IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JUAN PABLO ALVAREZ, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. N10C-03-151 JRJ
	)	
COOPER TIRE & RUBBER COMPANY,	)	
et al.,	)	
	)	
Defendants.	)	

Date Submitted: October 12, 2012
Date Decided: January 18, 2013

OPINION

Upon Consideration of Defendant's Motion for Summary Judgment:
GRANTED in Part and DENIED in Part.

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JURDEN, J.

I. INTRODUCTION

Defendant Cooper Tire & Rubber Company (the "Defendant" or "Cooper") moves this Court for summary judgment under Ohio law. For the reasons stated below, Defendant's motion for summary judgment is **GRANTED in Part and DENIED in Part**.

II. BACKGROUND

On March 19, 2008, Pablo Alvarez Navarette ("Mr. Alvarez") was driving with seven passengers on Mexican Federal Highway 45 through the State of Zacatecas in his 1998 Ford Expedition (the "Vehicle").[1] At some point, the right rear tire (the "Tire") suffered a "catastrophic tread separation," causing the vehicle to roll over (the "Accident").[2] Mr. Alvarez, his wife ("Mrs. Alvarez"), and their daughter ("Myra") died in the accident.[3] The other five passengers – including Juan Pablo Alvarez ("Juan Pablo"), Mr. and Mrs. Alvarez's son – survived but suffered personal injuries.[4] The Tire was designed and manufactured by Defendant.[5]

On March 12, 2010, Juan Pablo, individually and as a representative of the estates of the three decedents, along with the four other passengers, (together, the "Plaintiffs") filed a Complaint (the "Complaint") in the Superior Court of the State of Delaware against Defendant and the Ford Motor Company ("Ford").[6] Counts I through III of Plaintiffs' Complaint, against Cooper only, allege "Strict Liability," "Breach of Warranty," and "Negligence & Negligence Per

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[1] Motion for Summary Judgment at 1, *Alvarez v. Cooper Tire & Rubber Co.*, C.A. No. N10C-03-151 JRJ (Del. Super. Aug. 20, 2012) (Trans. ID 46001729) [hereinafter Motion] and Complaint at 1-2, *Alvarez v. Cooper Tire & Rubber Co.*, C.A. No. N10C-03-151 JRJ (Del. Super. Mar. 12, 2010) (Trans. ID 30036920) [hereinafter Complaint].
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Complaint at pp. 1 and 19.

Se," respectively.[7] Count VII, against both Cooper and Ford, allege a violation of "the Consumer Protection Act."[8] Counts VIII through X, against both Cooper and Ford, allege wrongful death actions, survival actions, and a claim for damages, respectively.[9] All of Plaintiffs' claims against Defendant stem from the alleged defectiveness of the Tire; the process by which it was designed, constructed, manufactured, tested, inspected, marketed, and/or sold; and the actions, words, warranties, duties, and/or representations of Defendant with respect thereto.[10] On September 26, 2011, this Court granted in part Defendant's conflict of law motion, which sought the application of Ohio law.[11] Defendant filed its Motion for Summary Judgment on August 20, 2012.[12] Plaintiffs replied on August 28, 2012.[13] The Court held oral argument on September 4, 2012.[14]

III. STANDARD OF REVIEW

Under Ohio law, "[s]ummary judgment shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[15] The moving party:

> bears the initial burden of . . . identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. . . . [I]f the moving party has

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[7] *Id.* at pp. 2, 5, and 7, respectively.
[8] *Id.* ¶ 73.
[9] *Id.* at pp. 16-18.
[10] *See generally* Complaint.
[11] Trans. ID 40024398. In its motion, Defendant first sought application of Mexican law. In the alternative, Defendant sought application of Ohio law. *See* Joint Motion to Determine Applicable Law Pursuant to Superior Court Civil Rule 44.1 of Defendants Cooper Tire & Rubber Company and Ford Motor Company, *Alvarez v. Cooper Tire & Rubber Co.*, C.A. No. N10C-03-151 JRJ (Del. Super. Sept. 26, 2011) (Trans. ID 35754238).
[12] *See* Motion.
[13] *See* Plaintiffs' Response to Defendant Cooper's Motion for Summary Judgment, Motion for Continuance of the Summary Judgment Hearing, and Leave to Supplement Plaintiff's Response, *Alvarez v. Cooper Tire & Rubber Co.*, C.A. No. N10C-03-151 JRJ (Del. Super. Aug. 28, 2012) (Trans. ID 46147081) [hereinafter Response].
[14] *See* Transcript of Motion for Summary Judgment, *Alvarez v. Cooper Tire & Rubber Co.*, C.A. No. N10C-03-151 JRJ (Del. Super. Sept. 4, 2012) (Trans. ID 46953694) [hereinafter Transcript].
[15] Ohio Civ. R. 56(c).

