

MEMORANDUM IN SUPPORT OF JURISDICTION

IN THE SUPREME COURT OF OHIO

07-0457

Renita Jackson, et al.	:	
	:	
Appellant.,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
v.	:	Eighth Appellate District
	:	
The Glidden Company,	:	Court of Appeals
et al.,	:	Case No. 87779
	:	
Appellees.	:	

---

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS RENITA JACKSON, ET AL.

---

Michael J. O'Shea, Esq.  
(0039330)  
55 Public Square #1600  
Cleveland, Ohio 44113  
(216) 241-0011  
(216) 479-7687 - fax

Counsel for Appellees  
Listed on Next Pages

John J. McConnell, Esq.  
Fidelma Fitzpatrick, Esq.  
Motley Rice LLC  
321 South Main Street  
PO Box 6067  
Providence, RI 02940  
(401) 457-7700  
(401) 457-7708 - fax

Attorneys for Appellants

**FILED**  
MAR 14 2007  
MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

COUNSEL FOR APPELLEES

ATTORNEYS FOR ATLANTIC RICHFIELD COMPANY:

Hugh E. McKay  
PORTER, WRIGHT, MORRIS & ARTHUR  
925 Euclid Avenue, Suite 1700  
Cleveland, Ohio 44115

Philip H. Curtis  
ARNOLD & PORTER  
399 Park Avenue  
New York, New York 10022

ATTORNEYS FOR FULLER O'BRIEN:

Richard J. DiSantis  
BUCKLEY, KING & BLUSO  
1400 Bank One Center  
Cleveland, Ohio 44114

Charles W. Siragusa  
CROWLEY, BARRETT & KARABA, LTD.  
20 South Clark Street, #2310  
Chicago, Illinois 60603

ATTORNEYS FOR THE SHERWIN-WILLIAMS COMPANY:

Robert S. Walker  
JONES, DAY, REAVIS & POGUE  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114

Paul M. Pohl  
Charles Moellenberg  
JONES, DAY, REAVIS & POGUE  
500 Grant Street, 31<sup>st</sup> Floor  
Pittsburgh, Pennsylvania 15219

ATTORNEYS FOR NL INDUSTRIES:

Timothy M. Fox  
ULMER & BERNE  
1300 East Ninth Street  
Suite 900  
Cleveland, Ohio 44114

Timothy S. Hardy  
KIRKLAND & ELLIS  
655 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005

ATTORNEYS FOR PPG INDUSTRIES/  
E.I. DU PONT DE NEMOURS & COMPANY:

James R. Miller  
DICKIE, McCAMEY & CHILCOTE  
Two PPG Place, Suite 400  
Pittsburgh, Pennsylvania 15222

Richard J. DiSantis  
BUCKLEY, KING & BLUSO  
1400 Bank One Center  
Cleveland, Ohio 44114

ATTORNEYS FOR LEAD INDUSTRIES ASSOCIATION:

David Ross  
Nicholas J. Milanich  
REMINGER & REMINGER CO., L.P.A.  
113 St. Clair Building  
Cleveland, Ohio 44114

Mark L. Sullivan  
Michael Griffin  
SULLIVAN, SULLIVAN & PINTA  
100 Franklin Street  
Boston, Massachusetts 02110

ATTORNEYS FOR SCM/GLIDDEN:

Michael T. Nilan  
HALLELAND LEWIS NILAN &  
JOHNSON

Pillsbury Center South, Suite 600  
220 South Sixth Street  
Minneapolis, Minnesota 55402

James T. Millican  
Weston Hurd Fallon Paisley  
2500 Terminal Tower  
Cleveland, Ohio 44113

ATTORNEYS FOR AMERICAN CYANAMID

Mary M. Bittance  
BAKER & HOSTETLER  
3200 National City Center  
1900 East Ninth Street  
Cleveland, Ohio 44114

TABLE OF CONTENTS

	<u>Page</u>
<u>EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....</u>	1
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	9
<u>Proposition of Law No. 1:</u> Pursuant to the doctrine of "the law of the case," a decision of a reviewing court in a case remains the law of that case on all the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.....	9
<u>Proposition of Law No. 2:</u> Alternative Liability does not require that an injured party identify the negligent defendant or defendants if the plaintiff demonstrate a factual issue as to each defendant's negligence .....	11
<u>Proposition of Law No. 3:</u> Appellant Courts are obligated to discuss all assignments of errors before affirming or reversing a trial court's decision.....	13
CONCLUSION.....	15
PROOF OF SERVICE.....	17

APPENDIX

Judgment Entry and Opinion of the Cuyahoga County Court of Appeals (January 25, 2007) 2007 Ohio 277

Jackson v. Glidden Co. (1995), 98 Ohio App. 3d 100

EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

STATEMENT OF THE CASE AND FACTS

I. Introduction.

This case involves a review of a second appeal in the mass tort/lead pigment poisoning litigation that spans the gambit of over 15 years. Attached to this memorandum is the decision of Jackson v. Glidden Co. (1995), 98 Ohio App. 3d 100 (an opinion that Appellants do not seek to contest) - hereinafter "*Jackson I.*" None of the parties to that decision sought review by this Court. Accordingly, absent some extraordinary change of Ohio law, the law handed down in that decision is the "law of the case." See Sheaffer v. Westfield Ins. Co. (2006), 110 Ohio St. 3d 265, 2006 Ohio 4476; and DeRolph v. State (2001), 93 Ohio St. 3d 309.

This case involves an analysis of what is generally called "collective liability" law. Under this facet of Ohio law, a number of defendants are essentially tendered the burden of identifying which of their number are the specific actual or partial cause of an specific injury which is the product of simultaneous and/or combined negligence. Collective liability law exists and is applied only when the specific combined or simultaneous negligence of the defendants in question makes it impossible for the innocently injured plaintiffs to identify which

of the named defendants caused their injury. This law is applied in order to prevent clearly negligent defendants from escaping responsibility for their injury solely because those defendants engaged in conduct which essentially masks their individual negligence and liability. Since the inception of this case in 1992, Ohio courts and the Ohio General Assembly have struggled with what is and how to apply the collectively liability law. This Court absolutely needs to intervene in order to aid and potentially end this decades long struggle.

Appellees have convinced the appellate court, and would like this Court, to ignore Ohio's clear recognition of collective liability law. If the Appellee had it their way, any polluter is basically going to be immune from any liability for environmental injury as long as it has been joined in such pollution by polluters who manufacture the *same pollutant*. In Bowling v. Heil Co. (1987), 31 Ohio St. 3d 277, 284, 31 OBR 559, 565, 511 N.E. 2d 373, 378-379, this Court adopted Comment c to Section 402A of the Restatement of the Law 2d, Torts (1965) 349-350, regarding the philosophical foundation of the products liability doctrine. This Court held that, to the extent that a manufacturer has benefitted from the marketing and distribution of a product to the consuming public, it must bear the burden of compensating individuals injured as a result of the defective condition of goods comprising a portion of its total output. See Flaucher v. Cone Automatic Machine

Co. (1987), 30 Ohio St. 3d 60.

In this case, for purposes of summary judgment, Appellants alleged and proved, in asserting collective liability law, that the Appellees collectively manufactured, produced and marketed a poisonous lead pigment product that has injured thousands of children in Ohio, including the Plaintiff children in this case.

