IN THE SUPREME COURT OF OHIO

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION, TRUMBULL COUNTY, OHIO; ET AL.

Plaintiffs-Appellees,

v.

PURDUE PHARMA L.P., ET AL.,

WALGREENS BOOT ALLIANCE, INC, WALGREEN COMPANY, WALGREEN EASTERN CO., INC. (22-3750/3841); CVS PHARMACY, INC., OHIO CVS STORES, LLC, CVS TENNESSEE DISTRIBUTION LLC, CVS RX SERVICES, INC., CVS INDIANA, LLC (22-3751/3843); WALMART, INC. (22-3753/3844)

Defendants-Appellants.

Case No. 2023-1155

Certification of a State Law Question from the United States Court of Appeals for the Sixth Circuit, Case No. 22-3750 et al.

BRIEF OF THE OHIO CHAMBER OF COMMERCE AND THE OHIO ALLIANCE FOR CIVIL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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I. INTEREST OF *AMICI CURIAE*

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization, representing businesses ranging from small sole proprietorships to some of the nation's largest companies. The Ohio Chamber works to promote and protect the interests of its more than 8,000 members, while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper. The Ohio Chamber regularly files amicus briefs in cases important to its members.

The Ohio Alliance for Civil Justice ("OACJ") is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. OACJ members support a balanced civil justice system that will not only award fair compensation to injured persons, but will also impose sufficient safeguards to ensure that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. The OACJ also supports stability and predictability in the civil justice system in order for Ohio's businesses and others to know what risks they assume as they carry on commerce in this State.

This case presents a question of great importance to the Ohio Chamber, the OACJ, and their member companies because the United States District Court for the Northern District of Ohio's ("District Court") decision to find the Ohio Product Liability Act ("OPLA") does not abrogate Appellees' common law public nuisance claims based on the sale of products is incorrect and injects uncertainty into what should be a predictable and consistent legal framework. There is no denying the magnitude of the opioid crisis in America. It is a devastating social and economic problem—one that deserves serious solutions. However, the Ohio General Assembly ("General

Assembly") has made clear that claims based on the manufacturing, supplying, and sale of products are confined to the claims set forth in the OPLA. Interpreting the OPLA in a manner that massively expands public nuisance law beyond its traditional reach to cover the distribution and sale of lawful products, not just opioids, is inconsistent with the law and the General Assembly's intent, and has tremendous consequences for Ohio's business community and the State's economy.

Therefore, the Ohio Chamber and the OACJ respectfully support the position of Appellants that the OPLA completely abrogates Appellees' common law public nuisance claims based on the sale of products. This Court should interpret the OPLA, accordingly, and find the law abrogates a common-law claim of absolute public nuisance resulting from the sale of a product in commerce even when a plaintiff seeks equitable abatement, including both monetary and injunctive remedies.

II. STATEMENT OF THE FACTS

Amici curiae defer, for the purpose of this brief, to the factual and procedural background set out in Appellants' merit brief.

III. SUMMARY OF ARGUMENT

The OPLA, through the amendments of Senate Bill 80 ("S.B. 80") and Senate Bill 117 ("S.B. 117"), explicitly abrogates all common-law claims based on the sale of products including those for public nuisance. The District Court did not interpret the OPLA in accordance with its ordinary meaning and misinterpreted the General Assembly's intent concerning the underlying bills. Specifically, the District Court concluded the OPLA abrogates only common law public nuisance claims for compensatory damages. *In re Nat'l Prescription Opiate Litig.*, 2018 WL 6628898, *15 (N.D.Ohio 2018). Such an interpretation is incorrect, ignores the unambiguous amendments to the OPLA from S.B. 80 and S.B. 117, and renders the amendments superfluous. Accordingly, this Court should find the OPLA abrogates all common law public nuisance claims based on the sale of products regardless of the remedy sought, including Appellees' claims.

IV. ARGUMENT

A. Prior to enactment of S.B. 80 and S.B. 117, courts found the OPLA did not abrogate all common-law product liability theories, which caused the General Assembly to enact tort reforms.