> satisfied its initial burden, the nonmoving party then has a reciprocal burden . . . to set forth specific facts showing that there is a genuine issue for trial . . . .[16]

"The evidence considered on summary judgment must be construed in the light most favorable to the party defending the motion."[17] The fact that the Ohio and Delaware standards for summary judgment are identical creates a "false conflict" of law.[18] Consequently, the Delaware standard for summary judgment is appropriate.[19]

The Court, then, must grant a motion for summary judgment in favor of the moving party if the pleadings, depositions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[20] The moving party initially bears the burden of showing that there are no genuine issues as to any material fact.[21] If the moving party succeeds in their showing, the burden shifts to the non-moving party "to demonstrate that there are material issues of fact."[22] In applying the statutory standard, the Court must view the record in the light most favorable to the non-moving party.[23]

IV. DISCUSSION

A. Introduction

Defendant moves for summary judgment on several grounds. First, Defendant seeks summary judgment on all of Plaintiffs' economic claims.[24] Second, Defendant argues that Plaintiffs fail to sufficiently state a claim for breach of implied warranty.[25] Third, Defendant

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[16] *Dresher v. Burt*, 662 N.E.2d 264, 274 (Ohio 1996).
[17] *Bowen v. Kil-Kare, Inc.*, 585 N.E.2d 384, 389 (Ohio 1992).
[18] *Deuley v. Dyncorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010).
[19] *Id.*
[20] Del. Super. Ct. Civ. R. 56(c).
[21] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979), citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962).
[22] *Id.* at 681, citing *Hurtt v. Goleburn*, 330 A.2d 134 (Del. 1974).
[23] *Id.* at 680, citing *Matas v. Green*, 171 A.2d 916 (Del. Super. 1961).
[24] Motion at 2.
[25] *Id.* at 2-3.

argues that Plaintiffs fail to establish a claim under "the Consumer Protection Act.[26] Fourth, Defendant argues that any attempt by Plaintiffs to recover punitive damages is barred.[27] Finally, Defendant argues that Counts I and III (Strict Liability and Negligence & Negligence Per Se, respectively) of the Complaint are preempted by the Ohio Product Liability Act.[28]

B. Economic Claims

Defendant moves for summary judgment "on any economic claim."[29] Plaintiffs reply with a single sentence: "Plaintiffs are not seeking damages for lost wages or medical expenses."[30] According to Defendant, however, because "Plaintiffs have produced no medical reports, reports from any medical doctors, medical bills, pay records, tax returns or economic reports," and further because "plaintiffs have no expert or documentary evidence to support a claim for economic loss *of any type*, such claims must *all* be dismissed as a matter of law."[31]

In support of its position, Defendant cites two Ohio cases[32] that clearly establish Ohio "as a jurisdiction requiring expert medical testimony to allow recovery of future medical expenses."[33] Neither case, however, indicates that expert testimony is required to recover for any other economic claim, let alone *all* economic claims. In fact, one of the cases suggests that the opposite is true.[34]

In *Turner*, the plaintiff was the only witness to testify on his behalf at a damages hearing.[35] The trial court awarded damages for pain and suffering, past medical expenses, past

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[26] *Id.* at 3.
[27] *Id.* at 3-4.
[28] *Id.* at 4-5.
[29] *Id.* at 2.
[30] Response at 1.
[31] Motion at 2 (emphasis added).
[32] *Turner v. Progressive Ins. Co.*, 2008 WL 4382698 (Ohio Ct. App. Sept. 26, 2008) and *Waller v. Phipps*, 2001 WL 1077942 (Ohio Ct. App. Sept. 14, 2001).
[33] *Waller*, 2001 WL 1077942 at *4 (internal citation omitted).
[34] *Turner*, 2008 WL 4382698 at *4-*5.
[35] *Id.* at *1 and *4.

lost income, and future medical expenses.[36] On appeal, the defendant argued that the trial court "committed reversible error when it awarded . . . damages based on inadequate and inadmissible evidence."[37] The Ohio Court of Appeals found that the trial court abused its discretion when it awarded damages for *future* medical expenses, explaining that "in order to establish future medical expenses, a plaintiff is required to provide the testimony of expert witnesses."[38] The court in *Turner* reduced the damage award by the plaintiff's estimate of future medical expenses.[39] However, the court also held that awarding damages for *past* medical expenses based only on the plaintiff's testimony was not an abuse of discretion and declined to reduce the damage award by any other amount.[40] Thus, plaintiff's testimony was sufficient to establish *past* lost income.

In the case *sub judice*, Plaintiffs have offered no evidence of lost wages or medical expenses because they do not seek such, and thus there is no genuine issue of material fact as to those damages. But, as noted above, Defendant still seeks summary judgment for economic claims. This is so because one plaintiff answered an interrogatory by stating that, while he "does not claim damages for medical bills or lost wages," he does claim "all other non-economic damages available under the law of the U.S. state(s) which apply to this case."[41] Because Plaintiffs expressly allege funeral expenses in the Complaint,[42] and supplied Defendant with funeral bills,[43] summary judgment is **DENIED** regarding funeral expenses. Summary judgment is **GRANTED** with respect to all other economic claims.

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[36] *Id.* at *4.
[37] *Id.*
[38] *Id.* at *5.
[39] *Id.*
[40] *Id.* at *6.
[41] Motion at Exhibit B, p. 9, Interrogatory No. 16.
[42] Complaint ¶ 81.