## II. Statement of the Facts and Case.

In the complaint filed back in 1992, Appellants alleged that the Appellees manufactured and/or produced the "lead pigment" that finds itself in all of the lead paint that has poisoned thousands of small children in Ohio - including the minor children named in the complaint. In their case Appellants conceded that, due to the fact that lead pigment was so fungible, making identification of a particular defendant essentially impossible, they had to rely upon Ohio's collective liability law; to wit: Market Share Liability, Alternative Liability and Enterprise Liability. In 1992, the trial court, on an Ohio Civ.R. 12(B)(6) basis, determined that collective liability law did not apply to Appellant's claims, and dismissed the entire case. However, the Eighth District Court of Appeals reversed in *Jackson I*, holding that all three of the collective liability counts exist under Ohio law and were applicable to this case.

After *Jackson I*, this case was remanded back to the trial Court for further proceedings. After much motion practice, the trial court essentially denied class certification (something that the Appellants chose not to appeal). Thereafter, on December 13, 2002, the Appellees moved the trial court for summary judgment. In short, the Appellees moved for summary judgment on the same collective liability issues that permeated *Jackson I*. Appellees argued that regardless of the facts and circumstances of their somewhat reprehensible conduct, Ohio law on collectively liability barred them from ever having to face a court or trier of fact. They argued (i) Market Share Liability was rejected by this Court in the case of Sutowski v. Eli Lilly & Company, (1998), 82 Ohio St.3d 347, 1998 Ohio 388; (ii) Enterprise Liability did not apply to them and (iii) Alternative Liability did not apply to them.

On January 20, 2006, over **three (3) years** after the summary judgment motion was filed, the trial court, without any discussion or analysis, issued a two-sentence post card ruling:

MOTION OF DEFENDANTS (FILED 12/13/2002) FOR SUMMARY JUDGMENT IS GRANTED. THE COURT, HAVING CONSIDERED ALL THE EVIDENCE AND HAVING CONSTRUED THE EVIDENCE MOST STRONGLY IN FAVOR OF THE NON-MOVING PARTY, DETERMINES THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THAT DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW. FINAL. COURT COST ASSESSED TO THE PLAINTIFF(S). BOOK 3476 PAGE 971 01/20/2006 NOTICE ISSUED

Obviously, given the text of that judgment entry, Appellees were unsure of the basis for the trial court granting summary judgment.

Appellees appealed the trial court's grant of summary judgment. However, in the decision of Jackson v. Glidden, 2007 Ohio 277 ("Jackson II"), the Cuyahoga County Court of Appeals affirmed the trial court's decision. Jackson II is the decision that gives rise to this memorandum in support of jurisdiction.

In Jackson II, the Court of Appeals essentially violated the law of the case doctrine, misapplied collective liability law, and then failed to address an important assignment of error altogether. This Court needs to assume jurisdiction of the issues in this case in order to (i) ratify and clarify the "law of the case" doctrine; (ii) ratify, clarify and apply Ohio law on collective liability and (iii) clarify and/or issue a declaration of law when it comes to court of appeals addressing assignments of error as required by Ohio App.R. 12(A).

### III. Law.

#### A. *The Law of the Case doctrine - and how it affects the Market Share Liability Issue.*

Ohio law provides for the doctrine of the "law of the case." As set forth in DeRolph v. State (2001), 93 Ohio St. 3d 309:

Pursuant to the doctrine of the law of the case, the "decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." Nolan v. Nolan (1984), 11 Ohio St. 3d 1, 3, 11 Ohio B. Rep. 1, 2-3, 462 N.E.2d 410, 412. (emphasis supplied).

Because of the existence of the law of the case doctrine, and given

the fact that Appellees chose not to appeal *Jackson I*, Market Share Liability is the law to be applied to this case for its entire history - something violated by the ruling on Market Share Liability in *Jackson II*.

***B. Alternative Liability exists in Ohio.***

Ohio law has always accepted the collective liability doctrine of Alternative Liability. This doctrine was first adopted by this Court in *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St. 3d 396. In *Minnich*, *supra*, this Court held that:

Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm. (2 Restatement of the Law 2d, Torts, Section 433[B][3], adopted.)

This Court went on to analyze the legal morality of, and procedure for, applying this law:

The shifting of the burden of proof brought about by this doctrine avoids the "injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." 2 Restatement of the Law 2d, Torts (1965) 446, Section 433(B)(3), Comment f.

It should be emphasized that under this alternative liability theory, plaintiff must still prove: (1) that two or more defendants committed tortious acts, and (2) that plaintiff was injured as a proximate result of the wrongdoing of one of the defendants. Only then will the burden shift to the defendants to prove that they were not the cause of plaintiff's injuries. This doctrine does not apply in cases where there is no proof

that the conduct of more than one defendant has been tortious. Alternative Liability was also discussed by this Court in Goldman v. Johns-Manville Sales Corp. (1987), 33 Ohio St.3d 40, and Horton v. Harwick Chem. Corp. (1995), 73 Ohio St. 3d 679, both of which declared that the doctrine could not be applied in asbestos cases. In Horton, *supra*, this Court stated:

The factor which makes alternative liability inappropriate in this case was mentioned in dicta in Goldman. The present cases lack what was present in the seminal cases in this area: ***defendants creating a substantially similar risk of harm.*** In Summers, for example, the defendants shot guns with identical ammunition in the direction of the plaintiff. In Minnich, both defendants allegedly supplied ***the same defective chemical*** to the plaintiff's employer. As this court stated in Goldman, "[a]sbestos-containing products do not create similar risks of harm because there are several varieties of asbestos fibers, and they are used in various quantities, even in the same class of product." Goldman, 33 Ohio St.3d at 46, 514 N.E.2d at 697. The records in these cases fail to demonstrate that the level of risk posed by each of the defendants' products is substantially similar.

Given that *Jackson I* was decided in 1995, this was law for purposes of *Jackson I*. This was also the law that had to be applied in *Jackson II* - for two separate but equal reasons: (i) *Jackson I* was the law of the case and (ii) even in the absence of *Jackson I*, nothing had changed in Ohio law on Alternative Liability since the original Minnich, Goldman and Horton decisions of this Court.

*C. Enterprise Liability exists in Ohio.*

Ohio law has recognized Enterprise Liability since the beginning of the twentieth century. No Supreme Court of Ohio case has **ever** reversed the holdings of New York, C & S. L. R. Co. v. Kistler (1902), 66 Ohio State 326, 64 NE 130; Bloom v. Leech (1929) 120 Ohio State 239; and East Ohio Gas Co. v. Daniel (1929) (App., Cuyahoga County) 7 OL Abs 691.

