

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

AUTO-OWNERS INSURANCE COMPANY	:	APPEAL NO. C-081247
	:	TRIAL NO. A-0701087
and	:	
SCOTT PLESSINGER,	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
COLERAIN FORD,	:	
JOHN DOE EMPLOYEES,	:	
and	:	
FORD MOTOR COMPANY,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Auto-Owners Insurance Company and Scott Plessinger appeal the trial court’s entry of summary judgment in favor of Colerain Ford and John Doe employees (collectively, “Colerain Ford”) and Ford Motor Company (“Ford”). Because Auto-Owners and Plessinger did not present sufficient evidence that Colerain Ford and Ford had acted tortiously, we affirm the judgment of the trial court.

Plessinger, Auto-Owners’ insured, was the owner of a 2002 Ford F350 diesel truck. In September 2005 and May 2006, Plessinger took the truck to Colerain Ford

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

to have service work performed. On May 27, 2006, the truck caught on fire and was destroyed. Plessinger and Auto-Owners filed a lawsuit, claiming that Colerain Ford had been negligent in doing the repair work on the truck and that Ford was liable under Ohio's product-liability statutes for defective design, defective manufacture, breach of warranties, failure to warn, and negligence. Colerain Ford and Ford moved for summary judgment, which was granted by the trial court.

We consider Auto-Owners and Plessinger's assignments of errors together. In the first, they assert that the trial court erred when it granted summary judgment to Colerain Ford, and in the second, they assert that the trial court erred when it granted summary judgment to Ford.

Summary judgment is proper when (1) there remains no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and with the evidence construed in favor of the party against whom the motion is made, that conclusion is adverse to that party.² We review the trial court's decision to grant summary judgment *de novo*.³

To succeed in their tort claims against Colerain Ford and Ford, Auto-Owners and Plessinger had to present evidence that the tortious acts of the defendants had proximately caused the damage to the truck. Auto-Owners and Plessinger presented reports that other Ford trucks had been recalled due to a defect in the speed-control deactivation switch. They argued that although the recall applied to gasoline F350s, not diesel F350s, the speed-control deactivation switch in Plessinger's diesel truck was subject to the same defect. They also offered the deposition of Steven Cottingham, a fire investigator. Cottingham stated that the fire's origin was in the engine compartment on the driver's side, where the speed-control deactivation

² Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

³ *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.

switch and the repaired valve covers were located. Cottingham further stated that he could not rule out as causes of the fire the deactivation switch and the valve-cover repair that had been performed by Colerain Ford. Other causes, however, were “pretty much ruled out,” according to Cottingham. But Cottingham was not able to state that either the deactivation switch or the valve-cover repair was more likely than not the cause of the fire.

Auto-Owners and Plessinger contend that, although Cottingham was unable to pinpoint whether the harm was caused by a defective deactivation switch or by negligent repairs done by Colerain Ford, they had offered sufficient evidence to survive a motion for summary judgment under the doctrine of alternative liability. Under that theory, “[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.”⁴ But Auto-Owners and Plessinger failed to present sufficient evidence that both Colerain Ford and Ford had acted tortiously. Cottingham was not able to state that the valve repair by Colerain Ford was done tortiously. Nor was he able to state that the deactivation switch in Plessinger’s truck was defective. Auto-Owners and Plessinger offered no other expert testimony about the alleged defect. We note they assert that the defect in the deactivation switch could have been supported by circumstantial evidence. But much of that circumstantial evidence was provided in Plessinger’s deposition, which was not filed with the trial court when the motions for summary judgment were decided. Absent evidence that both Colerain Ford and Ford had acted tortiously, the doctrine of alternative liability did not apply. The trial court properly granted summary judgment against Auto-Owners and Plessinger on all their claims. The assignments of error are overruled.

⁴ *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, 473 N.E.2d 1199, syllabus.

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Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 26, 2009

per order of the Court _____.

Presiding Judge