THE SUPREME COURT OF OHIO

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.,	)	CASE NO. 2023-0255
Appellants,	)	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. CA-20-110187
vs.	)	
THE SHERWIN-WILLIAMS COMPANY,	)	
Appellee.	)	

MERIT BRIEF OF AMICUS CURIAE THE OHIO INSURANCE INSTITUTE IN SUPPORT OF APPELLANTS

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INTRODUCTION

After years of litigation, Appellee The Sherwin-Williams Company ("S-W") was ordered to equitably abate lead paint hazards in pre-1951 homes in multiple California communities. *The Sherwin-Williams Co. v. Certain U/W at Lloyd's London, et al.*, 8th Dist. Cuyahoga No. 110187, 2022-Ohio-3031, ¶¶1-7. S-W now seeks indemnity from Appellants Certain Underwriters at Lloyd's, London, et al. and other insurers (collectively "Insurers") for that equitable abatement order. The Insurers issued a series of historical commercial general liability ("CGL")-type policies to S-W.

This appeal is not about the duty to defend. It is solely about the duty to indemnify. The Insurers' duty to indemnify is governed by two components: (1) the judgment against S-W; and (2) the terms of the Insurers' policies. It is undisputed that California law governs the former and Ohio law governs the latter.

The judgment is final and binding on S-W. No further proceedings or appeals are possible. The judgment requires S-W to abate the nuisance it caused. The adjudged remedy is purely equitable in nature—injunctive in form. Although it sets up an abatement fund, it imposes no damages of any kind--let alone damages because of "bodily injury" or "property damage". Moreover, the judgment expressly finds that S-W had "actual knowledge" that its acts or omissions would and did cause the harm to be abated. *Sherwin-Williams*, 2022-Ohio-3031, ¶¶8-17. Such knowledge means that the harm was neither fortuitous nor unintended nor unexpected.

The Insurers' policies only provide coverage for "damages" because of "bodily injury" or "property damage" that is neither expected nor intended by S-W. Therefore, the policies cannot and do not provide coverage for the equitable abatement ordered. Moreover, Ohio public policy

should bar insurance coverage against judgments where the insured has "actual knowledge" of the harm caused because such knowledge is tantamount to an intent to harm even if S-W subjectively denies such an intent.

While the trial court and the dissent in the Eighth Appellate District decision below failed to properly analyze all of the issues in this case, they reached the correct conclusion: the Insurers' policies cannot and do not provide coverage for the judgment against S-W. And they were not alone. Other courts in Ohio and California reached ***the same conclusion against S-W's California co-defendants***. *See Millenium Holdings, LLC v. Lumbermens Mut. Cas. Co*., No. 00-CV-411388, 2013 WL 12344184 (Cuy. Co. Aug. 8, 2013); *Certain U/W at Lloyd's London, et al v. Conagra Grocery Products Co*., 77 Cal.App.5th 729, 292 Cal.Rptr.3d 712 (1st Dist. 2022).[1]

If this were not enough, twice in the same year, this Court reached similar conclusions in similar public nuisance cases addressing insurance coverage for opioid distributors. *See Acuity v. Masters Pharmaceutical, Inc*., 169 Ohio St.3d 387, 2022-Ohio-3092; *Cincinnati Ins. Co. v. Discount Drug Mart, Inc*., 168 Ohio St.3d 437, 2022-Ohio-3714.[2]

Notwithstanding the foregoing, the majority opinion in the Eighth Appellate District wrongly insisted that the equitable abatement order against S-W should be covered by the Insurers' policies. The Ohio Insurance Institute ("OII"), as amicus curiae in support of the Insurers' position, now urges this Court to reverse the Eighth Appellate District and declare that

[1] *Conagra* involved the very same judgment. *Millenium* involved the same underlying conduct, but addressed a pre-judgment settlement.

