

IN THE SUPREME COURT OF OHIO

MARK SCHWARTZ, et al., : Supreme Court Case No. 2016-1372
: :
Appellees, : On Appeal from the
v. : Cuyahoga Court of Appeals,
: Eighth Appellate District
HONEYWELL INTERNATIONAL, INC., :
: Court of Appeals No. CA-15-103377
Appellant. : :

MEMORANDUM OF AMICI CURIAE, OHIO MANUFACTURERS' ASSOCIATION,
OHIO COUNCIL OF RETAIL MERCHANTS, OHIO TIRE & AUTOMOTIVE
ASSOCIATION, AND OHIO ALLIANCE FOR CIVIL JUSTICE,
IN SUPPORT OF JURISDICTION FOR PROPOSITION OF LAW NO. 1

Steven G. Blackmer (0072235) (Counsel of
Record)
Melanie M. Irwin (0086098)
Willman & Silvaggio LLP
One Corporate Center
5500 Corporate Drive, Suite 150
Pittsburgh, PA 15237-5848
Phone: (412) 366-3333
Fax: (412) 366-3462

*Counsel for Appellant, Honeywell
International Inc.*

Richard D. Schuster (0022813)
Damien C. Kitte (0084057)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P. O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-5475
Facsimile: (614) 464-6350
rdschuster@vorys.com
dckitte@vorys.com

*Counsel for Amici Curiae Ohio
Manufacturers' Association;
Ohio Council of Retail Merchants; Ohio Tire
& Automotive Association; and Ohio Alliance
for Civil Justice*

James L. Ferraro (0076089)
John Martin Murphy (0066221)
Anthony Gallucci (0066665)
Shawn M. Acton (0072675)
Kelley & Ferraro LLP
2200 Key Tower
127 Public Square
Cleveland, Ohio 44114

*Counsel for Appellees,
Mark Schwartz, Individually and as
Executor of the Estate of Kathleen
Schwartz, deceased, et al.*

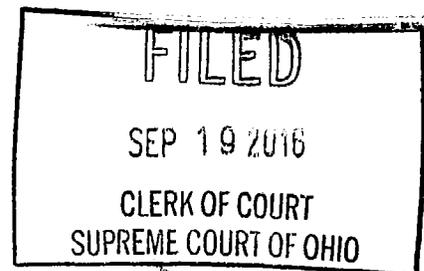


TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

STATEMENT OF PUBLIC AND GREAT GENERAL INTEREST 2

STATEMENT OF THE CASE AND FACTS 5

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1 5

Proposition of Law No. 1: A theory of causation based only upon cumulative exposure to various asbestos-containing products is insufficient to demonstrate that a particular defendant’s product was a “substantial factor” under R.C. 2307.96..... 5

 A. There Was No Evidence Of The Manner, Proximity, Frequency And Length Of Decedent’s Exposures, If Any, Attributable To Asbestos From Bendix Brakes..... 7

 B. Appellees’ Experts Merely Grouped The Unquantified *De Minimus* Secondary Exposures From Bendix Brakes With All Other Exposures Under The “Cumulative Exposure” Theory 8

 C. Grouping Of *De Minimus* Exposures With More Significant Exposures Under The Banner Of “Cumulative Exposures” Is Contrary To The Legal Requirement Of Showing Substantial Factor Causation 9

 D. The Supreme Court Of Ohio Needs To Reverse This New Theory Of Mass-Tort Liability 11

CONCLUSION..... 11

CERTIFICATE OF SERVICE 13

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Manufacturers' Association ("OMA") is a statewide association of approximately 1,600 manufacturing companies which collectively employ the majority of the roughly 610,000 men and women who work in manufacturing in the State of Ohio. OMA's members have a vital interest in ensuring that Ohio remains a desirable place to do business.

The Ohio Council of Retail Merchants (the "Ohio Council"), along with its member companies, have a keen interest in the resolution of this case. The Ohio Council was founded in 1922 and represents more than 7,500 retailers, wholesalers and distributors, ranging from local enterprises to influential regional businesses and large enterprise organizations. The Ohio Council is dedicated to presenting and protecting its members' interests on important statewide issues and to promoting business in Ohio.