C. Consumer Protection Act Claims

Plaintiffs allege in the Complaint that Defendant "violated the Consumer Protection Act."[44] Neither Delaware nor Ohio have an act by that name.[45] After the Court ruled that Ohio law applied, Plaintiffs failed to amend their Complaint to cite to the statute(s) constituting the Ohio Consumer Sales Practices Act. Defendant argues that Plaintiffs' claim should fail because they claim a violation of "the Consumer Protection Act," yet no such act exists under Ohio law.[46] Plaintiffs respond that summary judgment should be denied because "Cooper does not argue that Plaintiffs' claims fail under Ohio [*sic*] consumer protection scheme."[47] It is not clear from the Complaint or the record what that "consumer protection scheme" is or what the elements of a claim under the "scheme" are.[48]

Both Delaware and Ohio are notice pleading jurisdictions.[49] "The purpose of Rule 8(a) is to give the opposing party fair notice of the claim against him."[50] "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[51] The pleading must "be simple, concise and direct" and "[a]ll pleadings shall be so construed as to do substantial justice."[52] "A complaint that gives fair notice 'shifts to the defendant the burden to determine the details of the cause of action by way of

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[43] *See* Transcript at 56.
[44] Complaint ¶ 74.
[45] 6 Del. C. §§ 2511-2527 enumerate Delaware's "Consumer Fraud Act" and 13 Ohio Rev. Code §§ 1345.01-1345.99 enumerate Ohio's "Consumer Sales Practices Act."
[46] Motion at 3.
[47] Response at 2.
[48] *See* Transcript at 40.
[49] *See* Delaware Super. Ct. Civ. R. 8-9; *In re Benzene Litig.*, 2007 WL 625054, at *5-*6 (Del. Super. Feb. 26, 2007); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003); Ohio Civ. R. 8-9; and *Cincinnati v Beretta USA Corp.*, 95 Ohio St.3d 416 (Ohio 2002). This creates a "false conflict" of law. *Deuley v. Dyncorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010). As a result, Delaware's rules and law are appropriate. *Id.*
[50] *Benzene*, 2007 WL 625054 at *5.
[51] Del. Super. Ct. Civ. R. 8(a).
[52] *Benzene*, 2007 WL 625054 at *5, quoting Super. Ct. Civ. R. 8(e) and (f), respectively.

discovery for the purpose of raising legal defenses.'"[53] "[T]he plaintiff need only allege facts that, if true, state a claim upon which relief can be granted."[54]

In the Complaint, Plaintiffs allege that they "were consumers under the Consumer Protection Act" and that Defendant "violated the Consumer Protection Act as a result of their respective misrepresentations."[55] The Court notes that, while these allegations barely satisfy the notice pleading standard,[56] they do suffice to put Defendant on notice that Plaintiffs are suing under the Ohio Consumer Sales Practices Act.[57] Defendant has the initial burden of showing that there is no genuine issue as to any material facts under the Ohio statutory scheme.[58] Defendant articulated no such arguments and, thus, failed to meet its burden. Summary judgment is therefore **DENIED** as to Plaintiffs "Consumer Protection Act" claim. However, Plaintiffs shall amend their Complaint within seven (7) days to allege a consumer protection claim under Ohio law, specifically identifying all statutes they allege Defendant violated.

D. Product Liability Act Claims

Defendant claims that "Plaintiffs' common law negligence claims in Count I and III (Strict Liability and Negligence & Negligence Per Se) are preempted by the Ohio Product

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[53] *VLIW Tech.*, 840 A.2d at 611.
[54] *Id.*
[55] Complaint ¶¶ 73-74.
[56] This Court determined that Ohio law would apply to the claims in this case a year before oral argument, yet Plaintiffs never attempted to amend the Complaint. They told the Court at oral argument that "there [was] no basis" for doing so. Transcript at 40. When the Court disagreed, Plaintiffs' responded with, "[i]f factually our facts meet up with the Ohio cause of action, then we would so plead. And if not, we will remove that claim from our complaint." *Id.* To this the Court responded, "[b]ut shouldn't you have already gone through that exercise? You knew we were having dispositive motions today. Are you leaving it for the Court to have to sift through all this?" *Id.* at 40-41. Counsel for Plaintiffs admitted that he had "no excuse." *Id.* at 40. The Court notes that it was left (by both sides) to sift through much.
[57] A simple internet search of the terms "Ohio Consumer Protection Act" leads immediately to the Ohio Consumer Sales Practices Act and the statutes in which it is found. The same outcome results from the same query in separate search engines, both general and law specific. Moreover, any questions regarding the legal basis for Plaintiffs' Consumer Protection Act claim on the part of Defendant could have been addressed during discovery through interrogatories or simply by asking Plaintiffs.
[58] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979), citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962).

Liability Act."[59] Sections 2307.71 to 2307.80 of Title XXIII of the Ohio Revised Code comprise the Ohio Product Liability Act ("OPLA").[60] Section 2307.71(B) expressly provides: "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability claims or causes of action." OPLA defines a "product liability claim" as:

> [A] claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:
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> (a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
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> (b) Any warning or instruction, or lack of warning or instruction, associated with that product;
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> (c) Any failure of that product to conform to any relevant representation or warranty. 'Product liability claim' also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.[61]

In response, Plaintiffs cite to a 2008, Ohio Court of Appeals case, *Boyd v. Lincoln Elec. Co.*,[62] arguing that it is not clear that Plaintiffs' claims fall within the purview of OPLA.[63] In *Boyd*, a welder sued the manufacturers of "welding consumables" after being diagnosed with magnesium-induced parkinsonism.[64] The welder worked for various companies from 1977 to 2004 – the year the welder was diagnosed and filed suit.[65] He "base[d] his products-liability