[2] And this Court is not alone in so holding. The Supreme Court of Delaware, the United States Courts of Appeals for the Sixth Circuit and the United States Courts of Appeals for the Fourth Circuit have reached similar conclusions in similar public nuisance cases under different states laws. *See Ace Am. Ins. Co. v. Rite Aid Corp*., 270 A.2d 239 (De. 2022)(public nuisance caused by opioids); *Westfield Nat'l. Ins. Co. v. Quest Pharmaceuticals, Inc*., 57 F.4th 558 (6th Cir. (Ky.) 2023)(same); *Ellett Bros., Inc. v. U.S. Fidelity & Guaranty. Co*., 275 F.3d 384 (4th Cir. (S.C.) 2001)(public nuisance caused by guns).

the Insurers are ***not*** obligated to indemnify S-W with respect to the public nuisance judgment against it.

OII's Statement of Interest

OII is a member-run trade organization comprised of leading domestic, regional, and national property and casualty insurance companies, trade groups, and related organizations. Since 1968, the OII has sought to help Ohioans achieve a better understanding of insurance and related safety issues and has been recognized as the Ohio property and casualty insurance industry's voice on matters affecting or involving the industry. For more information, see ohioinsurance.org.

OII provides a wide range of services to its members and to the public, media, and government officials in three primary areas: education and research, legislative and regulatory affairs, and public information. In connection with these activities, OII closely monitors judicial decisions that address important issues of insurance law, and it has selectively participated as amicus curiae in many of this Court's landmark insurance cases. OII is uniquely qualified to provide this Court with a broad perspective on the basic principles of insurance law relevant to this appeal, as well as practical insight into how the Court's resolution of the issues in this case will impact insurers, insureds, and all Ohioans.

The issues presented by this case are of great interest to the OII and its members. OII members routinely issue liability policies like the ones before the Court in this case. The OII and its members have a keen interest in maintaining the transparency, uniformity, and predictability of the law regulating insurance coverage disputes – particularly with respect to the kinds of complicated disputes at issue here.

STATEMENT OF THE CASE AND FACTS

Except as addressed in argument below, OII incorporates by reference the Statement of the Case and Facts submitted by the Insurers.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: Under *Acuity*, CGL policies cover an insured's liability for "damages" "because of" "bodily injury" or "property damage" to particular individuals or properties. They do not cover liability imposed to abate societal harm and prevent future injuries.

This Court should adopt Proposition of Law No. 1 and reverse the Eighth Appellate District based upon *Acuity* and *Discount Drug Mart*. *Acuity* and *Discount Drug Mart* are controlling legal authority with respect to the issues in this case.

In *Acuity*, this Court held that amounts sought by local governments as a result of social conditions remotely related to potential bodily injury or property damage to the public were too tenuous to constitute "damages because of bodily injury" or property damage. 2022-Ohio-3092, ¶¶37-39. Generally, CGL-type policies, such as those issued by the Insurers in this case, would only be triggered by damages sought by: (1) the person injured; (2) his or her derivative claimants; and/or (3) his or her subrogees (or their equivalent). *Id*., ¶36.

In *Discount Drug Mart*, this Court, based upon *Acuity*, summarily vacated the Eighth Appellate District's earlier decision finding of coverage. 2022-Ohio-3714, ¶1. In this case, the majority opinion expressly relied upon its erroneous and now vacated decision in *Discount Drug Mart*. *Sherwin-Williams*, 2022-Ohio-3031, ¶¶68-69.[3]

As in *Acuity* and *Discount Drug Mart*, the claimants in this case were not injured persons, derivative claimants or subrogees, but instead they were local governments seeking coverage for

equitable injunction/abatement to address of broad societal problems. Such claims are not covered by CGL-type policies.

> **PROPOSITION OF LAW NO. 2: When an insured is "substantially certain" or has "actual knowledge" that its conduct will result in harm, coverage is unavailable under both CGL "expected or intended" policy language and Ohio public policy.**

This Court should adopt Proposition of Law No. 2 and reverse the Eighth Appellate District because the judgment against S-W clearly and unequivocally establishes that S-W had "actual knowledge" that it would cause the harm it did.