The Ohio Tire & Automotive Association ("OTAA") is a statewide trade association representing the interests of Ohio tire and automotive dealers, their suppliers, and other members of Ohio's tire industry. The OTAA provides a forum for discussion of important topics and issues facing the tire industry. The OTAA was formed in 1967 to safeguard and advance the business interests of its members; to promote standards of ethics; to promote harmony, good will, and understanding among its members; to encourage an exchange of ideas, technical knowledge, and retailing and wholesaling procedures; to improve the quality and standards of the products of the tire and automotive industry; to promote cooperation between members in local, state, and national regulating bodies with problems affecting the tire and automotive industry; and to acquaint through advertising and other means the buying public with the true value of the tire and automotive dealer in the community.

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. The OACJ leadership includes members from the Ohio Manufacturers Association, Ohio Council of Retail Merchants, NFIB Ohio, Ohio Chamber of Commerce, Ohio Association of Certified Public Accountants, Ohio Hospital Association, Ohio State Medical Association, and other organizations. OACJ members support a balanced civil justice system that will not only award fair compensation to injured persons, but will also impose sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ also supports stability and predictability in the civil justice system in order that Ohio’s businesses and professionals may know what risks they assume as they carry on commerce in this state.

Amici recognize that the future viability of many Ohio companies, and in turn the livelihoods of their employees, depends upon the correct application of Ohio’s statutes governing asbestos litigation. Accordingly, *Amici* request that this Court accept jurisdiction to review Defendant-Appellant Honeywell International Inc.’s Proposition of Law 1.

STATEMENT OF PUBLIC AND GREAT GENERAL INTEREST

Asbestos-related lawsuits have clogged Ohio courts for over three decades. At one point, over 40,000 asbestos lawsuits were pending in Ohio courts. Nationally, by 2003 over 70 companies had been driven into bankruptcy by these lawsuits, and since that time many more have filed for bankruptcy. Even today, over 1,000 asbestos lawsuits are still pending in Ohio. Now, a new version of mass-tort liability – the “cumulative exposure” theory – has been adopted by the Eighth District. This case presents the **first opportunity** for this Court to find that this mass tort expansion **is not permitted by Ohio law**.

This Court is called upon to decide whether a plaintiff can avoid the requirement, put in place by the General Assembly to control the flood of asbestos cases, found in R.C. 2307.96, which requires that a plaintiff prove, for each defendant, evidence of the manner, proximity, frequency and length of exposure to asbestos from a particular defendant's product to establish the element of substantial factor causation. **The Eighth District has jettisoned those requirements of R.C. 2307.06** and instead grouped *de minimus* or any unquantified asbestos exposures with significant exposures from other sources under the banner of "cumulative exposures." The courts below permitted cumulative exposures to satisfy the element of "substantial factor" causation and thus nullified the requirements of R.C. 2307.96.

This case is one of public or great general interest because the decision of the Eighth District allows a jury to impose liability for asbestos exposure on an individual defendant absent the evidence required by R.C. 2307.96 and abrogates the intent of the General Assembly. **The General Assembly enacted R.C. 2307.96** as part of H.B. 292 in 2004, **to address Ohio's "asbestos litigation crisis" as a result of over thirty-nine thousand asbestos personal injury cases pending in Ohio courts in 2003.** H.B. 292, Section 3(A)(3)(c), 150 Ohio Laws, Part III, 3989.

The General Assembly specifically found that:

- "The current asbestos personal injury litigation system is **unfair and inefficient**, imposing a severe burden on litigants and taxpayers alike." (Emphasis added) *id.* at Section 3(A)(2).
- "According to Judge Leo Spellacy, . . . appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999 there were approximately twelve thousand eight hundred pending asbestos cases in

Cuyahoga County. However, **by the end of October 2003, there were over thirty-nine thousand pending asbestos cases.** Approximately two hundred new asbestos cases are filed in Cuyahoga County every month.” (Emphasis added) *id.* at Section 3(A)(3)(e).

- “Nationally, **asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies,** including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.” (Emphasis added) *id.* at Section 3(A)(4).
- “**Owens Corning, a Toledo company, has been sued four hundred thousand times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy.** The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off two hundred seventy-five workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of five hundred jobs and a fifteen-million to twenty-million dollar annual reduction in regional income.” (Emphasis added) *id.* at Section 3(A)(4)(d).

To address these problems, the General Assembly enacted R.C. 2307.96 to establish the substantial factor causation requirement. The General Assembly made clear its intent by stating that:

It is the intent of the General Assembly in enacting section 2307.96 of the Revised Code in this act **to establish specific factors** to be considered when determining whether a particular plaintiff’s exposure to a particular defendant’s asbestos was a substantial factor in causing the plaintiff’s injury or loss.

