternative feasible design requirement when responding to a motion for summary judgment means that a plaintiff's product design defect claim cannot survive summary judgment.

> **Proposed Proposition of Law 2: In a design defect case under R.C. 2307.75, a lay witness with no experience and with no perception or first-hand knowledge of the product cannot offer lay witness opinion testimony as to the product's design or any feasible alternative design.**

Ohio Evid.R. 701 states that lay witness opinion must be "rationally based" on the witness's perception. Outside of the First District, Ohio courts (and courts interpreting the

federal analogue to Evid.R. 701)[4] have universally interpreted this language to import the personal knowledge requirement from Evid.R. 602. The First District, however, disregarded Evid.R. 701's personal knowledge requirement when it allowed the Plaintiffs' designated, but unqualified, expert witness to offer lay witness opinion testimony. In doing so, the First District created an exception to the established personal knowledge requirement that is broad enough to allow just about anyone to offer lay opinion testimony as to complicated matters that usually require expert testimony (such as a design defect in a product liability case). If permitted to stand, the First District's decision in this regard will create confusion not only in product liability cases, but in any case where lay opinion testimony is presented and/or used to supplant expert witness testimony.

A. Lay Witness Opinion Testimony Must be Backed by Personal Knowledge.

A witness testifying in an American court must have personal knowledge of a subject to offer testimony about it. This is a bedrock, foundational requirement of America's trial and legal system. There is one exception to this personal knowledge requirement: witnesses certified as experts under Evid.R. 702 can opine on matters that fall within their expertise. Outside of that, the personal knowledge requirement applies through and through, to any testifying witness. This includes lay witnesses offering opinions under Rule 701.

[4] *United States v. Baraloto*, 535 F. App'x 263, 273 (4th Cir.2013) ("It is important to note, however, that nothing in Rule 701 exempts lay opinion testimony from the personal knowledge requirement found in Rule 602."); *United States v. Mendiola*, 707 F.3d 735, 741 (7th Cir.2013) ("The requirement that lay opinion be based on the perception of the witness imports into Rule 701 the personal knowledge standard of Rule 602."); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir.1985) (noting that Federal Rule of Evidence 701 also includes "[t]he foundational requirement of personal knowledge of the outward events" on which a lay witness offers an opinion).

Ohio Evid.R. 701 governs opinions by lay witnesses. It reads:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences ***is limited to those opinions or inferences*** which are (1) ***rationally based on the perception of the witness*** and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

(Emphasis added.)

In *State v. McKee*, 91 Ohio St.3d 292, 744 N.E.2d 737 (2001), this Court held that Evid.R. 701 requires first-hand knowledge or observation. In reaching this conclusion, the *McKee* Court provided background to Evid.R. 701 that continues to be relevant in interpreting and applying the Rule. The Court traced the origins of the Rule from common law, when "lay witnesses were required to testify to facts rather than opinions." *Id.* at 296. Federal Rule of Evidence 701, upon which Ohio Evid.R. 701 is modeled, eventually superseded the common law and "obviated the common law requirement for rigid compartmentalization of lay witnesses testimony into fact or opinion." *Id.* Even so, as this Court explained in *McKee*, courts have always enforced the "core requirement[]" of the state and federal versions of Rule 701—"that the opinion is rationally based upon personal knowledge." *Id.*; *see id.* at 295 (Emphasis added.) ("***All these cases*** [allowing lay witness testimony under the federal or state versions of Rule 701], however, ***recognize the importance of a foundation of sufficient familiarity with the substance to support the opinion"*** and recognize that "a foundation is necessary before this testimony is admitted.").

Hence, according to this Court's own jurisprudence, a lay witness may not offer an opinion unless that opinion is backed by personal knowledge.

Following this Court's lead, lower Ohio courts have enforced Evid.R. 701's personal knowledge requirement. *See, e.g.*, *Wittensoldner v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 13AP-475, 2013-Ohio-5303, ¶ 13, quoting *State v. Mulkey*, 98 Ohio App.3d 773, 784, 649

N.E.2d 897 (10th Dist.1994) ("In order to satisfy the requirement that the opinion testimony must be rationally based on the perceptions of the witness, the opinion of the lay witness must be 'one that a rational person would form on the basis of the observed facts.'"); *State v. Primeau*, 8th District Cuyahoga No. 97901, 2012-Ohio-5172, ¶ 79 (lay witness's "opinion was based upon his personal knowledge and experience"—"[t[herefore, his testimony was properly admitted under Evid.R. 701").