Many cases have recognized and discussed enterprise liability since Bloom, *supra*.<sup>1</sup> Further, in *Jackson I*, the Court made it very clear that enterprise liability is well established in Ohio. When the General Assembly attempted to outlaw Enterprise Liability via

---

<sup>1</sup> See the 20 Ohio cases which have applied enterprise liability since Bloom: Cambridge Home Telephone Co. V. Harrington (1933), 127 Ohio St. 1; Lacey v. Heisey (1936), 53 Ohio App. 451; Morrow v. Hume (1936), 131 Ohio St. 319; Mitchell v. Great Eastern Stages, Inc. (1938), 60 Ohio App. 144; Fay v. Thrasher (1946), 77 Ohio app. 179; Ransom v. Feeney (1947), 81 Ohio App. 7; Henline v. Wilson (1960), 111 Ohio App. 515; Vonderheide v. Comeford (1961), 113 Ohio App. 284; Parrish v. Walsh (1982), 69 Ohio St.2d 11; Wilkerson v. Smith (March 23, 1983), Hamilton App. No. A-7907317, unreported (attached hereto); Getz v. Madison County Fairgrounds (May 26, 1987), Madison app. No. CA86-11-029, unreported (attached hereto); Kasunic v. City of Euclid (Dec. 15, 1988), Cuyahoga App. No. 54741, unreported (attached hereto); Bowling v. Heil Company (1987), 31 Ohio St. 3d 277; Leber v. Smith (March 3, 1989), Erie App. No. E-87-43, unreported (attached hereto); West American Insurance Company v. Carter (1989), 50 Ohio Misc.2d 20; Watts v. Pryor (1992), Cuyahoga App. No. 61212, unreported (attached hereto); O'Donnell v. Korosec (Nov. 27, 1992), Geauga App. No. 91-G-1659, unreported (attached hereto); Pfund v. Ciesielczyk (1992), 84 Ohio App.3d 159; Jackson v. Glidden (1995), 98 Ohio App.3d 100; Tittle v. Maurer (Oct. 23, 1995), Shelby App. No. 17-95-5, unreported; and Allen v. Lawrence (Aug. 21, 1997), Franklin app. No. 96APE10-1358, unreported..

RC 2307.791, it was later repealed. Enterprise Liability, another collectively liability doctrine, is a cousin to Alternative Liability in that there is a shift of the defendant identification requirement when the plaintiff shows that two or more defendants engaged in an "enterprise" that resulted in negligence and injury to another. Once a plaintiff demonstrates this, both defendants are jointly and severally liable.

Given that *Jackson I* was decided in 1995, this was, like Alternative Liability, the law for purposes of *Jackson I*. Like Alternative Liability, this law on Enterprise Liability was also the law that had to be applied in *Jackson II* - for the same two separate but equal reasons: (i) *Jackson I* was the law of the case and (ii) even in the absence of *Jackson I*, nothing had changed in Ohio law on Alternative Liability since the original holdings of this Court in *New York, C & S. L. R. Co. v. Kistler*, *Bloom v. Leech*, and *East Ohio Gas Co. v. Daniel*.

#### ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

Proposition of Law No. 1: Pursuant to the doctrine of "the law of the case," a decision of a reviewing court in a case remains the law of that case on all the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels

The issue that this Court needs to address is simple. Does the law of the case prevent a subsequent trial court or appellate court from reversing or modifying the law set down in *Jackson I*.

In *Jackson I*, the Court of Appeals, when addressing collective liability law as it relates to Market Share Liability held:

In Goldman, *supra*, the court held that market share liability is fundamentally a theory of assessing liability, and was advanced by the California Supreme Court in *Sindell v. Abbott Laboratories* (1980), 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, to provide redress where alternative liability was inapplicable. In *Sindell*, the court was faced with a class action brought by daughters of women who had taken DES during pregnancy. The daughters developed a rare form of cancer years later.

\*\*\*

In the case sub judice, the appellants have alleged that lead paint and lead paint products are completely fungible, and that a substantial share of all of the lead paint producers in the state are present in the suit. These allegations are sufficient, when viewed as true, to require the denial of the appellees' motion to dismiss.

Thus, *Jackson I* held that Market Share Liability was the law of Ohio - and certainly the law for *Jackson I*. Given the undisputed fact that no party to *Jackson I* appealed that decision to this Court, *Jackson I*, as it relates to Market Share Liability, became the law of this case. Regardless of the decision of Sutowski v. Eli Lilly & Company, (1998), 82 Ohio St.3d 347, 1998 Ohio 388, Market Share Liability is the law for all purposes of this case, and had to be applied in *Jackson II*. However, the Court in *Jackson II* ignored the law of the case doctrine and held that Sutowski, *supra*, precluded the application of Market Share Liability.

This Court needs to issue a decision that determines how the law of the case works in situations such as the one at bar.

Proposition of Law No. 2: Alternative Liability does not require that an injured party identify the negligent defendant or defendants if the plaintiff demonstrates a factual issue as to each defendant's negligence

In *Jackson II*, the record reviewed by the Court of Appeals showed a number of facts, to wit: The minor child Appellants were all poisoned by the ingestion of the lead pigment contained in lead paint. Since the early 1900s, the Appellees knew the lead pigment that was being inserted into lead paint was going to be toxic to and poison small children, and, nevertheless, actively continued to market to, and produce it for, the paint industry.<sup>2</sup> The Appellant minor children were poisoned in the very same fashion as predicted by the Appellees. Further, in fact, the Appellees knew that there were safer pigment alternatives to lead pigment in paint, and, nevertheless, actively continued to market to, and produce it for, the paint industry. Indeed, rather than investigate or disclose the known dangers of the lead pigment product, the Appellees actively attacked scientists and activists who sought to prevent further marketing and production of lead pigment in paint. Indeed, rather than investigate and disclose the known dangers of the lead pigment product, the Appellees actively lobbied state and federal legislatures to prevent any regulation or prohibition of lead

---

<sup>2</sup> These facts were all set forth in the affidavit of the Appellants' toxicologist historians David Rosner and Gerald Markowitz - an affidavit that, for some unexplained reason, is given no mention whatsoever in *Jackson II*. In fact, the "fact" section of Appellants' brief in opposition to the summary judgment motion was over 30 pages long. None of those facts are addressed in the opinion of *Jackson II*.

pigment for paint. None of these facts were seriously contested by the Appellees.

Appellants also produced evidence that the lead pigment in lead paint is essentially the same molecular product, which causes the same medical injury - plumbism (the medical term for lead poisoning).

Alternative Liability, for summary judgment purposes, eliminates the product identification requirement if a plaintiff present two sets of facts: (1) two or more defendants committed tortious acts, and (2) plaintiff was injured as a proximate result of the wrongdoing of one of the defendants. There is no question that the conduct and facts presented by Appellants in their summary judgment brief (and supported in the record cited in the summary judgment brief) demonstrated that all of the Appellees collectively engaged in negligent (if not reckless and intentional) behavior when it came to lead pigment marketing and production. There was also no question that each of the minor children were poisoned by lead paint. Thus, according to the law of Alternative Liability, the Appellants had presented *a factual issue* as to whether the product identification burden had to be shifted to the Appellees.

Nevertheless, the Court of Appeals held, when discussing Alternative Liability law and the facts of this case:

In viewing the facts and inferences in a light most favorable to Jackson, we conclude *the inability to identify the type of paint or the manufacturer* of the paint the children allegedly ingested is fatal to satisfying the first prong of the Minnich two-prong test. (emphasis supplied).

Essentially, the Court of Appeals did what Alternative Liability says it should not do - place the burden of product identification upon the Appellants. This act essentially destroyed the very purpose and "injustice" which this Court determined (in Minnich) should not happen when dealing with "wrongdoers" such as the Appellants. This Court needs to take up jurisdiction on this issue in order to give a clear pronouncement on the interpretation and application of Alternative Liability law. Otherwise, Alternative Liability (as set forth by this Court in Minnich) as the tool to serve "the entirely innocent plaintiff" (as was emphasized in Minnich) is essentially a toothless tiger.

**Proposition of Law No. 3: Appellant Courts are obligated to discuss all assignments of errors before affirming or reversing a trial court's decision.**

Glaringly absent from *Jackson II* is any meaningful discussion of the doctrine of Enterprise Liability. As set forth above, Enterprise Liability has been the law of Ohio for over 100 years. A large number of pages and large emphasis was placed on Enterprise Liability in Appellants' briefs in *Jackson II*.