The California judgment establishes that S-W had "actual knowledge" of the harm it caused.

The Eighth Appellate District explained the equitable abatement order against S-W:

> . . . was premised on [S-W's] promotion of lead paint for interior use **with knowledge of the hazard** that such use would create." *Id.* (Emphasis sic).
>
> The court acknowledged the trial court's findings that [S-W and the other defendants] had " 'actual knowledge of the hazards of lead paint — including childhood lead poisoning' when they produced, marketed, sold, and promoted lead paint for residential use" and that "defendants 'learned about the harms of lead exposure through association-sponsored conferences' "; they "knew in the 1930s that 'the dangers of lead paint to children were not limited to their toys, equipment, and furniture' "; they knew "both that 'high level exposure to lead — and in particular, lead paint — was fatal' and that 'lower level lead exposure harmed children' "; and "by the 1920s, defendants knew that 'lead paint used on the interiors of homes would deteriorate and that lead dust resulting from this deterioration would poison children and cause serious injury.' " *Id.* at 84-85, quoting the March 26, 2014 Superior Court decision. ***The trial court's express findings made clear that the " 'harms' and 'hazards' of which defendants had actual knowledge included that (1) 'lower level lead exposure harmed children,' (2) 'lead paint used on the interiors of homes would deteriorate,' and (3) 'lead dust resulting from this deterioration would poison children and cause serious injury.' "*** *Id.* at

[3] In the Eighth Appellate District, *Discount Drug Mart* and *Sherwin-Williams* were argued before the same three-judge panel a day apart. *Sherwin-Williams*, 2022-Ohio-3031, ¶68.

> 85, quoting the March 26, 2014 Superior Court decision. (Bold emphasis in original; bold italics and underline added).

2022-Ohio-3031, ¶¶10-11. Thus, based upon decades of evidence about what S-W knew and when S-W knew it, the California courts expressly found that S-W had "actual knowledge" that its acts and/or omissions "would poison children and cause serious injury" and result in a public health hazard.[4]

When the insured's liability is established by such a judgment, the duty to indemnify is determined by the actual liability imposed by that judgment. *Hoyle v. DJT Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, ¶6. When the insured's mental state is determined by such a judgment, it cannot later be re-litigated later with respect to the insurer's duty to indemnify. *Howell v. Richardson*, 45 Ohio St.3d 365, 544 N.E.2d 878 (1989), at paragraph one of the syllabus; *Grant Mut. Cas. Co. v. Uhrin*, 49 Ohio St.3d 162, 550 N.E.2d 950 (1990). It is fixed by that judgment. Thus, as a matter of adjudicated fact and law, S-W had actual knowledge that its actions "would poison children and cause serious injury".

The Insurers' policies bar coverage for the California judgment.

The Insurers' CGL-type policies, however, are limited to damages that are fortuitous, unexpected and unintended. The harm caused by S-W was none of these. As a result, the Insurers' CGL-type policies cannot and do not provide coverage for at least three reasons: (1) express policy language; (2) the fortuity doctrine; and (3) public policy. This further explained below in order as follows.

[4] This is different than products liability cases that impose strict liability upon a tortfeasor when certain statutory conditions are met. There is nothing in the instant case that jeopardizes insurance coverage for products liability cases.

The Insurers' policies expressly bar coverage for harm that is expected or intended by S-W.

The express language of the Insurers' policies extends only to harm that is unexpected and unintended. This is accomplished by requiring that any damages be caused by "an accident" or "occurrence"--which is expressly defined as to require that resulting damages be unexpected or unintended—and/or by way of an exclusion barring coverage for expected or intended harm. Wherever the provisions are found, the net effect is the same: coverage is expressly barred for harm that is expected or intended by S-W. So what does this mean for insurance coverage for civil judgments?