[59] Motion at 4.
[60] Though not referred to as the "Ohio Product Liability Act" in the code itself, case law confirms the popular name. *See Piskura v. Taser Intern.*, 2012 WL 5378805, at *1 (S.D. Ohio Oct. 29, 2012); *Boyd v. Lincoln Elec. Co.*, 902 N.E.2d 1023 (Ohio Ct. App. 2008); *Doty v. Fellhauer Elec., Inc.*, 888 N.E.2d 1138, 1139 (Ohio Ct. App. 2008); and *Hertzfeld v. Hayward Pool Products, Inc.*, 2007 WL 4563446, at *9 (Ohio Ct. App. Dec. 31, 2007).
[61] 23 Ohio Rev. Code § 2307.71(A)(13).
[62] 902 N.E.2d 1023 (Ohio Ct. Appl. 2008).
[63] Response at 4.
[64] 902 N.E.2d at 1025-26.
[65] *Id.* at 1025.

claims on theories of both strict liability and negligence."[66] Relying on two Ohio Supreme Court cases,[67] the Ohio Court of Appeals held that OPLA "has not abrogated the common law applicable to products-liability claims. In other words, common-law products-liability actions grounded in negligence . . . survive enactment of [OPLA]."[68] While true in some instances, the holding in *Boyd* does not apply here.[69]

The Ohio legislature first codified strict liability claims through the enactment of OPLA in 1988.[70] In *Carrel v. Allied Products Corp.*, the Ohio Supreme Court held that, "in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force."[71] The Ohio Supreme Court determined that the language in OPLA was simply "not strong enough to completely eliminate unmentioned common-law theories."[72] In other words, OPLA only abrogated those common law causes of action specifically enumerated. In response, the Ohio General Assembly amended OPLA to include Section 2307.71(B) ("R.C. 2307.71(B)").[73] In doing so, "the General Assembly state[d] that [OPLA] is 'intended to supersede the holding of the Ohio Supreme Court in *Carrel* . . . and to abrogate all common law product liability causes of action.'"[74] But, as discussed below, cases decided after this amendment have limited the application of OPLA to common law causes of action that accrue after April 7, 2005 (the date R.C. 2307.71(B) went into

[66] *Id.* at 1028.
[67] *Carrel v. Allied Products Corp.*, 677 N.E.2d 795 (Ohio 1997) and *Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177 (Ohio 1990).
[68] *Boyd*, 902 N.E.2d at 1028.
[69] The parties submissions were not very helpful on this issue. The Court notes that it had to conduct its own legal research to find the applicable legal standards under Ohio law in order to decide this issue.
[70] *Piskura v. Taser Intern.*, 2012 WL 5378805, at *18 (S.D. Ohio Oct. 29, 2012).
[71] 677 N.E.2d at 798.
[72] *Id.* at 799.
[73] *Piskura*, 2012 WL 5378805 at *18.
[74] *Doty v. Fellhauer Elec., Inc.*, 888 N.E.2d 1138, 1142 (Ohio Ct. App. 2008) (emphasis added); *see also Luthman v. Minster Supply Co.*, 2008 WL 169999 (Ohio Ct. App. Jan. 22, 2008); *Hertzfeld v. Hayward Pool Products, Inc.*, 2007 WL 4563446 (Ohio Ct. App. Dec. 31, 2007); and *Piskura*, 2012 WL 5378805 at *18.

effect). OPLA does not abrogate common law causes of action that accrued before April 7, 2005.[75]

In *Doty v. Fellhauer Elec., Inc.*, a fire "caused by the malfunction of an electrical apparatus" damaged both the Doty residence and the Schacht residence.[76] The fire occurred on November 11, 2003.[77] The Dotys and the Schachts filed suit on December 15, 2005.[78] On September 15, 2006, defendants filed a motion for judgment on the pleadings, arguing that OPLA abrogated the Doty's and Schacht's common law product liability claims.[79] The issue before the Ohio Court of Appeals was "whether the . . . amendments to [OPLA] retroactively abrogate [the] common-law product-liability claims."[80] The court held that "[a]lthough [OPLA] clearly states the intent to abrogate all common-law product-liability claims, it does not provide that causes of action accruing prior to the effective date would be subject to the amendment."[81] Thus, R.C. 2307.71(B) applies prospectively, abrogating all common law claims accruing after April 7, 2005, but not retrospectively to claims that accrued before April 7, 2005.[82] Because the fire occurred before April 7, 2005, the court held that the plaintiffs' common law claims were not abrogated.[83]

Three other cases are also instructive. In *Hertzfeld v. Hayward Pool Products, Inc.*, a husband and wife were injured when the chlorine feeder for their swimming pool exploded.[84] The Ohio Court of Appeals held that "the state of products liability law as of the date the cause

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[75] *Doty*, 888 N.E.2d at 1139.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1141.
[81] *Id.* at 1142.
[82] *See also Hertzfeld v. Hayward Pool Products, Inc.*, 2007 WL 4563446 (Ohio Ct. App. Dec. 31, 2007) and *Luthman v. Minster Supply Co.*, 2008 WL 169999 (Ohio Ct. App. Jan. 22, 2008).
[83] *Id.*
[84] 2007 WL 4563446, at *1.

of action arose applies."[85] The court held that the plaintiffs' claims were not abrogated because the OPLA amendments abrogating all common law claims were "not effective until April 7, 2005," while "[t]he instant cause of action arose on June 1, 2003."[86]