Ohio App.R. 12(A) (1) provides:

**(A) Determination.**

(1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:

(a) Review and affirm, modify, or reverse the judgment or final order appealed;

(b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, the

record on appeal under App.R. 9, and, unless waived, the oral argument under App.R. 21;

(c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

In interpreting this mandatory appellate rule, this Court has repeatedly held that a failure by a court of appeals to address each assignment of error is grounds for reversal. See Criss v. Springfield Township(1989), 43 Ohio St. 3d 83; Lumbermen's Underwriting Alliance v.. American Excelsior Corp. (1973), 33 Ohio St. 2d 37, 62 O.O. 2d 373, 294 N.E. 2d 224; State v.. Jennings (1982), 69 Ohio St. 2d 389, 23 O.O. 3d 354, 433 N.E. 2d 157; Dougherty v.. Torrence (1982), 2 Ohio St. 3d 69, 2 OBR 625, 442 N.E. 2d 1295; and Danner v.. Medical Center Hospital (1983), 8 Ohio St. 3d 19, 8 OBR 167, 456 N.E.2d 503.

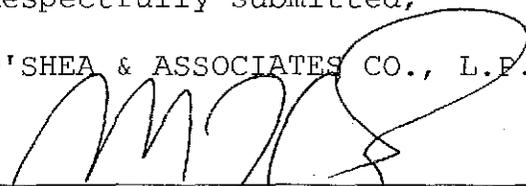
The second assignment of error asserted and extensively discussed by Appellants in *Jackson II* was the improper application (and/or exclusion) of Enterprise Liability to Appellant's claims. There was absolutely no discussion of the facts in the record as they applied to Enterprise Liability. None. Accordingly, this Court must reverse and remand this case to the Eighth District Court of Appeals with an mandate that the court of appeals discuss and address that important assignment of error.

**CONCLUSION**

Accordingly, Appellant prays that this Court take jurisdiction of this appeal to determine once and (hopefully) for all: (1) how the law of the case doctrine functions in Ohio, (2) how Ohio law applies Alternative Liability and (3) how Ohio law applies the Ohio App.R. 12(A) requirement of a meaningful discussion of assignment of errors.

Respectfully submitted;

O'SHEA & ASSOCIATES CO., L.P.A.



Michael J. O'Shea, Esq. (0039330)

[michael@moshea.com](mailto:michael@moshea.com)

55 Public Square

Suite 1600

Cleveland, Ohio 44113

(216) 241-0011

(216) 479-7687 - fax

John J. McConnell, Esq.

Fidelma Fitzpatrick, Esq.

Jonathan Orent, Esq.

Motley Rice LLC

321 South Main Street

PO Box 6067

Providence, RI 02940

(401) 457-7700

(401) 457-7708 - fax

**Attorneys for Appellants**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice was served upon the following persons this 14 day of March, 2007:

**COUNSEL FOR APPELLEES**

**ATTORNEYS FOR ATLANTIC RICHFIELD COMPANY:**

Hugh E. McKay  
PORTER, WRIGHT, MORRIS & ARTHUR  
925 Euclid Avenue, Suite 1700  
Cleveland, Ohio 44115

Philip H. Curtis  
ARNOLD & PORTER  
399 Park Avenue  
New York, New York 10022

**ATTORNEYS FOR FULLER O'BRIEN:**

Richard J. DiSantis  
BUCKLEY, KING & BLUSO  
1400 Bank One Center  
Cleveland, Ohio 44114

Charles W. Siragusa  
CROWLEY, BARRETT & KARABA, LTD.  
20 South Clark Street, #2310  
Chicago, Illinois 60603

**ATTORNEYS FOR THE SHERWIN-WILLIAMS COMPANY:**

Robert S. Walker  
JONES, DAY, REAVIS & POGUE  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114

Paul M. Pohl  
Charles Moellenberg  
JONES, DAY, REAVIS & POGUE  
500 Grant Street, 31<sup>st</sup> Floor  
Pittsburgh, Pennsylvania 15219

**ATTORNEYS FOR NL INDUSTRIES:**

Timothy M. Fox  
ULMER & BERNE  
1300 East Ninth Street  
Suite 900  
Cleveland, Ohio 44114

Timothy S. Hardy  
KIRKLAND & ELLIS  
655 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005

**ATTORNEYS FOR PPG INDUSTRIES/  
E.I. DU PONT DE NEMOURS & COMPANY:**

James R. Miller  
DICKIE, McCAMEY & CHILCOTE  
Two PPG Place, Suite 400  
Pittsburgh, Pennsylvania 15222

Richard J. DiSantis  
BUCKLEY, KING & BLUSO  
1400 Bank One Center  
Cleveland, Ohio 44114

ATTORNEYS FOR LEAD INDUSTRIES ASSOCIATION:

David Ross  
Nicholas J. Milanich  
REMINGER & REMINGER CO., L.P.A.  
113 St. Clair Building  
Cleveland, Ohio 44114

Mark L. Sullivan  
Michael Griffin  
SULLIVAN, SULLIVAN & PINTA  
100 Franklin Street  
Boston, Massachusetts 02110

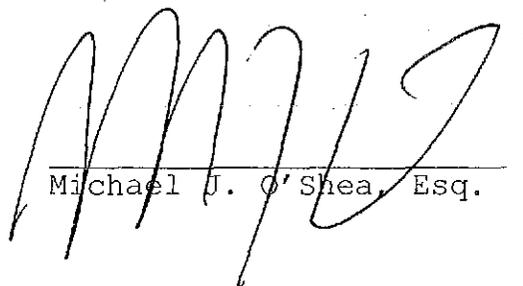
ATTORNEYS FOR SCM/GLIDDEN:

Michael T. Nilan  
HALLELAND LEWIS NILAN &  
JOHNSON  
Pillsbury Center South, Suite 600  
220 South Sixth Street  
Minneapolis, Minnesota 55402

James T. Millican  
Weston Hurd Fallon Paisley  
2500 Terminal Tower  
Cleveland, Ohio 44113

ATTORNEYS FOR AMERICAN CYANAMID

Mary M. Bittance  
BAKER & HOSTETLER  
3200 National City Center  
1900 East Ninth Street  
Cleveland, Ohio 44114



Michael J. O'Shea, Esq.