Harm is intended when the insured does something which brings about the exact result intended. This Court has equated such direct intent with the criminal intent of "purposely" under R. C. 2901.22(A)("A person acts purposely when it is the person's specific intention to cause a certain result, or when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature"). *See Harasyn v. Normandy Metals, Inc*., 49 Ohio St.3d 173, 175, 551 N.E.2d 962 (1990).

Harm is expected when it is substantially certain to occur or is inflicted knowingly. *Harasyn*, 49 Ohio St.3d at 175 ("What we refer to as 'substantially certain' is similar to the culpable mental state existing when a person asks 'knowingly' in R. C. 2901.22(B)");[5] *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 31 Ohio St.3d 65, 67, 509 N.E.2d 74 (1987) ("[W]e are unable to see how [the insured] could have committed any acts with the belief that [the plaintiffs] were *substantially certain* to be injured, yet not have '*expected*' such injuries to occur"[emphasis in

[5] R. C. 2901.22(B) provides, in pertinent part: "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will

original]); *W. Res. Mut. Ins. Co. v. Campbell*, 111 Ohio App.3d 537, 542-543, 676 N.E.2d 919 (9th Dist. 1996), *appeal not allowed by* 77 Ohio St.3d 1472 (1996)(equating "expected" with "substantially certain" and "knowingly" and addressing Ohio cases finding similarly); *Cincinnati Ins. Co. v. Oblates of St. Francis De Sales*, 6th Dist. No. L-09-1146, 2010-Ohio-4382, ¶20, *appeal not allowed by* 127 Ohio St.3d 1546 (2011)(equating "expected" with "substantially certain" despite insured's denial of subjective intent).

If injury is expected, intent to harm will be inferred as a matter of law where the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm. *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, at paragraph two of the syllabus.

In this case, the California judgment establishes that the harm caused by S-W was both expected and intended. The finding of "actual knowledge" clearly establishes that the harm was "expected". Moreover, a final judgment of "actual knowledge" of harm indicates that the trier of fact rejected S-W's protestations of innocence and establishes an actual intention to harm—as it would be nonsensical to know that such harm would occur without intending such harm. Nevertheless, if any questions remain, the kind of harm that the California court found against S-W in this case was precisely the kind of harm upon which intent will be inferred. *Campbell, supra.* That is, because S-W knew that lead paint would deteriorate and that such deterioration would poison children, cause serious injury and create a public health hazard, S-W's intentional act was intrinsically tied to the harm that was caused.[6]

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probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist."

[6] The causal relationship between S-W's acts and harm are much closer than the placement of the Styrofoam deer in the roadway in *Campbell*. In any event, even if intent is not inferred in this case, it cannot be reasonably contended that the finding of "actual knowledge" does not establish

Despite this, intentional tortfeasors often try to muddy the waters by denying specific intent to hurt anyone. In duty to defend cases, where liability has not yet been established, this can be problematic for courts and litigants. In this case, however, subjective denials of intent cannot help S-W because it has been judicially established that the harm was inflicted with S-W's actual knowledge and therefore was substantially certain to occur (which, at a minimum, establishes expected harm and precludes coverage). In *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 1996-Ohio-113, this Court held that where a substantial certainty of harm exists, subjective denials of intent are unavailing and expected and intended harm exclusions will be applied based upon the objective facts. In so holding, this Court concluded that a "completely subjective test would virtually make it impossible to preclude coverage for intentional [injuries] absent admissions by insureds of specific intent to harm or injure" and "[h]uman nature augurs against any viable expectation of such admissions." 76 Ohio St.3d at 37. Since it is always in the interest of the insured to establish coverage and avoid policy exclusions, Ohio courts hold that the insured's own self-serving statements are of "negligible value" in such cases. *See e.g. State Farm v. Harpster*, 8th Dist. No. 90012, 2008-Ohio-3357, ¶49; *Nationwide Mut. Ins. Co. v. Layfield*, 11th Dist. No. 2002-L-155, 2003-Ohio-6756, ¶12.[7]

The express policy language alone is sufficient reason to rule in favor of the Insurers in this case—but it is not the only reason that exists to do so.