When first enacted in 1988, the OPLA did not expressly abrogate all common-law product liability claims. Consequently, the statute's lack of express abrogation language led the Supreme Court of Ohio to find the OPLA did not abrogate certain common-law claims in a number of cases. For instance, in *LaPuma v. Collinwood Concrete*, 75 Ohio St.3d 64, 661 N.E.2d 714 (1996), this Court found that the OPLA did not abrogate claims seeking economic damages. In *Carrel v. Allied Prods. Corp.*, 78 Ohio St. 3d, 677 N.E.2d 795 (1997), this Court analyzed the OPLA and concluded that "[t]he common-law action of negligent design survives the enactment of [OPLA]." This Court then allowed product-based public nuisance claims arising from the sale of handguns in *City of Cincinnati v. Beretta U.S.A.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (2002).

Those decisions led to unpredictable and expansive potential liability for manufacturers and suppliers of products and contributed to a civil justice system that hindered economic growth, harmed Ohio businesses and consumers, and curtailed innovation in the Buckeye State. Those impacts resulted in the General Assembly pursuing tort reforms to address product liability lawsuits.

B. The General Assembly enacts S.B. 80 to abrogate all common-law product liability causes of actions.

Shortly after *Beretta*, the General Assembly enacted S.B. 80, sponsored by then State Senator, now CEO of the Ohio Chamber, Steve Stivers. Am.Sub.S.B. No. 80, 2004 Ohio Laws 144. Included in S.B. 80 was newly created R.C. 2307.71(B) where the General Assembly plainly and unambiguously states the forthcoming sections of the OPLA "abrogate all common law product liability causes of action." R.C. 2307.71(B). There is no ambiguity in this amendment to

the OPLA and, thus, no need for courts to evaluate the legislature's intent to ascertain the statute's meaning. *See Wilson v. Lawrence,* 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶ 11. No ambiguity exists since R.C. 2307.71(B) clearly and unequivocally mandates that courts rely on the OPLA rather than any common-law theory when reviewing product liability claims. *See Id.* at ¶ 12. Therefore, this Court merely needs to apply the statute as written. *See State v. Hairston,* 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471. Applying R.C. 2307.71(B) in the present matter results in the abrogation of all common-law product liability theories in favor of the OPLA.

Despite claims by Appellees and *amici* supporting Appellees, the above provision, by its plain terms, unambiguously directs courts to rely on the OPLA rather than any common-law theories of product liability. The General Assembly was not required to expressly state it was superseding *Beretta* or *LaPuma*, in addition to *Carrel*, in the uncodified sections of S.B. 80 for the statute to supersede those decisions since "reading the words and phrases in context and construing them according to the rules of grammar and common usage" shows the General Assembly did not intend to limit the application of R.C. 2307.71(B) to only abolish the common-law theory of negligent design. *State ex rel. Steele v. Morrissey,* 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. Instead, the legislature was unambiguous and made clear that the OPLA abrogates every common-law theory of product liability by using the term "all" in R.C. 2307.71(B).

Moreover, within the same uncodified section of S.B. 80 that Appellees cite in support of their claim that the legislation only supersedes *Carrel,* the General Assembly reiterated its clear and expansive intent by declaring "the amendment made by this act to section 2307.71 of the Revised Code is intended to supersede the holding of the Ohio Supreme Court in *Carrel v. Allied*

Products Corp. [citation omitted]… and to abrogate all common law product liability causes of action." Am.Sub.S.B. No. 80, Section 3(D), 2004 Ohio Laws 144 (emphasis added).

C. The General Assembly enacts S.B. 117 to clarify the OPLA applies to public nuisance claims brought against a product's manufacturer and supplier.

In response to the reforms in S.B. 80, plaintiffs began filing common-law public nuisance actions alleging products caused harm to a public right. The most notable of these public nuisance lawsuits occurred when Columbus, Toledo, and other large cities sued Ohio-based Sherwin Williams for the manufacturing of lead paint products.