FEB - 5 2007

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 87779

---

**RENITA JACKSON, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**THE GLIDDEN COMPANY, ET AL.**

DÉFENDANTS-APPELLEES

---

**JUDGMENT:  
AFFIRMED**

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-236835

**BEFORE:** Blackmon, J., Calabrese, P.J., and Nahra, J.

**RELEASED:** January 25, 2007

**JOURNALIZED:**

FEB - 5 2007

CA06087779

43751116



VOL 629 #0091

## ATTORNEYS FOR APPELLANTS

Michael J. O'Shea, Esq.  
O'Shea & Associates Co., LPA  
55 Public Square, Suite 1600  
Cleveland, Ohio 44113

Harvey B. Bruner, Esq.  
Bruner & Jordan  
1600 Illuminating Building  
55 Public Square  
Cleveland, Ohio 44113

John J. McConnell, Esq.  
Fidelma L. Fitzpatrick, Esq.  
Aileen L. Sprague, Esq.  
Motley Rice LLC  
321 South Main Street  
Providence, Rhode Island 02903

## ATTORNEYS FOR APPELLEES

### **Glidden Company**

Robert J. Koeth, Esq.  
Koeth, Rice & Leo Co., LPA  
1280 West Third Street  
Cleveland, Ohio 44113

James T. Millican, Esq.  
Weston, Hurd, Fallon, Paisley & Howley  
2500 Terminal Tower  
50 Public Square  
Cleveland, Ohio 44113-2241

**American Cyanamid**

Mary M. Bittance, Esq.  
Baker & Hostetler  
3200 National City Center  
1900 East Ninth Street  
Cleveland, Ohio 44114-3485

**Atlantic Richfield Co.**

Philip H. Curtis, Esq.  
Bruce R. Kelly  
Eric J. Przybylko, Esq.  
Arnold & Porter LLP  
399 Park Avenue, 34<sup>th</sup> Floor  
New York, New York 10022-4690

Hugh E. McKay, Esq.  
Leo Spellacy, Jr., Esq.  
Porter, Wright, Morris & Arthur  
1700 Huntington Building  
925 Euclid Avenue  
Cleveland, Ohio 44115-1405

**NL Industries**

Timothy M. Fox, Esq.  
Ulmer & Berne, LLP  
88 East Broad Street, Suite 1600  
Columbus, Ohio 43215

Timothy S. Hardy, Esq.  
Kirkland & Ellis  
655 Fifteenth Street, N.W., Suite 1200  
Washington, D.C. 20005

David Ross  
Nicholas J. Milanich  
Reminger & Reminger Co., L.P.A.  
1400 Midland Building  
101 Prospect Avenue West  
Cleveland, Ohio 44115-1093

Donald Scott  
Elizabeth L. Thompson, Esq.  
Bartlit, Beck, Herman, Pelanchar & Scott LLP  
1899 Wynnopp Street, Eighth Floor  
Denver, Colorado 80202

Mark L. Sullivan  
Michael Griffin  
Sullivan, Sullivan & Pinta  
100 Franklin Street  
Boston, Maine 02110-1401

**Fuller O'Brien**

Richard J. DiSantis, Esq.  
Buckley, King & Bluso  
1400 Bank One Center  
600 Superior Avenue, East  
Cleveland, Ohio 44114-2652

Charles W. Siragusa, Esq.  
Thomas F. Karaba, Esq.  
Paul F. Markoff, Esq.  
Jason J. DeJonker, Esq.  
Crowley, Barrett & Karaba Ltd.  
20 South Clark Street, Suite 2310  
Chicago, Illinois 60603-1802

**PPG Industries /E.I. du Pont de Menours & Co.**

James R. Miller, Esq.  
Dickie, McCamey & Chilcote  
Two PPG Place, Suite 400  
Pittsburgh, Pennsylvania 15222-7272

Robin G. Weaver, Esq.  
Michael T. Sprenger, Esq.  
Squires, Sanders & Dempsey LLP  
4900 Key Tower, 127 Public Square  
Cleveland, Ohio 44114-1304

William H. King, Jr., Esq.  
Joy C. Fuhr, Esq.  
Collin J. Hite, Esq.  
Mc Woods LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219

**SCM / Glidden**

Michael Nilan, Esq.  
George J. Socha, Esq.  
Scott Smith, Esq.  
Halleland, Lewis, Nilan & Johnson  
Pillsbury Center South, Suite 600  
220 South Sixth Street  
Minneapolis, Minnesota 55402

**Sherwin-Williams Company**

Paul M. Pohl, Esq.  
Charles M. Moellenberg, Esq.  
Jones, Day  
500 Grant Street, 31<sup>st</sup> Floor  
Pittsburgh, Pennsylvania 15219



PATRICIA ANN BLACKMON, J.:

Appellant Renita Jackson appeals the trial court's decision granting summary judgment in favor of the Glidden Company. ("Glidden"). Jackson assigns ten errors for our review.<sup>1</sup>

Having reviewed the record and pertinent law, we affirm the trial court's decision. The history of this litigation and more details of the relationship between the parties are contained in prior decisions of this court and that of the Cuyahoga County Common Pleas Court.<sup>2</sup> The apposite facts follow.

Appellants are three mothers and their six children. The family units consist of Renita Jackson, her three children, Ramon, Manuel, and Maria; Janice Lascko, her daughter Janessa; and Selina Gainer, her daughters Latoya and Zinzi. ("Jackson"). Appellees are lead paint and lead pigment manufacturers namely: Atlantic Richfield Co., Fuller O'Brien, Sherwin-Williams Co., NL Industries, PPG Industries/E. I Du Pont de Nemours & Co., and SCM/Glidden ("Glidden").

On August 11, 1992, Jackson, along with the other mothers, filed suit individually on behalf of their respective children, and all other children

---

<sup>1</sup>See Appendix.

<sup>2</sup>*Jackson v. Glidden Co.* (1995), 98 Ohio App.3d 100; *Jackson v. Glidden Co.* (Mar. 30, 2001), Cuyahoga C.P. 236835.

similarly situated. The complaint alleged the children were poisoned as a result of ingesting deteriorated lead-based paint in their residences, which were manufactured or processed by Glidden. The complaint asserted causes of action for strict liability, negligence per se, negligence, breach of implied warranties, breach of express warranties, fraud by misrepresentation, nuisance, enterprise liability, alternative liability, market share liability, and punitive damages.

The complaint alleged that the paint manufacturers knew of the severe hazards of lead paint since the early 1900's, long before this information was widely circulated to the public. Further, the paint manufacturers were aware that non-toxic pigments, such as zinc-oxide pigment, were available as substitutes for lead pigments in paint. Despite this knowledge, the paint manufacturers continued to promote their product for use in paint intended for residential interior surfaces and refused to warn potential consumers of the known hazards.

Glidden filed a motion to dismiss the complaint and a motion to hold Jackson's motion for class certification in abeyance. On July 29, 1993, the trial court granted Glidden's motion to dismiss, but held Jackson's motion for class certification in abeyance. On appeal, we affirmed the dismissal of the

complaint as to the claim of enterprise liability, but reversed the dismissal as to the claims of alternative liability and market share liability.<sup>3</sup>

On March 30, 2001, the trial court denied class certification. Jackson did not appeal the trial court's decision regarding class certification, but continued to prosecute the individual claims. On December 13, 2002, Glidden filed a motion for summary judgment. On January 20, 2006, the trial court granted Glidden's motion for summary judgment.

### Summary Judgment

We review an appeal from summary judgment under a de novo standard of review.<sup>4</sup> Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.<sup>5</sup> Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence

---

<sup>3</sup>*Jackson v. Glidden Co.* (1995), 98 Ohio App.3d 100.

<sup>4</sup>*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

<sup>5</sup>*Id.* at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion, which is adverse to the non-moving party.<sup>6</sup>

The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.<sup>7</sup> If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact.<sup>8</sup>

With these principles in mind, we proceed to address Jackson's assigned errors, which will be discussed together and out of order where appropriate.

### Market Share Liability

In the third assigned error, Jackson argues the trial court erred in granting summary judgment in favor of Glidden on her market share claim. We disagree.

In *Sutowski v. Eli Lilly & Company*,<sup>9</sup> the Ohio Supreme Court stated in its syllabus:

---

<sup>6</sup>*Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327.

<sup>7</sup>*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

<sup>8</sup>*Id.* at 293.

<sup>9</sup> (1998), 82 Ohio St.3d 347.