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that the harm was "expected" by S-W. For this reason alone, none of the Insurers' policies provide coverage.

[7] Not surprisingly, This is ***not*** a special rule for insurance cases, but rather has widespread application. Indeed, Ohio juries charged with determining intent are instructed to look to the objective facts surrounding the act: " 2. HOW DETERMINED. Because you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the defendant an awareness of the probability that (*describe the alleged result or nature*

The Insurers policies bar coverage for harm that is not fortuitous.

Ohio follows the fortuity doctrine. On multiple occasions, this Court has held that CGL-type policies, such as those issued by the Insurers in this case, only cover harm that is fortuitous from the standpoint of the insured. *See e.g. Westfield Ins. Co. v. Custom Agri Sys., Inc*., 133 Ohio St.3d 476, 2012-Ohio-4712, ¶¶13-14; *Ohio Northern Univ. v. Charles Constr. Serv., Inc*., 155 Ohio St.3d 197, 2018-Ohio-4057, ¶17; *Motorists Mut. Ins. Co. v. Ironics, Inc*., 168 Ohio St.3d 467, 2022-Ohio-841, ¶¶43-44. Quoting the overwhelming body of legal authority and commentators on the subject, this Court agreed: "A requirement that loss be accidental in some sense in order to qualify as to the occasion for liability of an insurer is implicit, even when not express, because of the very nature of insurance." *Ironics*, ¶43; see also 7 Couch on Ins. § 101:2 (2023)("Policies contain a risk requirement that the insured suffer some loss in order to be covered. In general, the loss must occur as a result of a fortuitous event, not one planned, intended, or anticipated").[8]

There are at least two reasons for this implied condition of every liability policy.

The first reason is to minimize the insured's motive to commit fraud or profit from intentional acts or known losses. 7 Couch on Ins. § 101:2 (2023).

The second reason is that the business of insurance is based upon a statistical analysis of the risk of a particular fortuity occurring across a particular insurance market segment. This probability can then be converted into premiums for that insurance market and the risk can be

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of the defendant's conduct)." CR 417.11 Knowingly R.C. 2901.22(B) (offenses committed on and after 3/23/15) [Rev. 1/10/15], 2 CR Ohio Jury Instructions 417.11.

[8] It is not necessary here to explore whether insurers and insureds can contract for non-fortuitous losses because there is no suggestion in the evidence that the S-W and the Insurers intended to do so. Rather, it is sufficient to the note that, absent a clear intention not present in this case, insurance involves fortuity.

spread over the entire market rather than borne by an individual. When a loss is not fortuitous (i.e has already occurred prior to the placement of insurance or is intended or expected), then the process is disrupted. On a large scale, coverage for non-fortuitous losses can cause an entire market to become unstable leading to unaffordable insurance and/or insurer insolvency. 7 Couch on Ins. § 101:1 (2023); *Id*., § 1.2.

Ohio public policy bars coverage for harm that is intended.

Based upon the fact the harm caused by S-W was neither unexpected nor unintended, it is barred by both the express terms of the Insurers' policies and the fortuity doctrine. Thus, it may not be necessary to reach the issue of whether S-W's behavior is also barred by Ohio public policy. Yet the expected and intentional harm caused by S-W is precisely the kind of harm that Ohio law has found should be barred by Ohio public policy.[9] Unlike duty to defend cases where the actual intention of the insured remains a disputed question of fact prior to final judgment, once final judgment establishes that the insured had "actual knowledge" of the harm caused, reason and logic dictate that intent to harm must follow as a matter of law. This is not the pre-judgment test set down by this Court in *Campbell*, but rather naturally follows from a conclusive and definitive finding that S-W had "actual knowledge" that the very harm caused would in fact occur.