In *Luthman v. Minster Supply Co.*, a consumer filed several common law product liability claims against the store from which he purchased a defective product on June 5, 2005.[87] The consumer purchased the item "in fall 2001 or spring 2002" but "first found out about the problem . . . in the summer of 2003."[88] The Ohio Court of Appeals held that R.C. 2307.71(B) did not apply because it went into effect "after [plaintiff's] cause of action arose."[89]

In *Jones v. Walker Mfg. Co.*, a plaintiff injured in a lawnmower accident sued the store from which his father purchased the lawnmower.[90] The Ohio Court of Appeals found that "[t]he undisputed facts show that the mower in question was built in January 1994 and first sold in February 1994. "[The defendant] took possession of the mower in April 2004 as a trade-in from another customer. It sold the mower to [the plaintiff's] father in May 2004."[91] The court held:

> R.C. 2307.71(B) states: 'Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law products liability claims or causes of action.' [The plaintiff] admittedly suffered his injuries after the effective date of R.C. 2307.71(B), so his common law products liability claims are superseded by statute and barred as a matter of law.[92]

Ohio law is clear that all common law product liability claims or causes of action accruing after April 7, 2005, are abrogated by R.C. 2307.71(B).

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[85] *Id.* at *9.
[86] *Id.*
[87] 2008 WL 169999, at *1 (Ohio Ct. App. Jan. 22, 2008).
[88] *Id.* at *3.
[89] *Id.* at *3.
[90] 2012 WL 1142889, at *1 (Ohio Ct. App. April 5, 2012).
[91] *Id.* at *2.
[92] *Id.* at *4.

Defendant argues that Counts I and III are barred by OPLA.[93] Count I alleges Strict Liability, asserting that the Tire "was unreasonably dangerous" because "Defendant Cooper designed, manufactured, and marketed the Tire and placed it into the stream of commerce in a defective condition."[94] Count II alleges Negligence and Negligence Per Se, asserting:

> Defendant Cooper breached the duty of reasonable care . . . in that it negligently designed, constructed, manufactured, tested or inspected the subject tire, failed to consider the result of testing, and/or failed to inspect the subject tire for defects, and/or failed to heed the results of warranty claims and/or adjustment records. . . . [and] negligently failed to warn Plaintiffs of the Tire's defects and the effect of said defects . . . [and] is also negligent per se in failing to comply with applicable provisions of the Federal Motor Vehicle Safety Standards & Regulations.[95]

All allegations in Counts I and III of the Complaint are product liability claims[96] and are, therefore, subject to OPLA.[97]

In the case *sub judice*, the undisputed facts show that the Vehicle was manufactured in 1998, the Tire was manufactured in 2003, Mr. Alvarez purchased the Vehicle in 2008, and the Accident occurred in 2008. Because Plaintiffs suffered their injuries after April 7, 2005, R.C. 2307.71(B) applies and all common law product liability claims are superseded by statute and barred as a matter of law.[98] This includes Plaintiffs' Strict Liability claim in Count I as well as Plaintiffs' Negligence and Negligence Per Se claims in Count III. Plaintiffs' Breach of Implied Warranty claim in Count II is also a common law product liability claim.[99] And Plaintiffs'

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[93] Motion at 4.
[94] Complaint ¶¶ 8-9.
[95] Complaint ¶¶ 44-48.
[96] *Cf.* 23 Ohio Rev. Code § 2307.71(A)(13). *See also Fanean v. Rite Aid Corp. of Delaware, Inc.*, 984 A.2d 812, 815-16 (Del. Super. 2009); *Chambers v. St. Mary's School*, 697 N.E.2d 198, 565-66 (Ohio 1998); and *Hernandez v. Martin Chevrolet, Inc.*, 649 N.E.2d 1215, 1216-17 (Ohio 1995); to confirm that negligence per se is a common law claim.
[97] 23 Ohio Rev. Code § 2307.72.
[98] *Id.* § 2307.71(B).
[99] In fact, as discussed in the next section, under Ohio law, breach of implied warranty and strict liability are identical claims under common law and, therefore, merge into a single claim. *Hertzfeld v. Hayward Pool Products, Inc.*, 2007 WL 4563446, at *9 (Ohio Ct. App. Dec. 31, 2007).

Wrongful Death claims in Count VIII[100] and Survivor Actions in Count IX fall under the purview of OPLA.[101] Thus, all are barred under OPLA as a matter of law and Plaintiffs have one claim under OPLA.[102]

But Plaintiffs have failed to plead a claim under OPLA. The Court ruled that Ohio law applied in this case on September 26, 2011. From that time until oral argument one year later, Plaintiffs failed to amend (or request an opportunity to amend) their Complaint in order to bring it into conformity with the Ohio law. Plaintiffs should have amended. But this Court cannot ignore the fact that Plaintiffs' Complaint demonstrates the existence of genuine issues of material facts as to Defendant's liability with respect to the Tire and the Accident. Therefore, summary judgment is **DENIED** *on the condition* that Plaintiffs amend their Complaint within seven (7) days to properly plead a claim under OPLA.