The lead paint litigation and other product liability actions disguised as public nuisance lawsuits were not well received by the General Assembly. To address plaintiffs circumventing R.C. 2307.71(B), the legislature moved swiftly to pass S.B. 117 in response to escalating litigation. Am.Sub.S.B No. 117, 151 Ohio Laws, Part II, 2274. Under S.B. 117, the legislature explicitly expanded the definition of a product liability claim so it "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." R.C. 2307.71(A)(13).

The updated OPLA statute from S.B. 117 is unambiguous. R.C. 2307.71(A)(13) conveys clearly and unequivocally that product liability claims include "any public nuisance claim"; thus, a court's analysis can end without evaluating legislative intent.

However, if this Court believes there is ambiguity in the OPLA amendments from S.B. 117, Representative Bill Seitz, in a House Session on December 14, 2006, made it abundantly clear that the General Assembly's intent in passing S.B. 117 was, in part, to stop product liability lawsuits from masquerading as public nuisance lawsuits and to clarify all public nuisance claims

based upon the sale of a product are subject to OPLA, in accordance with the legislature's original intent in S.B. 80:

> One of the things we did in Senate Bill 80 was to provide that common law product liability causes of action are abrogated. That means over with, no can do, out the window. Did we leave people who are victimized by defective products remedy less? Of course not. We directed them instead to follow our statutes on products liability. And so in 2307.71(B) we said here are your remedies by statute, common law theories of relief for defective products are abrogated. Why did we do that? Because among other things, the Senate Bill 80 added a statute of repose and many of you were very much in favor of that. You didn't want people sued long after the fact after their products had been out on the market…
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> …
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> …we said in Senate Bill 80 if you want to sue a manufacturer of a defective product on a products liability theory, you've got 10 years from the time that product was put on the market to sue them. Now, we did that two years ago. Trial lawyers are infinitely ingenious people. Just like any other smart business man, they're always looki ng for an angle. So they began to bring product liability suits, but this time they called them nuisance cases at common law. In other words, the gravamen of the lawsuit, the basis of the lawsuit is that the product was bad, but instead of suing under statutory products liability like we told them to when we abrogated common law theories of liability. They said, well this is a nuisance theory, this is not a product liability theory.
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> …
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> …in Senate Bill 80 we said common law product liability theories are abolished; follow our statutes on product liability. We meant all the common law theories that were based on defective products. So what we're doing here in Senate Bill 117 is we're putting belt and suspenders on what we did two years ago by specifically saying product liability claims include claims or causes of action based on common law public nuisance claims, that's all we're doing. We're simply saying frankly again in more clear language because these folks are infinitely ingenious what we said two years ago less specifically...
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> …

> …The classic nuisance case is where you have a residential subdivision and somebody comes in and builds a hog farm and the hogs stink. That is your classic public nuisance. The people who live in the established subdivision can get an order saying hey this is a nuisance, the odors are making me sick, stop the farm. Stop those pigs. But what the plaintiff's lawyers are now doing for example, in the lead paint context is akin to trying to hold the fertilizer manufacturer responsible because the hogs stink…
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> …
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> …to hold manufacturers responsible on a nuisance theory is to turn our Senate Bill 80 on its head… …[1]

Consistent with Representative Seitz's statements, the General Assembly further expressed its intent for the OPLA to apply to public nuisance claims brought against the manufacturer and supplier of a product in Section 3 of the uncodified sections of the bill. The General Assembly stated that S.B. 117 abrogates:

> [A]ll common law product liability causes of action including common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated, including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacturer's or supplier's product.

Am.Sub.S.B No. 117, Section 3, 151 Ohio Laws, Part II, 2274. It does not get any clearer or unambiguous than that. And the passage of S.B. 117 proved to be significant. For instance, in December 2007, the court in *City of Toledo v. Sherwin-Williams Co.* dismissed the lawsuit noting S.B. 117 included language that "expressly encompasses public nuisance claims within the product liability statute." *Sherwin-Williams Co.,* 2007 WL 4965044 (Dec. 12, 2007).