[9] In *Conagra Grocery*, California's First Appellate District found that liability insurance for similar willful conduct by S-W's co-defendants was barred by California public policy. 77 Cal.App.5th at 748-750.

PROPOSITION OF LAW NO. 3: The term "damages" in a CGL is payment for loss or injury sustained by a person, and it does not include monetary payments that do not compensate anyone for loss or injury.

This Court should likewise adopt Proposition of Law No. 3. The abatement order was equitable relief akin to an injunction. There should be no question that the abatement order in this case does not constitute "damages" within the meaning of the Insurers' policies.

The Insurers' policies are to be interpreted in context.

As with all things contractual, the meaning of this standard policy language is best begun by reference to the policy language itself. *Gomolka v. State Auto Mut. Ins. Co.*, 70 Ohio St.2d 166, 172-173, 436 N.E.2d 1347 (1982); *Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-3655, ¶13. It is a cardinal rule to interpret such insurance contract provisions in context. *Sauer v. Crews*, 2014-Ohio-3655, at syllabus.[10] This allows a court to determine "the interpretation which makes a rational and probable agreement." *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 316, 1996-Ohio-393. While courts normally construe ambiguity against an insurer because the insurer drafts the policy, an insurance policy "is unambiguous if it can be given a definite legal meaning." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶11. Strained interpretations and over-lawyered efforts to create ambiguity should be disregarded. *Beverage Holding, LLC v. 5701 Lombardo, LLC*, 159 Ohio St.3d 194, 2019-Ohio-4716, ¶43. The reason for this rule is that the most insidious kind of inaccuracy is contextual inaccuracy

[10] This has been a common sense rule of contract interpretation for decades. Insurance policy provisions are "to be construed in light of the subject matter with which the parties are dealing and the purpose to be accomplished." *Bobier v. Nat'l Cas. Co.*, 143 Ohio St. 215, 54 N.E.2d 798 (1944), paragraph one of the syllabus; *The Travelers Ins. Co. v. The Buckeye Union Cas. Co.*, 172 Ohio St. 57, 157 N.E.2d 792 (1961), paragraph one of the syllabus. The meaning of the policy provisions is to be considered "from the instrument as a whole, and not detached or isolated parts thereof." *Gomolka v. State Auto Mut. Ins. Co.*, 70 Ohio St.2d 166, 172-173, 436 N.E.2d 1347 (1982). If those provisions have a specific contractual definition, have acquired a "commercial or technical meaning" or have a "special meaning manifested in the contractual

because the words are bereft of their true meaning by lifting them from the environment that anchors them. Decontextualization provides an appearance of meaning that is often contrary to actual meaning.[11]

The context of the Insurers' policies is tort liability.

The Insurers' policies speak to S-W's ***legal liability*** to pay certain types of ***damages***. The words in the policies give them their context and include terms like "damages", "bodily injury", "property damage", "products", "premises" and the like. Such words are not just the language of law, but the language of ***tort*** law. *See e.g. VBF, Inc. v. Chubb Grp. of Ins. Cos.*, 263 F.3d 1226, 1231 (10th Cir. 2001); *Fed. Ins. Co. v. New Hampshire Ins. Co.*, 439 Fed. Appx. 287, 290-291 (5th Cir. 2011); *Data Specialties, Inc. v. Transcontinental Ins. Co.*, 125 F.3d 909, 912-913 (5th Cir. 1997); *Baylor Heating & Air Cond., Inc. v. Federated Mut. Ins. Co*., 987 F.2d 415, 419-420 (7th Cir. 1993); *Cincinnati Ins. Co. v. Metropolitan Props., Inc*., 806 F.2d 1541, 1543-1544 (11th Cir. 1986); *First Southern Ins. Co. v. Jim Lynch Enterprises, Inc*., 932 F.2d 717, 720 (8th Cir. 1991); *Newman v. XL Specialty Ins. Co*., No. C-1-06-781, 2007 WL 2982751 (S.D. Ohio Sept. 24, 2007), *4.[12] Thus, the Insurers' policies should be interpreted in the context of tort law.