**“In Ohio market-share liability is not an available theory of recovery in a products liability action.”**

Notwithstanding the above pronouncements, Jackson urges this court to reverse the *Sutowski* decision and recognize market share liability. However, in *State ex rel. Heck v. Kessler*,<sup>10</sup> the court stated:

**“It is axiomatic that the syllabus of an opinion issued by the Supreme Court of Ohio states the law of the case, and as such, all lower courts in this state are bound to adhere to the principles set forth therein.”**

Further, in *World Diamond, Inc. v. Hyatt Corp.*,<sup>11</sup> the court stated:

**“All trial courts and intermediate courts of appeals are charged with accepting and enforcing the law as promulgated by the Supreme Court and are bound by and must follow the Supreme Court’s decisions.”<sup>12</sup>**

Our review reveals the trial court followed the mandate of the Supreme Court in granting summary judgment in favor of Glidden on Jackson’s market share liability claim. We are likewise constrained to follow the law as determined by the Supreme Court in *Sutowski*. Accordingly, we overrule the third assigned error.

---

<sup>10</sup>(1995), 72 Ohio St.3d 98.

<sup>11</sup>(1997), 121 Ohio App.3d 297.

<sup>12</sup>Id. at 306.

### Alternative Liability

In the first assigned error, Jackson argues the trial court erred in granting summary judgment in favor of Glidden on her alternative liability claim. We disagree.

In the case of *Minnich v. Ashland Oil Co.*,<sup>13</sup> the Supreme Court of Ohio first adopted the theory of alternative liability. The court held:

**“Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each actor to prove that he has not caused the harm.”**<sup>14</sup>

The shifting of the burden of proof brought about by this doctrine avoids the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.<sup>15</sup>

However, in order for a plaintiff to shift the burden to the defendants to prove that they were not the cause of the plaintiff's injuries under an alternative liability theory, the plaintiff is required to prove each of the following:

---

<sup>13</sup>(1984), 15 Ohio St.3d 396.

<sup>14</sup>Id. at syllabus, adopting 2 Restatement of the Law 2d (1965), Torts, Section 433B(3).

<sup>15</sup>Id. at 397.

**“(1) that two or more defendants committed tortious acts, and (2) that plaintiff was injured as a proximate result of the wrongdoing of one of the defendants.”<sup>16</sup>**

The Supreme Court of Ohio applied the first prong of the *Minnich* two-pronged test in *Goldman v. Johns-Manville Sales Corp.*,<sup>17</sup> where the court held:

**“[A]lternative liability theory in an asbestos litigation case will be rejected where the plaintiff is unable to prove that the injury was caused by the asbestos-containing products of any of the defendants before the court.”<sup>18</sup>**

In *Goldman*, the court specifically found that the alternative theory of liability was inapplicable, stating:

**“In this case, it is clear that Goldman has not been able to show that any of the defendants acted tortiously, because she is unable to show that any of the defendants remaining in this case supplied any asbestos products to [plaintiff’s employer].”<sup>19</sup>**

In the instant case, Jackson alleged that her three children ingested lead paint at two houses built in 1917 and 1926, respectively. Lascko’s daughter ingested lead paint at a house built in 1900, and Gainer’s daughters ingested lead paint at a house built in 1930.<sup>20</sup> However, the record is devoid of any

---

<sup>16</sup>Id.

<sup>17</sup>(1987), 33 Ohio St.3d 40.

<sup>18</sup>Id. at paragraph two of the syllabus.

<sup>19</sup>Id. at 45.

<sup>20</sup>Third Amended Complaint.

indication that Jackson knew what type of paint was on the walls or the pigment the paint contained. Jackson did not know who manufactured the paint or who supplied the pigment the paint contained. The record also indicates that Jackson and Lascko identified their former landlords, but when the landlords were deposed, neither of them could identify the type of paint on the walls or who manufactured the paint.<sup>21</sup>

The Supreme Court of Ohio has continued to limit the application of alternative liability to unique situations, all of which have required a plaintiff to satisfy a threshold burden of proving that all the defendants acted tortiously.<sup>22</sup> The doctrine of alternative liability has never relieved plaintiffs of this burden.<sup>23</sup> It is the plaintiff's fulfillment of this burden that triggers the application of the doctrine in the first instance. Then and only then, the doctrine of alternative liability operates to shift to the two-defendant tortfeasors the burden of disproving that their negligence has a causal link to the plaintiff's injuries.<sup>24</sup>

Our review of the record indicates that the injuries Jackson claimed are from different products, by different manufacturers, some of whom incorporated

---

<sup>21</sup>Gainer's former landlord is deceased.

<sup>22</sup>*Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 687-688.

<sup>23</sup>*Peck v. Serio* (2003), 155 Ohio App.3d 471.

<sup>24</sup>*Id.* at 476.

the lead pigment into paint and some who merely provided the lead pigment for third parties to incorporate into paint.<sup>25</sup> In addition, the paint manufacturers utilized their own formulas for incorporating white lead into paint.<sup>26</sup> Further, there are a variety of lead pigments other than white lead carbonate that were used in paint formulations.<sup>27</sup> Moreover, there is no single, defined injury that results from lead poisoning.

In viewing the facts and inferences in a light most favorable to Jackson, we conclude the inability to identify the type of paint or the manufacturer of the paint the children allegedly ingested is fatal to satisfying the first prong of the *Minnich* two-pronged test.

Under the second prong of the *Minnich* two-pronged test, courts have generally read this prong to require all potential defendants to be joined in order to apply the alternative liability theory.<sup>28</sup> In *Huston v. Konieczny*,<sup>29</sup> the Ohio Supreme Court stated:

---

<sup>25</sup>Heitmann Affidavit at 21, 22, 34-37.

<sup>26</sup>Heitmann Affidavit at 33-37.

<sup>27</sup>Heitmann Affidavit at 5 and 32.

<sup>28</sup>See, *Marshall v. Celotex Corp.* (E.D.Mich.1987), 651 F.Supp. 389, 392; *Starling v. Seaboard Coast Line R. R. Co.* (S.D.Ga.1982), 533 F.Supp. 183, 188; *Sindell v. Abbot Laboratories* (1980), 26 Cal.3d 588, 603, 163 Cal.Rptr. 132, 139, 607 P.2d 924, 931.

<sup>29</sup>(1990), 52 Ohio St.3d 214, 219.

**“In order for the burden of proof to shift from the plaintiffs under 2 Restatement of the Law, 2d, Torts, Section 433B(3), all tortfeasors should be before the court, if possible.”**

Although Jackson alleged that the named defendants manufactured and/or produced substantially all lead pigment,<sup>30</sup> we acknowledged, in a previous decision from this court, that not all defendants have been joined in the action.<sup>31</sup> The failure to join as defendants all potentially responsible tortfeasors precludes the application of alternative liability.<sup>32</sup>

We conclude that the evidence submitted in this case fails to raise a genuine issue of material fact on the issue of proximate causation. Jackson's inability to identify the paint on the walls of the respective houses or the manufacturer of said paint, and her failure to join as defendants all potential tortfeasors, precludes the applicability of the alternative liability theory. Accordingly, we overrule the first assigned error.

**Enterprise Liability, Conspiracy, Strict Liability, Failure to Warn, Express Warranty, Negligence, Fraud and Nuisance**

Through our analysis of Jackson's first assigned error, we have dispensed with the necessity of entering into a prolonged discourse with respect to the

---

<sup>30</sup>Third Amended Complaint.

