

**IN THE SUPREME COURT OF OHIO**

IN RE: NATIONAL PRESCRIPTION	:	Case No. 2023-1155
OPIATE LITIGATION	:	
	:	
TRUMBULL COUNTY, OH;	:	
LAKE COUNTY, OH;	:	On Review of Certified Question
PLAINTIFFS' EXECUTIVE COMMITTEE,	:	from the U.S. Court Of Appeals for
	:	the Sixth Circuit, Case No. 22-3750
<i>Respondents,</i>	:	<i>et al.</i>
	:	
v.	:	
	:	
PURDUE PHARMA L.P., <i>ET AL.</i> ,	:	
	:	
WALGREENS BOOTS ALLIANCE, INC.,	:	
WALGREEN CO., WALGREEN EASTERN	:	
CO., INC; CVS PHARMACY, INC., OHIO	:	
CVS STORES, LLC, CVS TENNESSEE	:	
DISTRIBUTION, LLC, CVS RX SERVICES	:	
INC., CVS INDIANA, LLC; WALMART	:	
INC.,	:	
	:	
<i>Petitioners.</i>	:	

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**AMICUS CURIAE BRIEF OF THE CLEVELAND BUILDING & CONSTRUCTION  
TRADE COUNCIL IN SUPPORT OF RESPONDENTS**

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## **I. STATEMENT OF INTEREST OF THE CLEVELAND BUILDING & CONSTRUCTION TRADES COUNCIL**

Established over one hundred years ago in 1913, The Cleveland Building & Construction Trades Council (“Building Trades”) is the umbrella organization for more than 29-member local unions working in the construction industry in every county, city, township and village in the Greater Cleveland region, including Lake County. Its member unions include boilermakers, bricklayers, carpenters, cement masons, electrical workers, elevator operators, glaziers, insulators, iron workers, laborers, millwrights, pipefitters, roofers, sheet metal workers, Teamsters, stage-hands and tile layers.<sup>1</sup> The employees of these unions (“Members”) reside throughout Northeast Ohio, including in Lake and Trumbull County, and provide the skilled labor necessary to build many of the state’s most exciting economic development projects. The Building Trades’ affiliated unions represent more than 10,000 highly skilled and highly trained Member-craftworkers who work with developers, building owners, contractors and individuals who rely on a productive and professional workforce.

To help foster growth amongst skilled workers in Ohio, the Council offers over fifteen apprenticeship programs to Ohioans seeking a career in the trades. These programs offer a career path—as an alternative to college and without student loan debt—where a graduating apprentice can earn an average starting hourly wage of approximately \$28 plus benefits.<sup>2</sup> The Building Trades

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<sup>1</sup> A full list of the district councils and local unions that comprise the Cleveland Building Trades can be found at Cleveland Building & Construction Council, *Local Unions & District Councils*, 2023, <https://www.cbctc.org/local-unions-district-councils> (accessed on February 5, 2024).

<sup>2</sup> Cleveland Building & Construction Council, *Apprenticeships*, 2023, <https://www.cbctc.org/about-apprenticeships> (accessed on February 5, 2024).

is heavily invested in the communities it serves and is committed to diversity and inclusion in the workplace.<sup>3</sup>

While the Building Trades has excelled in recruiting workers and providing developers, building owners and contractors with a productive and professional workforce, its Members have been hit hard by the opioid crisis. In a 2023 article, the Brookings Institute examined the economic impact of the opioid epidemic and concluded that “[t]here is strong evidence that the opioid epidemic has reduced the labor force participation in the United States.”<sup>4</sup> The Brookings Institute also concluded that “[w]hile the opioid epidemic has had a significant impact across the labor market, its effect have been particularly pronounced in specific occupations and industries[,]” including the construction industry.<sup>5</sup>

Not surprisingly, the Brookings Institute found that occupational injuries often lead to opioid prescriptions and the jobs with the highest rates of opioid overdose fatalities generally have high occupational injuries and low access to paid sick leave. “Employees with limited access to paid sick leave may also rely on opioids after an occupational injury in order to manage pain and continue working, making them more vulnerable to [opioid use disorder].<sup>6</sup> Thus, workers, such as the Building Trade Members, have often continued to work after suffering occupational injuries

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<sup>3</sup> Cleveland Building & Construction Council, *Diversity & Inclusion Programs*, 2023, <https://www.cbctc.org/diversity-inclusion> (accessed on February 5, 2024).

<sup>4</sup> The Brookings Institution, *The Economic Impact of the Opioid Epidemic*, April 17, 2023, <https://www.brookings.edu/articles/the-economic-impact-of-the-opioid-epidemic> (accessed on February 5, 2024).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

and have masked those injuries through the use of prescription opioids—often leading to opioid use disorder and sometimes death.