In the context of tort law, "damages" means amounts paid to substitute or compensate for harm rather than to achieve a specific outcome like the abatement of a nuisance.

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context", that meaning must be applied. *Id*. *See also Sutton Bank v. Progressive Polymers, LLC*, 161 Ohio St.3d 387, 2020-Ohio-5101, ¶15.

[11] For example, if the question were the meaning of the undefined term "offsides", one could reach different conclusions depending upon context. If "touchdowns", "first downs", "linebackers", etc. surrounded the term "offsides", the only reasonable conclusion would be that "offsides" refers to a penalty in American football. If, however, "strikers", "goals", "forwards", "corner kicks", etc. surrounded the term "offsides," the only reasonable conclusion would be that "offsides" refers to a penalty in soccer.

[12] Some of the foregoing cases address coverage under errors & omissions policies rather than CGL-type policies, but the context of such policies is also tort law. Consequently, policy terms were interpreted in that context.

Equitable relief is not damages—whether in tort or in contract. This is not a new concept to this Court. This Court has so held in multiple cases addressing the scope of jurisdiction for the Ohio Court of Claims. *See e.g. Cristino v. Ohio BWC*, 118 Ohio St.3d 151, 2008-Ohio-2013, ¶8; *Measles v. Indus. Comm.*, 128 Ohio St.3d 458, 2011-Ohio-1523, ¶9; *Santos v. Ohio BWC*, 101 Ohio St.3d 74, 2004-Ohio-28, ¶13.[13] If "[d]amages are given to the plaintiff to substitute for a suffered loss", such damages are not equitable in nature but instead constitute legal damages. *Ohio Hosp. Assn. v. Ohio DHS*, 62 Ohio St.3d 97, 105, 579 N.E.2d 695 (1991). And this Court is not alone. The Supreme Court of the United States has held similarly in other contexts. *Montanile v. Bd. of Trustees of the Nat'l. Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 144-145, 136 S.Ct. 651, 658-659 (2016). Likewise, this Court recently explained in *Kisling, Nestico & Redick, LLC v. Progressive Max. Ins. Co.*, 158 Ohio St.3d 376, 2020-Ohio-82, ¶20, equitable remedies do not award general damages. "Damages are given to the plaintiff *to substitute* for a suffered loss, whereas [equitable] remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* (emphasis in original). Tort law generally awards damages because a court cannot give the plaintiff back what was harmed—his or her physical health or undamaged property. The court can, however, provide the plaintiff substitute compensation for such losses. That is, the court can award damages.

The California courts were quite clear. The abatement order against S-W: (1) "did not seek to recover any prior accrued harm"; (2) "nor did they seek compensation of any kind"; and (3) "would not be utilized to recompense anyone." *Sherwin-Williams*, 2022-Ohio-3031, ¶14. Stronger still, California law expressly prohibited the plaintiffs from seeking damages against S-W. *Id.*, ¶¶12-14. For reasons unrelated to insurance coverage, S-W even expressly argued that

[13] Those seeking damages against the state often try to cloak their claims in equity to avoid litigating in the Court of Claims.

the abatement order should be considered damages, but the California courts expressly rejected S-W's argument. *Id.*, ¶¶12-14. There is no set of circumstances under which it could be reasonably contended that the abatement order constitutes "damages".

There are additional reasons for this conclusion. The parameters of tort law, although they may change with state lines, are well-known and generally predictable. Tort judgments implicitly incorporate concepts such as the right to trial by jury, causation, damage caps, comparative fault, joint and several liability, and the like. When insurance policies are underwritten for coverage for legal liability for damages, they incorporate these basic contextual assumptions into their framework, pricing and scope.