(Emphasis added.) H.B. 292, Section 5, 150 Ohio Laws, Part III, 3989. The General Assembly also stated that:

Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail. **To submit a legal concept such as a "substantial factor" to a jury in these complex cases without such scientifically valid defining factors would be to invite speculation** on the part of juries, something that the General Assembly has determined not to be in the best interests of Ohio and its courts.

(Emphasis added) *id.*

The courts below have now overruled the substantial factor requirements of R.C. 2307.96 and thus paved the way for plaintiffs to pursue claims against Ohio businesses and employers based on *de minimus* or any unquantified asbestos exposures. **The Eighth District's decision is just one in a series of attempts by one of several panels of the Eighth District Court of Appeals to gut asbestos reform requirements.** Absent review by this Court, this evisceration invites plaintiffs' counsel to file thousands of asbestos-related lawsuits of dubious merit in Ohio (and Cuyahoga County) and reestablishes Ohio as a haven for job-destroying lawsuits.

STATEMENT OF THE CASE AND FACTS

The *Amici* adopt the statement of case and facts from the memorandum in support of jurisdiction filed by Defendant-Appellant Honeywell International, Inc.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1

Proposition of Law No. 1: A theory of causation based only upon cumulative exposure to various asbestos-containing products is insufficient to demonstrate that a particular defendant's product was a "substantial factor" under R.C. 2307.96.

Ohio Revised Code 2307.96 clearly and specifically requires a plaintiff to present evidence of manner, proximity, frequency and length of exposure to asbestos from a *particular* defendant's product. The Eighth District's decision erases any objective criteria establishing

substantial factor causation as required by R.C. 2307.96. In the present case, **Appellees had no evidence regarding manner, proximity, frequency or length of decedent's exposure** to asbestos from Bendix brakes. The courts below nevertheless permitted the jury to consider whether asbestos from Bendix brakes caused decedent's mesothelioma under the new theory of "cumulative exposure."

The "cumulative exposure" theory, however, negates the substantial factor requirement under R.C. 2307.96, which provides that, for a particular defendant in an asbestos case, **"the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury** or loss on which the cause of action is based." (Emphasis added) R.C. 2307.96(A). Regarding the evidence that a plaintiff must put forth to establish substantial-factor causation, the statute provides:

In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

- (1) The **manner** in which the plaintiff was exposed to the defendant's asbestos;
- (2) The **proximity** of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;
- (3) The **frequency and length** of the plaintiff's exposure to the defendant's asbestos;
- (4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

(Emphasis added) R.C. 2307.96(B).

The courts below permitted the *de minimus*, if any, secondary exposure attributable to Bendix brakes to be grouped with other and more significant exposures under the guise of

“cumulative exposure.” Such evidence of *de minimus* exposure does not satisfy Ohio’s substantial factor requirement.

A. There Was No Evidence Of The Manner, Proximity, Frequency And Length Of Decedent’s Exposures, If Any, Attributable To Asbestos From Bendix Brakes.

While there was evidence of asbestos exposure from multiple sources over decedent’s life, **there was evidence of only *de minimus*, if any, secondary exposure from Bendix brakes.** Appellees failed to provide evidence of the manner, proximity, frequency and length of decedent’s exposures attributable to Bendix brakes.

From 1963 to 1996, decedent’s father, Arthur Webber, worked at Pennwalt as an electrician. Mr. Webber testified that throughout his thirty year employment, he was frequently occupationally exposed to “clouds of asbestos dust” from asbestos-containing products that would “engulf” him with asbestos fibers. According to Mr. Webber, this dust covered his clothing every day, and it would remain on his clothing as he drove in the family car, and picked up decedent from school. Mr. Webber would often play with decedent while she was an infant, or feed her, while still wearing his work clothes from Pennwalt. Thus, there was evidence regarding the manner, proximity, frequency and length of decedent’s exposures attributable to her father’s employment at Pennwalt. Appellees collected several million dollars in settlement funds from the Defendants responsible for the asbestos-containing products used at Pennwalt.

There was, however, no evidence of the manner, proximity, frequency and length of exposures attributable to Bendix brakes. Over the eighteen year period during which decedent lived with Mr. Webber, he performed five to nine brake jobs using Bendix brakes. Decedent never helped Mr. Webber perform a brake job, nor was she even in proximity to him at the time of the work. Mr. Webber testified that he would routinely dust his clothes off in the garage.