“The State of Ohio is among the states that have felt the greatest burden of this epidemic. For example, Ohio is one of eight states whose opioid mortality rate doubled every three years from 1999 to 2016, and Ohio has the fifth-highest rate of overdose deaths in the US.”<sup>7</sup> A 2017 study by the Plain Dealer likewise confirmed the impact opioids had on Ohio construction workers.<sup>8</sup> The study concluded that “[c]onstruction workers in Ohio were seven times more likely to die of an opioid overdose last year than were workers in other professions, according to a Plain Dealer analysis that included records from more than 12,000 opioid drug overdose deaths in the state from 2010 through 2016.” The Plain Dealer study found that there “isn’t a single reason that men in these skilled jobs are losing battles with addiction and dying so often; there are many.” “Construction work is physical. Swinging a hammer over and over for hours. Hauling beams and bricks and coils of wire. Or kneeling all day to smooth cement or lay bricks. Tough, repetitive work wears down even the strongest bodies over time, often causing chronic lower back, shoulder and knee pain.” Thus, “[t]aking a pill to get through the day became routine for some, especially those who had families to feed and mortgages to pay.”<sup>9</sup>

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<sup>7</sup> MDPI, Pharmacy, MacKinnon, N.J.; Privitera, E. *Addressing the Opioid Crisis through an Interdisciplinary Task Force in Cincinnati, Ohio, USA*, July 9, 2020, <https://doi.org/10.3390/pharmacy8030116> (accessed on February 5, 2024).

<sup>8</sup> Metro, *Ohio Construction Workers Seven Times More Likely to Die of an Opioid Overdose in 2016*, November 5, 2017, [https://www.cleveland.com/metro/2017/11/ohio\\_construction\\_workers\\_seven\\_times\\_more\\_likely\\_to\\_die\\_of\\_an\\_opioid\\_overdose\\_in\\_2016.html](https://www.cleveland.com/metro/2017/11/ohio_construction_workers_seven_times_more_likely_to_die_of_an_opioid_overdose_in_2016.html) (accessed on February 5, 2024).

<sup>9</sup> *Id.*

## **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

As stated above, Ohio is among the states hardest hit by this epidemic and Ohio's local governmental entities have been on the front lines of battling the opioid crisis created by others, including, as the jury found, the pharmacy-Appellants. Nevertheless, Appellants request that this Court conclude that the Ohio Product Liability Act ("OPLA") bars the Counties' common-law public nuisance claims seeking equitable relief to abate the public nuisance the jury determined was caused by the pharmacy-Appellants through the dispensing of prescription opioids in violation of their statutory duties. As stated more fully below, such a conclusion is contrary to the OPLA's express language, history and the difference between claims seeking compensatory damages and claims seeking equitable abatement, a remedy which is essential to every community throughout Ohio.

## **III. STATEMENT OF THE CASE AND FACTS**

The Building Trades incorporate and rely on the statement of the case and facts contained in the parties' briefing.

## **IV. ARGUMENT**

### **A. The Abatement of Public Nuisances Is Supported by the History of the OPLA and the History of Common Law Public Nuisance In Ohio.**

As this Court held in a matter involving one of the Building Trades' unions, Ohio courts "look to the language of the statute, the circumstances under which the statute was enacted, legislative history, and the consequences of a particular construction when determining the intention of the legislature" if a statute is ambiguous. *See Sheet Metal Workers' Int'l Ass'n, Loc. Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444, ¶ 29. While the Building Trades believes the statute clearly does not abrogate equitable relief, if the statute were subject to interpretation, these additional factors confirm, as the trial court correctly determined, that the OPLA does not bar equitable relief in public nuisance

claims. See *Cty. of Lake, Ohio v. Purdue Pharma, L.P. (In re Natl. Prescription Opiate Litigation)*, 622 F. Supp. 3d 584, 598-600 (N.D. Ohio 2022).

First, as the trial court correctly concluded, as did the Ross County Common Pleas Court did in an action brought by Attorney General Yost on behalf of the State of Ohio,<sup>10</sup> this Court's decision in *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, "upheld as viable a public nuisance claim that was virtually identical to the one alleged by Plaintiffs in this case." *Cty. of Lake, Ohio*, 622 F. Supp. 3d at 599.

Second, while the General Assembly had an opportunity to bar claims for equitable relief for public nuisance claims when it amended the OPLA in 2005 and again in 2007, it did not do so. The legislative record provides no indication that the General Assembly sought to bar equitable relief associated with public nuisance claims. If the legislature intended to bar equitable relief for a broad category of public nuisance claims it should have expressly done so, but it did not.

Last, as the trial court correctly found, the history of common law nuisance in Ohio draws a distinction between compensatory damages that compensate an injured party for the harm caused by the nuisance from equitable abatement that requires tortfeasors to implement or pay for prospective remedial measures to abate the public nuisance. *Cty. of Lake, Ohio*, 622 F. Supp. 3d at 594. Here, had the General Assembly intended to bar actions to abate a public nuisance without articulating any statutory procedure to bring such claims, it would have essentially shifted the responsibility of abating a public nuisance from the tortfeasor to Ohio's taxpayers.

Had the General Assembly intended to abrogate actions to abate a public nuisance without providing a statutory mechanism for bringing them, it would have expressly done so and informed

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<sup>10</sup> *State ex rel. DeWine v. Purdue Pharma L.P.*, Ross C.P. No. 17 CI 261, 2018 WL 4080052 (Aug. 22, 2018).

Ohio taxpayers that they would bear the responsibility for funding any public nuisance created by a tortfeasor. The Building Trades respectfully submits that this Court should not engage in judicial activism and legislate from the bench what the General Assembly chose not to do. If the Court answers the certified question in the affirmative, it will be doing just that. The Court will be telling the Ohio taxpayer that they—and not tortfeasors—will be responsible for paying necessary remedial measures associated with all future public nuisances.

## V. CONCLUSION

The Cleveland Building Trades & Construction Council respectfully urge this Court to answer the certified question in the negative. While Ohio local governments are already taking significant steps to abate opioid epidemic, additional abatement funds are critical to local governments' ability to try and end the opioid epidemic caused by Appellants.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 7<sup>th</sup> day of February, 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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