Equity lacks these assumptions, and therefore should not be confused with the actions at law (which provide damages). By its very nature, equity lacks many of the basic concepts inherent in tort law. In the limited universe of equity, judges sit almost as royalty—dictating to all what is just and what is not. Indeed, while recognizing the importance of equity as a gap filler to the law, many legal commentators have worried about the potential danger of equity if left unchecked:

> Blackstone's understanding was not that equity gave a judge the power to create a new rule when injustice existed; rather, it gave a judge the power to correct an application of the law when the letter of the law contradicted the spirit of the law. Blackstone was very concerned about the danger of the former view. He continued:
>
> > "Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light, must not be indulged too far; lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much

> more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind."

Ex parte Baker, 143 So.3d 754, 758 (Al. Sup. Ct. 2013). Furthermore:

> The United States Supreme Court has shared Justice Story's concerns . . .
>
> > " 'If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superseding the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis* and, it may be, *ex aequo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority.' "
>
> *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999) (Scalia, J., for the Court) (quoting 1 Joseph Story, *supra* at 19).

Ex parte Baker, 143 So.3d at 759. Thus, equity is not just another way of awarding damages. It is an entirely different way of granting relief altogether. Based upon the foregoing, it would be unreasonable to superficially equate equitable relief with legal relief. Consequently, there is no reasonable interpretation of equity that can be equated with damages.

S-W's arguments otherwise are unavailing.

Nevertheless, S-W makes three basic arguments to the contrary. None is persuasive.

First, S-W asserts that the term "damages" in the Insurers' policies is ambiguous and should be interpreted in favor of S-W. This is wrongheaded in two respects. As a preliminary

manner, based upon the foregoing, S-W's extra-contextual interpretation of "damages" is unreasonable and therefore cannot trigger the rule of contra proferentem. *Galatis*, 2003-Ohio-5849, ¶11. Furthermore, even if the rule of contra proferentem could be employed, the rules of issue preclusion and claim preclusion prevent the very argument S-W seeks to make. S-W made this same argument in California—and lost. S-W cannot relitigate it now.

Second, S-W claims that other Ohio courts have found that some forms of equity can constitute damages under CGL-type policies (ostensibly relying upon *Wayne Mut. Ins. Co. v. McNabb*, 4th Dist. Washington No. 15CA1, 2016-Ohio-153). While the Fourth Appellate District may believe that damages and restitution are one in the same, as explained above, this Court has definitively ruled otherwise. *See e.g. Cristino, supra; Measles, supra; Santos, supra*. Even if there were some question about restitution (since it involves the restoration of money), other Ohio courts have clearly held that injunctive relief is not covered by CGL-type policies. *See e.g. Westfield Ins. Co. v. HealthOhio, Inc.*, 73 Ohio App.3d 341, 345, 597 N.E.2d 179, 182 (3rd Dist.1992). *HealthOhio* is more inline with this Court's interpretation of the issue.

Finally, S-W asks this Court to rely upon decades old pollution cases brought under state and federal environmental laws to find that CGL-type policies can and should be triggered. There is no controlling legal authority for this approach, and there was a split across the nation on such issues before the introduction of absolute pollution exclusions in 1986 mercifully brought an end to this "jamming of square pegs into round holes" on such issues.[14] There is no need to go down this twisted path again (or to re-address such old decisions) in light of the clear and unequivocal rulings from the California courts in this case. To the extent S-W seeks to conjure up the ghosts of the past to contend that the abatement order should be considered

tantamount to damages, claim preclusion and issue preclusion should bar S-W from doing so now.

CONCLUSION

Based upon the foregoing, OII respectfully requests this Court to reverse the Eighth Appellate District and enter judgment for the Insurers on all issues.

Respectfully submitted,

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[14] Moreover, as recently explained to this Court in the party and amici briefings for *AKC, Inc. v. United Specialty Ins. Co.*, 166 Ohio St.3d 460, 2021-Ohio-3540, the insurance market now sells pollution policies to cover many of the risks associated with such events.

CERTIFICATE OF SERVICE

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