E. Breach of Implied Warranty Claims

Plaintiffs claim that Defendant breached the "implied warranties of merchantability and fitness for a particular purpose."[103] Defendant moves for summary judgment, claiming "there was no warranty running from Cooper to any plaintiff."[104] According to Defendant, Ohio law requires "parties [to] be in privity of contract before the implied warranties of merchantability and fitness for a particular purpose will attach."[105] Defendant cites two Ohio cases to support its legal argument.[106] Defendant concludes that, because Mr. Alvarez purchased the Vehicle from a private individual with the Tire attached, Plaintiffs "cannot establish the privity of contract with

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[100] 23 Ohio Rev. Code § 2307.71(A)(13).
[101] 23 Ohio Rev. Code § 2307.71(A)(1).
[102] 23 Ohio Rev. Code § 2307.71(B).
[103] Complaint ¶¶ 27-28.
[104] Motion at 2.
[105] *Id.*
[106] *Curl v. Volkswagen of America, Inc.*, 871 N.E.2d 1141 (Ohio 2007) and *Johnson v. Monsanto Co.*, 2002 WL 2030889 (Ohio Ct. App. Sept. 6, 2002).

Cooper necessary to bring a claim for breach of implied warranty claim under Ohio law."[107] Plaintiffs, relying on *Norcold, Inc. v. Gateway Supply Co.*, counter that privity of contract is not necessary under the common law.[108]

In *Norcold*, a refrigerator manufacturer sued the distributor and manufacturer of certain parts necessary in its business, claiming those parts were subject to stress corrosion cracking and therefore potentially hazardous.[109] The trial court granted the defendant's motion for summary judgment, "finding that absent privity of contract, Ohio law does not provide a common-law remedy in tort to a commercial purchaser of a defective product for purely economic loss."[110] On appeal, the Ohio Court of Appeals affirmed, holding that "absent privity of contract, a commercial purchaser of a defective product cannot maintain a claim for purely economic loss under common-law tort theories of recovery."[111] The holding in *Norcold* does not apply in this case because Mr. Alvarez was a <u>non</u>-commercial purchaser; nevertheless, *Norcold* merits discussion.

In *Norcold*, the Ohio Court of Appeals differentiated between commercial and non-commercial purchasers.[112] (As noted above, the privity requirement in *Norcold* does not apply here because Mr. Alvarez was a non-commercial purchaser.) More important, however, the court in *Norcold* distinguished a claim for breach of implied warranty <u>in tort</u> and a claim for breach of implied warranty <u>under contract law</u>/the Uniform Commercial Code (the "UCC").[113]

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[107] Motion at 3.
[108] Response at 1, citing *Norcold v. Gateway Supply Co.*, 798 N.E.2d 618, 627 (Ohio Ct. App. 2003) ("[T]he [Ohio Supreme C]ourt . . . reaffirmed the existence of a noncommercial consumer plaintiff's common-law products liability claim, based upon implied-warranty theory, to recover purely economic damages from a product supplier with whom the plaintiff was not in privity.").
[109] *Norcold*, 798 N.E.2d at 619-20.
[110] *Id.* at 620.
[111] *Id.* at 628.
[112] *Id.*
[113] *Id.* at 626-27.

Last, and particularly important here, the court in *Norcold* held that, under Ohio law, "an action in tort for breach of express or implied warranty is synonymous with strict liability."[114] [115]

In their Complaint, Plaintiffs fail to specify under which theory of the law they are suing for breach of implied warranty. In Count II of the Complaint, Plaintiffs claim only that there existed "implied warranties of merchantability and fitness for a particular purpose" and that Defendant breached them.[116] Because Plaintiffs' Complaint sounds in tort, the Court finds that Plaintiffs' breach of warranty claims are brought in tort. Thus, privity is unnecessary. And, in any event, the issue of privity is mooted by the fact that the claims for breach of implied warranty are common law product liability claims that accrued after April 7, 2005, and are therefore abrogated by OPLA.[117]

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[114] *Id.* at 627.

[115] In the process of reaching its decision, the court in *Norcold* discussed the holdings of two Ohio Supreme Court cases. *Norcold*, 798 N.E.2d at 626-627, discussing *Iacono v. Anderson Concrete Corp.*, 326 N.E.2d 267 (Ohio 1975) and *LaPuma v. Collinwood Concrete*, 661 N.E.2d 714 (Ohio 1996). First, in *Iacono*, "the Ohio Supreme Court held that a homeowner could sue in tort under implied-warranty theories to recover property damages against the supplier of defective driveway material with whom the plaintiff was not in privity of contract." *Norcold*, 798 N.E.2d at 626, internal citation omitted. Second, in *La Puma*, the Ohio Supreme Court "reaffirmed the existence of a noncommercial consumer plaintiff's common-law products liability claim, based upon implied-warranty theory, to recover purely economic damages from a product supplier with whom the plaintiff was not in privity." *Id.* at 627, internal citation omitted. Thus, privity is unnecessary when suing to recover purely economic damages for breach of implied warranty in tort. This is because, prior to the 2005 amendment discussed previously, OPLA preempted any claim for more. *Johnson v. Monsanto Co.*, 2002 WL 2030889, at *6 (Ohio Ct. App. Sept. 6, 2002) (where the court held that the defendants "sufficiently pled a claim based upon the theory of implied warranty in tort" because "[t]he right to bring such an action does not depend upon the existence of a contractual relationship between the plaintiff and the defendant, and because [the defendants] are claiming economic damages, Ohio's product liability statutes have not preempted their claim.").