Appellees ask this Court to read into the statute a differentiation between public nuisance claims subject to the OPLA and public nuisance claims that can still seek common-law remedies.

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[1]The Ohio Channel, *House Session - Dec. 14, 2006 Part 2*, https://www.ohiochannel.org/video/house-session-december-14-2006-part-2 (accessed Dec. 28, 2023) (emphasis added).

But no such distinction or bifurcation is present in R.C. 2307.71(A)(13). This Court would exceed its Constitutional authority by adopting Appellees' preferred reading of the OPLA because it would require this Court to rewrite the law when legislative authority is solely vested in the General Assembly. Ohio Constitution, Article II, Section 1.

In sum, S.B. 80, S.B. 117, and the OPLA are unambiguous and the result of a deliberate legislative process. The public policy goals included bringing stability to Ohio's economy by restoring and increasing fairness in Ohio's civil justice system. The legislature accomplished their intent by expressly and unambiguously abrogating all common-law claims against a product's manufacturer and supplier, including those for public nuisance.

D. The District Court erroneously held that the text of the OPLA does not abrogate Appellees' common-law public nuisance claims based on the sale of products.

As discussed above, the belt and suspenders language inserted into the OPLA, through S.B. 80 and S.B. 117 is unambiguous and indicates the OPLA abrogates Appellees' common-law causes of action for public nuisance. In pertinent parts, S.B. 117 defines a product liability claim to include "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 public." R.C. 2307.71(A)(13). The term "any" is akin to "all" and means an indefinite number. *In re Collier*, 85 Ohio App.3d 232, 237, 619 N.E.2d 503 (4th Dist.1993). Consequently, the OPLA's definition of "[p]roduct liability claim" controls and it encompasses any and all common-law public nuisance claims. *See State v. S.R.*, 63 Ohio St. 3d 590, 589 N.E.2d 1319, 1323 (1992) (the "General Assembly's construction of a statute as provided by a definitional section controls the application of the statute."), citing *Montgomery Cty. Bd. of Commrs. v. Pub. Util. Comm.*, 28 Ohio St.3d 171, 503 N.E.2d 167, 170 (1986).

Applying this plain and all-encompassing language, Appellees' common-law public nuisance claims are "product liability claims" under the OPLA, considering they allege the pharmacies "created and maintained a public nuisance" because their "marketing," "distributing," and "selling" of prescription opioids "unreasonably interfere with the public health, welfare, and safety." Supp. Am. Compls. ¶ 619, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio 2020), ECF Nos. 3326, 3327; *see also* R.C. 2307.71(A)(13). Additionally, there appears to be no dispute that prescription opioids fall within the statutory definition of a "product." *See* R.C. 2307.71(A)(12).

If this Court believes any uncertainty exists regarding whether the OPLA abrogates Appellees' common-law public nuisance claims based on the sale of products (which it should not), the legislative history discussed above provides valuable context and guidance regarding the General Assembly's intent. For instance, S.B. 117 provides the OPLA amendments were meant to "abrogate common law product liability causes of action including common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated…" Am.Sub.S.B No. 117, Section 3, 151 Ohio Laws, Part II, 2274. That encompasses Appellees' claims.

Rather than applying Ohio law as enacted by the General Assembly, the District Court attempted to rewrite the OPLA, which is not permissible. "A fundamental principle of the constitutional separation of powers among the three branches of government, is that the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21. This Court should apply the plain and unambiguous language of the OPLA, which completely abrogates Appellees' common-law public nuisance claims based on the sale of products.

V. CONCLUSION

The Ohio Chamber and the OACJ respectfully request this Court to find the OPLA abrogates a common-law claim of absolute public nuisance resulting from the sale of a product in commerce even when a plaintiff seeks equitable abatement, including both monetary and injunctive remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 8th day of January, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing system. I further certify that a copy of the foregoing was served by e-mail upon the following counsel for the parties:

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