Evid.R. 602 further reinforces Rule 701's personal knowledge requirement. It reads:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness ***has personal knowledge of the matter***. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(Emphasis added.) By its own text, only one kind of witness is exempted from Evid.R. 602's personal knowledge requirement: an expert witness offering opinions under Evid.R. 702. Because Evid.R. 602 only exempts one kind of witness, it applies to every other kind of testimony allowable under the Rules of Evidence. This includes testimony by a lay witness. Ohio courts agree. *See, e.g., Jenkins v. Giesecke & Devrient Am., Inc.*, 9th Dist. Summit No. 26205, 2012-Ohio-4136, ¶ 18 ("The requirement that lay opinion testimony is rationally based on the witness' perception reflects a recognition of the limitation, embodied in Evid.R. 602, that a witness must have personal knowledge of matter to which he testifies.").

At bottom, it is well-established that Ohio law, including Evid.R. 701 and Evid.R. 602, requires a lay witness's opinion to be based on personal knowledge or perception. When a court wholly eliminates this requirement and allows lay opinion testimony in the absence of personal knowledge or perception, as the First District did, it creates a broad and dangerous exception to the well-established principle that lay witness opinion testimony must be based upon personal knowledge and experience. Under this exception, any designated, but unqualified expert

witness, will automatically be permitted to offer opinion testimony as a lay witness, regardless of whether such witness has any personal knowledge of, or experience with, the product (or other subject) at issue.

B. The First District Eliminated Evid.R. 701's Personal Knowledge Requirement.

The Plaintiffs offered one witness, Shirk, as an expert to testify regarding the design of the Motorola XTS radio at issue, which the Plaintiffs allege was defective due to its design and that such defect caused the death of Captain Broxterman. According to Shirk, the small recessed button on top of the radio "made it difficult to push while wearing a fireman's glove, which [Shirk] consider[ed] a design defect." *Zang v. Cones*, Hamilton C.P. No. A1203403, 18 (Apr. 22, 2014). The trial court held that Shirk did not qualify as an expert who could opine on the design of a radio. *Id.* It also held that Shirk would not have been qualified to give an opinion under Rule 701 because there was "no foundation for his testimony that the Motorola radio was defective"—"[h]e never even attempted to operate it with a glove, thus his testimony cannot rebut that of an experienced firefighter who verified that the emergency button can be operated." *Id.* at 19. Although it reversed the trial court's decision granting summary judgment to Motorola, the First District did not disturb these findings.

Even though Shirk had been called as an expert witness, the court of appeals allowed his testimony to be converted to lay witness opinion testimony. But a designated expert witness cannot transform into a lay witness to offer testimony where he was not at the scene of the incident when the product at issue was being used and has no personal knowledge of or first-hand experience using the product. Further, the First District acknowledged that Shirk "conceded" in his deposition that:

> [H]e had never transmitted on a Motorola XTS5000 radio or a competitor's radio, had never activated the emergency button, and had never performed an ergonomics analysis of emergency buttons on radios used by firefighters.

Zang, 2015-Ohio-2530, at ¶ 31.

Nonetheless, the First District held that Shirk's lay opinion that the button was hard to push while wearing gloves—despite Shirk having no foundation for it—created a genuine issue of material fact regarding whether a feasible alternative design existed. *See id.* at ¶ 34.

CONCLUSION

The plain language of R.C. 2307.75 requires a plaintiff in a products liability action to put forth evidence of (and ultimately prove) the existence of a feasible alternative design. The Ohio Rules of Evidence require that a lay witness's opinion be based on personal knowledge. The First District's decision not only eliminates both of these well-established requirements, it also opens the door for lay witness opinion testimony to be used in sophisticated products and other cases where expert testimony has usually been required to establish liability. For these reasons, this case implicates numerous issues of public and great general interest. The OMA requests that this Court accept jurisdiction of this case and resolve the issues it presents on the merits.

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