None of the witnesses ever testified that Mr. Webber came in contact with decedent immediately following one of the sporadic times in which he had changed brakes. There was no testimony that decedent ever laundered the clothing that Mr. Webber wore when he did the brake jobs over the eighteen year period in question. Simply put, **there was no evidence regarding the manner, proximity, frequency and length of decedent's exposures attributable to asbestos from Bendix brakes**, despite the clear requirement of such evidence to establish substantial factor causation under R.C. 2307.96.

B. Appellees' Experts Merely Grouped The Unquantified *De Minimus* Secondary Exposures From Bendix Brakes With All Other Exposures Under The "Cumulative Exposure" Theory.

Even though there was no evidence regarding manner, proximity, frequency and length of decedent's exposure to asbestos from Bendix brakes – as is required by R.C. 2307.96 – the courts below allowed Appellees' experts to simply group those exposures with the exposures attributable to Mr. Webber's work at Pennwalt.

Appellees' pathology expert, **Dr. Carlos Bedrossian, admitted that he could not attribute causation to any specific product, including Bendix brakes.** Dr. Bedrossian did not opine to a reasonable degree of scientific or medical certainty that the exposure to Bendix brakes was responsible for decedent's peritoneal mesothelioma. Instead, he opined only that it was a contributing factor in conjunction with the asbestos exposure from her father's employment at Pennwalt.

Appellees' industrial hygiene expert, Joseph Guth, Ph.D., was unable to opine "how much exposure had occurred and over what period of time" for either Mr. Webber or decedent. Dr. Guth merely focused on the fact that decedent developed mesothelioma. The mesothelioma diagnosis confirmed in his mind that she must have had sufficient levels of exposures to

asbestos-containing products. **Similar to Dr. Bedrossian, however, Dr. Guth did not separate out any of decedent's potential exposures.** He simply grouped the secondary exposure from Mr. Webber's 30 years of daily exposures while at Pennwalt with the *de minimus* exposure, if any, from the possible take home of asbestos fibers that were released from the sporadic 5 to 9 brake jobs done over 18 years.

C. Grouping Of *De Minimus* Exposures With More Significant Exposures Under The Banner Of "Cumulative Exposures" Is Contrary To The Legal Requirement Of Showing Substantial Factor Causation.

The grouping of *de minimus*, if any, secondary exposure associated with Bendix brakes with the other exposures in this case under the banner of "cumulative exposure" is **contrary to the substantial factor requirement under Ohio law.** The cumulative exposure theory is a variant of the "each and every exposure" theory under which *any* exposure to asbestos – even a single fiber – above the normal background levels can cause an asbestos-related disease.

- **Lacks scientific support**

The "each and every exposure" theory is routinely discarded due to its **lack of scientific support.** See, e.g., *Betz v. Pneumo Abex, LLC*, 615 Pa. 504, 550, 44 A.3d 27 (2012) (labeling the "every exposure" theory a fiction in irreconcilable conflict with itself); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004) (noting that the plaintiff's expert's opinion "that every breath [the plaintiff] took which contained asbestos could have been a substantial factor in causing his disease, is not supported by the medical literature").

- **Cannot satisfy the legal test for substantial factor causation**

More importantly, courts have recognized that the "cumulative exposure" or "each and every exposure" theory **cannot satisfy the legal requirement of substantial factor causation.** See, e.g., *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 954-955 (6th Cir. 2011)

(holding that, under Kentucky law, plaintiff's expert's opinion that "[a]ll of his exposures – and one can't differentiate them – contributed to his developing mesothelioma" was insufficient to establish that the defendant's product was a substantial factor in causing the decedent's disease); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) (noting that, under Kentucky law, plaintiffs' "every exposure" hypothesis would make every incidental exposure to asbestos a substantial factor and render the substantial factor test "meaningless").

- **"Cumulative exposure" cannot even satisfy a lesser causation standard**

Furthermore, the Supreme Court of Georgia recently considered evidence similar to the present case and held that the evidence was insufficient to show causation, even under Georgia's less exacting causation standard. *See Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 788 S.E.2d 421 (2016). In *Scapa*, the plaintiff, Mr. Knight, was an independent contractor who occasionally worked at Scapa's Waycross facility, where he was allegedly exposed to an unquantified amount of asbestos. *Id.* at 287. The plaintiff's pathology expert opined that "[b]ecause each and every exposure to respirable asbestos in excess of the background contributes to the cumulative exposure, . . . each exposure in excess of the background is a contributing cause to the resulting mesothelioma regardless of the extent of each exposure." *Id.* at 288.