<sup>31</sup>*Jackson v. Glidden Co.* (1995), 98 Ohio App.3d 100.

<sup>32</sup>*Fiorella v. Ashland Oil, Inc.* (1993), 92 Ohio App.3d 411.

remaining assigned errors. In order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom.<sup>33</sup> Additionally, proximate causation is an essential element which Jackson is required to prove in each of the remaining causes of action.<sup>34</sup>

In order for a plaintiff in a personal injury suit to have her case submitted to a jury, it is necessary that the plaintiff produce some evidence upon each element essential to establish liability, or produce evidence of a fact upon which a reasonable inference may be predicated to support such element.<sup>35</sup> As previously discussed, Jackson has failed to show that the paint manufacturers proximately caused the injuries alleged. Consequently, the trial court properly granted summary judgment in favor of the paint manufacturers. Accordingly, we overrule the remaining assigned errors.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

---

<sup>33</sup>*Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

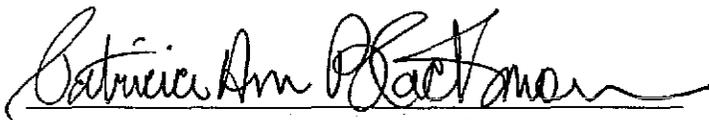
<sup>34</sup> *State Auto. Mut. Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151, 156; *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, paragraph two of the syllabus; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55; *Hoffman v. Johnston* (1941), 68 Ohio App. 19, 29.

<sup>35</sup> *Strother*, supra, 67 Ohio St.2d at 285.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
PATRICIA ANN BLACKMON, JUDGE

ANTHONY O. CALABRESE, JR., P.J., and  
JOSEPH J. NAHRA, J.\*, CONCUR

(\*SITTING BY ASSIGNMENT: JOSEPH J. NAHRA, RETIRED, OF THE  
EIGHTH DISTRICT COURT OF APPEALS.)

APPENDIX

Assignments of Error

**“I. The trial court erred by granting summary judgment on appellant’s alternative liability claim.”**

**“II. The trial court erred by granting summary judgment on appellant’s enterprise liability claim.”**

**“III. The trial court erred by granting summary judgment on appellant’s market share claim.”**

**“IV. The trial court erred by granting summary judgment on appellant’s conspiracy claim.”**

**“V. The trial court erred by granting summary judgment on appellant’s strict liability claim.”**

**“VI. The trial court erred by granting summary judgment on appellant’s failure to warn claim.”**

**“VII. The trial court erred by granting summary judgment on appellant’s breach of express warranty claim.”**

**“VIII. The trial court erred by granting summary judgment on appellant’s negligence claim.”**

**“IX. The trial court erred by granting summary judgment on appellant’s fraud claim.”**

**“X. The trial court erred by granting summary judgment on appellant’s nuisance claim.”**

LEXSEE 98 OHIO APP. 3D 100

**JACKSON et al., Appellants, v. GLIDDEN COMPANY et al., Appellees**

No. 66085

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

*98 Ohio App. 3d 100; 647 N.E.2d 879; 1994 Ohio App. LEXIS 5489; CCH Prod. Liab. Rep. P14,410*

January 13, 1994, Decided

**PRIOR HISTORY:** [\*\*\*1]

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court, Case No. CV-236835.

**DISPOSITION:**

*Judgment accordingly.*

**COUNSEL:**

*Harvey B. Bruner & Assoc., Harvey B. Bruner and Michael J. O'Shea, for appellants.*

*Bertsch, Millican & Winslow, James T. Millican and Robert J. Koeth; Dick Jambor, for appellee Glidden Company.*

*Donald A. Bright and Dean M. Harris, for appellee Atlantic Richfield Company.*

*Dickie, McCamey & Chilcote and James R. Miller, for appellee PPG.*

*James D. Shomper, for appellee E.I. Du Pont de Nemours & Co.*

*Samuel Friedman, for appellee SCM Chemicals.*

*John W. Lebold and Dale Normington, for appellee Sherwin-Williams Company.*

*James Lowery, for appellee Westinghouse Electric Corp.*

*Porter, Wright, Morris & Arthur, Richard M. Markus and Hugh E. McKay; Arnold & Porter, Otis Pratt Pear-sall, Philip H. Curtis, Reuben S. Koolyk, Murray R. Garnick and Maureen E. McGirr, Gallagher, Fulton, Sharp & Norman, James G. Gowan and Paul J. Schumacher, Crowley, Barrett & Karaba and Charles W. Siragusa; Reminger & Reminger, Nicholas J. Milanich and Davis Ross; Sullivan, Sullivan & Pinta, Mary Morrissey Sullivan, [\*\*\*2] Mark L. Sullivan and Michael Griffin; Ulmer*

*& Berne and Timothy M. Fox; Kirkland & Ellis, John M. Walker and Timothy S. Hardy; Buckley, King & Bluso and Richard J. DiSantis; Popham, Haik, Schnobrich & Kaufman and Michael Nilan; Jones, Day, Reavis & Pogue, Charles H. Moellenberg, Jr., Paul M. Pohl and Marc L. Swartzbaugh; Kramer & Tobocman Co., L.P.A., and Edward G. Kramer; Weston, Hurd, Fallon, Paisley & Howley and Gary W. Johnson, for other appellees.*

*Edward G. Kramer, Renee Heller and Angela Thiel, Legal Interns, for amicus curiae The Housing Law Clinic.*

**JUDGES:**

James D. Sweeney, Judge. Nagra, C.J., and Weaver, J., concur.

**OPINION BY:**

SWEENEY

**OPINION:**

[\*102] [\*\*881] Plaintiff-appellant Renita Jackson and her children, Ramon Manuel, and Maria Jackson, appeal from the trial court's order granting the motion to dismiss filed by the defendant-appellee NL Industries, and joined in by all of the remaining defendants-appellees. The amended complaint was filed on behalf of the appellant children and all other children similarly situated and alleged that the appellant children, Ramon Manuel and Maria Jackson, were poisoned from exposure to [\*\*\*3] significant quantities of lead contained in the paint of the premises where they lived. The appellees are lead paint and lead pigment manufacturers, and the Lead Industries Association, an organization which lobbies and carries out activities nationwide on behalf of its members.

The appellants set out thirteen causes of action: absolute product liability, negligence *per se*, negligence, breach of implied warranties, breach of express warranties, fraud by misrepresentation, nuisance, enterprise liability,

negligent infliction of emotional distress, alternative liability, market share liability, and punitive damages.

[\*103] In essence, the appellants allege that the appellees are responsible for the manufacturing, promotion, selling, distributing, supplying or applying lead and/or lead paint products which were used in painting, staining, construction of, and the maintenance and remodeling of, homes, residences and buildings in Ohio.

The trial court granted the motion of the appellees to hold the motion for class certification in abeyance and, on July 29, 1993, the trial court granted the motion to dismiss as to all defendants-appellees. The court held:

"All defendants [\*\*\*4] in the within action having joined in the Motion of NL Industries, Inc. to dismiss the Amended Complaint, or, in the alternative to strike each separate count of the Complaint is hereby GRANTED, as the theories of enterprise liability, market share liability and alternative liability cannot substitute under Ohio law for an allegation and proof that each or any defendant proximately caused the alleged injuries. All other motions outstanding are MOOT.

"FINAL."

The appellants set forth five assignments of error.