But privity <u>is</u> necessary when suing for breach of implied warranty under contract law/the UCC. In *Curl v. Volkswagen of Am., Inc.*, the purchaser of a 2002 Volkswagen Beetle sued for breach of implied warranty of merchantability. 871 N.E.2d 1141, 1143 (Ohio 2007). The Supreme Court of Ohio held that "longstanding Ohio jurisprudence provides that purchasers of automobiles may assert a contract claim for breach of implied warranty only against parties with whom they are in privity." *Id.* at 1147. The court explained that "[a] claim for breach of implied warranty, though similar to a tort action, arises pursuant to the law of sales codified in Ohio's Uniform Commercial Code." *Id.* And though "[t]he privity requirement . . . remains absent in strict liability tort actions, . . . Ohio continues to require privity as to contract claims." *Id. See also Bruns v. Cooper Industries, Inc.*, 605 N.E.2d 395, 397 (Ohio Ct. App. 1992) (in which the Ohio Court of Appeals held that "[p]rivity between the buyer and seller is a prerequisite to a breach of warranty claim brought under the Uniform Commercial Code."). To proceed, then, Plaintiffs here need privity if they are suing for breach of implied warranty under the UCC or seeking to recover non-economic damages under tort. Privity is not necessary if Plaintiffs are suing in tort for purely economic damages.

[116] Complaint ¶¶ 27-28.

[117] *See supra* this Court's discussion of the Ohio Product Liability Act, at 8-14 of this Opinion.

Under Ohio law, a tort claim for breach of implied warranty is the same as a claim for strict liability and, therefore, the two merge into a single claim.[118] In *Temple v. Wean United, Inc.*, the Supreme Court of Ohio explained:

> It is now well established that, in order for a party to recover based upon a strict liability in tort theory, it must be proven that: "(1) There was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss."[119]

In *Johnson v. Monsanto Co.*, the Ohio Court of Appeals explained that "an action for breach of implied warranty in tort requires the following elements: 1) the existence of a defect; 2) the defect was present at the time the product left the hands of the manufacturer; and 3) the plaintiff's injury was directly and proximately caused by the defect."[120] The elements for strict liability and breach of implied warranty in tort are identical. Thus, according to Ohio law, "the separately stated claims for breach of the implied warranty . . . and the claim of strict liability . . . are identical and therefore merge."[121]

But here, the merger of Plaintiffs' breach of implied warranty and strict liability claims ends up being irrelevant because of OPLA.[122] As discussed earlier, there is no genuine issue of material fact as to whether the Accident occurred after the critical April 7, 2005, date and, thus, Plaintiffs are barred from bringing any *common law* product liability claims. Consequently, summary judgment is **GRANTED** as to Plaintiffs' common law product liability claims.

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[118] *See Norcold v. Gateway Supply Co.*, 798 N.E.2d 618, 627 (Ohio Ct. App. 2003) ("[A]n action in tort for breach of express or implied warranty is synonymous with strict liability."); *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 320 (Ohio 1977) (where the Ohio Supreme Court said that breach of implied warranty and strict liability in tort are "virtually indistinguishable."); and *Hertzfeld v. Hayward Pool Products, Inc.*, 2007 WL 4563446, at *9 (Ohio Ct. App. Dec. 31, 2007) ("[T]he separately stated claims for breach of the implied warranty . . . and the claim of strict liability . . . are identical and therefore merge.").
[119] 364 N.E.2d at 321.
[120] 2002 WL 2030889, at *6 (Ohio Ct. App. Sept. 6, 2002).
[121] *Hertzfeld*, 2007 WL 4563446, at *9.

F. Punitive Damages Claims

Defendant asks the Court to "dismiss"[123] any claim for punitive damages relating to (1) Plaintiffs' wrongful death claims, (2) the survival claims on behalf of the estates of Mr. and Mrs. Alvarez, and (3) all other punitive damages claims.[124] Defendant relies on *Estate of Owensby v. City of Cincinnati*[125] in arguing that, under Ohio law, "it is well established that punitive damages are not recoverable in wrongful death cases."[126] Plaintiffs concede this point[127] and, therefore, Defendant's motion for summary judgment with respect to punitive damages for the wrongful death claims is **GRANTED**.

Defendant claims it is entitled to summary judgment on the issue of punitive damages with respect to the survival claims on behalf of the estates of Mr. and Mrs. Alvarez.[128] Defendant and Plaintiffs agree that punitive damages are only recoverable in survival actions "when the deceased suffered conscious pain."[129] The parties disagree, however, on whether expert testimony is necessary to establish conscious pain and suffering. Regarding Mr. Alvarez, because Plaintiffs concede that there is "no evidence at all with regard to his condition after the accident,"[130] there is no genuine issue of material fact as to his conscious pain and suffering and, therefore, summary judgment is **GRANTED** with respect to punitive damages for Mr. Alvarez's survival claim.

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[122] *See supra* this Court's discussion of the Plaintiffs' Product Liability Act Claims, at 8-14 of this Opinion.
[123] The Court finds Defendant's language somewhat curious given the fact that the case is at the summary judgment phase.
[124] Motion at 3-4.
[125] 385 F. Supp. 2d 619, 623-25 (S.D. Ohio 2004).
[126] Motion at 3.
[127] Response at 2 ("[P]unitive damages are not recoverable in a wrongful death action . . . .") (internal citations omitted).
[128] Motion at 3-4.
[129] Response at 2 ([P]unitive damages . . . are recoverable in a survival action when the deceased suffered conscious pain . . . .") (internal citations omitted); *see also* Motion at 3-4 ("In a survival action, punitive damages are only recoverable . . . for conscious pain and suffering.").
[130] Transcript at 64; *see also id.* at 65.