Under Georgia law, a plaintiff need not show that exposure to asbestos attributable to a particular defendant was a "substantial" factor in causing the injury. *Id.* at 291. Instead, a plaintiff must show only that the exposure made a "meaningful contribution" to the injury. *Id.* at 291. Despite this lesser standard, the *Scapa* court nevertheless held that the plaintiff's evidence did not satisfy the "meaningful contribution" standard:

But by his testimony, Dr. Abraham essentially told the jury that it was unnecessary to resolve the extent of exposure at the Waycross facility — if the jury determined that Knight was exposed at the facility to any asbestos beyond background, that exposure contributed to his cumulative exposure, and according to Dr. Abraham, it was, therefore, a contributing cause of the mesothelioma. Such testimony does not “fit” the issue that the jury was charged with deciding, and it could not have been helpful to the jury.

Id.

D. The Supreme Court Of Ohio Needs To Reverse This New Theory Of Mass-Tort Liability.

The issue for this Court is clear. The Eighth District’s decision permits a plaintiff to group exposures – which individually fail to satisfy the substantial factor standard under R.C. 2307.96 – with other exposures and hold a defendant liable despite being responsible for no more than *de minimus*, if any, exposure. Courts that have considered analogous facts have held that such an approach is inconsistent with the substantial factor requirement. The Eighth District’s decision has thwarted the intent of the General Assembly, and review by this Court is needed to give clear direction to all courts in Ohio regarding the proper application of the requirements of R.C. 2307.96.

CONCLUSION

Because the Eighth District’s decision below is directly contrary to the intent of the General Assembly when it enacted R.C. 2307.96, *Amici* respectfully urge this Court to accept jurisdiction over Appellant’s Proposition of Law No. 1 to require courts to enforce the requirements of R.C. 2307.96, that the plaintiff prove manner, proximity, frequency, and length of exposure to asbestos from a specific defendant’s product in order to establish that the specific defendant’s product was a substantial factor in causing the plaintiff’s disease. Furthermore, it is imperative for this Court to reject the new theory of “cumulative exposure” as a replacement for the proof required for a plaintiff to establish substantial factor causation under R.C. 2307.96.

Respectfully submitted,

Richard D. Schuster

Richard D. Schuster (0022813)

Damien C. Kitte (0084057)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street, P. O. Box 1008

Columbus, Ohio 43216-1008

Telephone: (614) 464-5475

Facsimile: (614) 464-6350

rdschuster@vorys.com

dckitte@vorys.com

*Counsel for Amici Curiae Ohio
Manufacturers' Association; Ohio Council
of Retail Merchants; Ohio Tire &
Automotive Association; and Ohio Alliance
for Civil Justice*

CERTIFICATE OF SERVICE

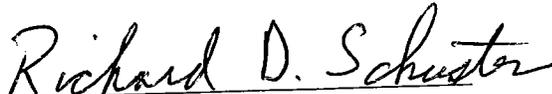
The undersigned certifies that a copy of the foregoing Memorandum of *Amici* in Support of Jurisdiction For Proposition of Law No. 1 was served by First-Class U.S. Mail, postage pre-paid, on the following counsel of record this 19th day of September, 2016:

James L. Ferraro (0076089)
John Martin Murphy (0066221)
Anthony Gallucci (0066665)
Shawn M. Acton (0072675)
Kelley & Ferraro LLP
2200 Key Tower
127 Public Square
Cleveland, Ohio 44114

*Attorney for Plaintiff-Appellee
Mark Schwartz, Individually and as
Executor of the Estate of Kathleen
Schwartz, deceased, et al.*

Steven G. Blackmer (0072235) (Counsel of
Record)
Melanie M. Irwin (0086098)
Willman & Silvaggio LLP
One Corporate Center
5500 Corporate Drive, Suite 150
Pittsburgh, PA 15237-5848
Phone: (412) 366-3333
Fax: (412) 366-3462

*Counsel for Appellant, Honeywell
International Inc.*



Richard D. Schuster (0022813)
*Counsel for Amici Curiae Ohio
Manufacturers' Association; Ohio
Council of Retail Merchants; Ohio
Tire & Automotive Association; and
Ohio Alliance for Civil Justice*