Regarding Mrs. Alvarez, Plaintiffs rely on the deposition of Juan Pablo (Mrs. Alvarez's son) to establish that Mrs. Alvarez experienced conscious pain and suffering.[131] Juan Pablo testified that he knew his mother was "agonizing" and "dying" because he "was like a meter away" from his mother,[132] and that his mother "was having difficulty breathing."[133]

Defendant argues that Juan Pablo's testimony should be disregarded because he is not qualified to "establish conscious pain and suffering."[134] In support of this argument, Defendant relies on *Harris v. Mt. Sinai Med. Ctr.*[135] In *Harris*, a mother and father sued a hospital alleging medical negligence resulting in the wrongful death of their newborn infant.[136] The infant's father testified that the newborn infant gained consciousness, he saw the baby shake, and he felt as if the baby responded when he held him.[137] The court noted in *Harris* the fact that none of the experts opined that the baby gained consciousness at any time during its nineteen days on life support systems,[138] and that one of the experts testified that "at no time was the baby conscious."[139] The court found that the latter expert's testimony was admissible and, therefore, the directed verdict in the defendant's favor was not erroneous.[140]

But Ohio law "does not mandate expert testimony in every case to prove consciousness."[141] On the contrary, "Ohio has long recognized that there is an exception to the

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[131] Transcript at 53-54.
[132] Letter from Timothy E. Lengkeek to the Honorable Jan R. Jurden in Response to the Judge's Request for an Excerpt from the Deposition Transcript, *Alvarez v. Cooper Tire & Rubber Co.*, C.A. No. N10C-03-151 JRJ (Del. Super. Sept. 21, 2012) (Trans. ID 46584517), wherein Plaintiffs provided a short excerpt from the Deposition of Juan Pablo, taken Feb. 28, 2011.
[133] *Id.*
[134] Motion at 4.
[135] 1998 WL 274507 (Ohio Ct. App. May 28, 1998).
[136] *Id.* at *1.
[137] *Id.* at *5.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Bradley v. Univ. Hosp. of Cleveland*, 2001 WL 1654762, at *5 (Ohio Ct. App. Dec. 27, 2001); *see also Turner v. Barrett*, 426 N.E.2d 1193, 1194 (Ohio Ct. App. 1980) and *Johnston v. Johnston*, 774 N.E.2d 1249, 1283 (Ohio Misc. 2001).

general rule . . . made for testimony which is a compound of fact and opinion."[142] "A prime example is that of the non-expert witness testifying as to physical condition. The witness is permitted to testify in the form of a conclusion because the primary facts gained from observation and upon which the conclusion is based are too numerous to detail."[143] Here, Juan Pablo's testimony "is a compound of fact and opinion," the purpose of which is to ascertain the "physical condition" of Mrs. Alvarez; namely, whether she was conscious. Given Juan Pablo's eyewitness testimony, there is a genuine issue of material fact as to what conscious pain and suffering Mrs. Alvarez experienced before her death.

Last, Defendant asks the Court to "dismiss" all of Plaintiffs' "other punitive damages claims."[144] After complying with this Court's mandate to amend the Complaint, Plaintiff will be left with two claims: (1) a claim under the Ohio Consumer Sales Practices Act, and (2) a product liability claim under OPLA. Under the Ohio Consumer Sales Practices Act, if Plaintiffs prevail, their recourse is to "rescind the transaction or recover [their] actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages."[145] Thus, Plaintiffs cannot recover punitive damages for claims under the Consumer Sales Practices Act. Under OPLA, Defendant "shall not be liable for punitive or exemplary damages" if it "fully complied with all applicable government safety and performance standards."[146] Plaintiffs' expert testified in his deposition that the Tire met the federal standards.[147] Plaintiffs counter that discovery is

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[142] *Bradley*, 2001 WL 1654762 at *6.
[143] *Id.*
[144] Motion at 3.
[145] 13 Ohio Rev. Code § 1345.09(A).
[146] 23 Ohio Rev. Code § 2307.80(D).
[147] *See* Transcript at 20-22.

incomplete.[148] The Court, then, defers consideration of Defendant's motion for summary judgment with respect to punitive damages under OPLA until discovery is complete.[149]

Summary judgment is **GRANTED** on the issue of punitive damages with respect to Plaintiffs' wrongful death claims and Mr. Alvarez's survival claim and **DEFERRED** on the issue of Mrs. Alvarez's survival claim and all Plaintiffs' punitive damages claims under OPLA.

V. CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment is **DENIED** as to funeral expenses; Count VII; and Counts I, II, III, VIII, and IX (conditional on Plaintiffs' amending the Complaint within seven (7) days of the issuance of this opinion). Defendant's motion for summary judgment is **GRANTED** as to all other economic claims and as to punitive damages with respect to Plaintiffs' wrongful death claims and Mr. Alvarez's survival claim. Defendant's motion for summary judgment is **DEFERRED** as to punitive damages with respect to Mrs. Alvarez's survival claim and all Plaintiffs' punitive damages claims under OPLA.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

cc: Prothonotary

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[148] *See id.* at 42-49.

[149] The proper mechanism to address this is a 56(f) motion. "[T]he Court may refuse the application for judgment . . . to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just." Del. Super. Ct. Civ. R. 56(f).