The appellants' first assignment of error:

"I

"The trial court erred as a matter of law in preventing appellants from receiving a hearing or decision on the certification motion."

The appellants argue that the trial court abused its discretion when it held the ruling on the motion for class certification in abeyance until the ruling on the motion to dismiss was given. The appellants contend that the trial court erred in entering its pretrial case management order, and that judicial economy would have been better served to rule on the motion for class certification in conjunction with the motion to dismiss so that the issues could have been appealed together.

Rulings [\*\*\*5] on motions for class certification are within the sound discretion of the trial court. *Shaver v. Std. Oil Co. (1990)*, 68 Ohio App. 3d 783, 589 N.E.2d 1348. The trial court must control its docket and the orderly progression of its cases. In order to do so, the judge in the case *sub judice* issued a pretrial management order. The court ruled that both the class action determination and discovery would be deferred until the disposition of the motions to dismiss. The trial court did not abuse its discretion in controlling in an orderly fashion the litigation before it.

The appellants' first assignment of error is overruled.

The appellants' second, third, and fourth assignments of error will be considered together:

[\*104] [\*\*\*882] "II

"The trial court erred as a matter of law in granting the appellees' NL motion when it determined that 'enterprise liability' does not apply to the product identification issue.

"III

"The trial court erred as a matter of law in granting appellees' NL motion when it determined that 'alternative liability' does not apply to the product identification issue.

"IV

"The trial court erred as a matter of law in granting appellees' NL motion [\*\*\*6] when it determined that 'market share liability' does not apply to the product identification issue."

The appellants argue that the trial court erred in granting the motion to dismiss filed by NL Industries. In granting a motion to dismiss filed pursuant to *Civ.R. 12(B)(6)*, the trial court must keep in mind that the standard for granting such a motion is in accord with the notice pleading requirements of both the Federal and the Ohio Rules of Civil Procedure. A plaintiff is not required to prove the case, and as long as a set of facts which would allow the plaintiff to recover is set forth in the complaint, the court may not grant the motion to dismiss. *York v. Ohio State Hwy. Patrol (1991)*, 60 Ohio St. 3d 143, 573 N.E.2d 1063.

The Supreme Court in *York* clearly enunciated the standard to be applied when granting a motion to dismiss:

"\* \* \* In *O'Brien v. University Community Tenants Union, Inc. (1975)*, 42 Ohio St. 2d 242, 71 Ohio Op. 2d 223, 327 N.E.2d 753, this court set forth the standard for granting a motion to dismiss pursuant to *Civ.R. 12(B)(6)*. Specifically, we held that in order for a court to dismiss a complaint for failure to state a claim upon which relief [\*\*\*7] may be granted, it must appear "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *O'Brien at 245*, 71 Ohio Op. 2d at 224, 327 N.E.2d at 755, citing *Conley v. Gibson (1957)*, 355 U.S. 41, 45 [78 S. Ct. 99, 101, 2 L. Ed. 2d 80, 84]. In the recent case of *Mitchell v. Lawson Milk Co. (1988)*, 40 Ohio St. 3d 190, 532 N.E.2d 753, we elaborated upon this standard, noting that "[i]n construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the nonmoving party." *Id. at 192*, 532 N.E.2d at 756, citing 2A Moore, Federal Practice (1985) 12-63, Paragraph 12.07 [2.-5]." *York, 60 Ohio St. 3d at 144*, 573 N.E.2d at 1064-1065.

[\*105] The following facts alleged in Paragraph 12 of the amended complaint must therefore be taken as true: the appellees participated in practically and/or substantially all processing, manufacturing, designing, developing, testing, packaging, inspection, selling, distributing, supplying, delivering, marketing and/or applying of products with [\*\*\*8] lead and/or white lead pigments, including dry white lead carbonate, dry white lead sulphate and white lead-in-oil for the use in paint/varnish production (collectively "lead paint products"). Paragraph 13 alleges that the appellees acted individually as well as in concert with each other, jointly and severally, manufactured, sold, promoted, distributed, supplied and/or applied lead products or lead paint products.

The appellants argue in the second, third and fourth assignments of error that the trial court erred in refusing to recognize the theories of enterprise liability, market share liability, and alternative liability under Ohio law.

In the second assignment of error, the appellants correctly point out that enterprise liability was recognized in *Hall v. E.I. Du Pont de Nemours & Co.* (E.D.N.Y.1972), 345 F. Supp. 353. The plaintiffs in *Hall* alleged that the defendants' conduct combined to cause injury at the point of the labeling and designing of blasting caps. Children throughout the country suffered injuries. The court held that to establish enterprise liability, the plaintiffs would have to demonstrate the defendants' joint awareness of the risks at issue and their [\*\*\*9] joint capacity to reduce or affect those risks. The court emphasized the applicability to industries composed of a small number of units. The court specifically stated at 378: "What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized [\*\*883] industry composed of thousands of small producers."

Here, the amended complaint alleges that the appellees "acting together and united in the joint prosecution of a purpose, and in a community of interest, created, promoted, directed, governed and adhered to an industry-wide standard of safety in the manufacture, promotion, selling, distributing, supplying and/or applying of lead products or lead paint." The appellants also asserted that the industrywide safety standard was insufficient and inadequate, and that the injuries sustained by the plaintiffs were directly and proximately caused by the use of the lead products and/or lead paint products produced and promoted by the defendants under and in adherence to the industrywide standard.

Assuming, as we must, that these allegations are true, the appellants have failed to establish that the theory of [\*\*\*10] enterprise liability applies to this action. The appellants have not alleged that the appellees delegated the safety responsibility to the trade association, that the

appellees were jointly aware of the risks at issue, or that in their joint capacity appellees could have reduced or affected [\*106] those risks. The appellants have alleged only that the appellees, with a joint purpose, adhered to an inadequate industry standard. This is not sufficient.

The appellants' second assignment of error is overruled.

In the third assignment of error, the appellants assert the theory of alternative liability. The amended complaint alleges that two or more of the appellees committed the tortious acts, that through no fault of their own, the appellants are unable to identify which of the appellees manufactured and/or produced a lead product and/or lead paint product causing their injuries, that the appellees manufactured and/or produced substantially all lead products or lead paint products, and that all of the lead products produced and/or manufactured by the appellees were virtually identical because all share the same defective qualities: poisonous lead.

In *Minnich v. Ashland Oil* [\*\*\*11] Co. (1984), 15 Ohio St. 3d 396, 15 Ohio B. Rep. 511, 473 N.E.2d 1199, the Ohio Supreme Court recognized the theory of alternative liability. The court held in its syllabus:

"Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm. (2 *Restatement of the Law 2d, Torts, Section 433[B][3]*, adopted.)"

The court stated that the shifting of the burden of proof avoids the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon an innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm have made it difficult or impossible to prove which of them have caused the harm.

The court specifically held that the plaintiff must still prove (1) that two or more defendants committed tortious acts, and (2) that plaintiff was injured as a proximate result of the wrongdoing of one of the defendants. The burden then shifts to the defendants to prove that they were not the cause of the plaintiff's injuries. The [\*\*\*12] court noted that there were multiple defendants, but a single proximate cause.

In *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St. 3d 40, 514 N.E.2d 691, the court cited *Minnich*, and reiterated the two-step analysis necessary to apply alternative liability. The court held that both alternative liability and market share liability were methods of relaxing the requirement that the plaintiff identify which one of a group of negligent tortfeasors caused plaintiff's injury. In *Goldman*, the court upheld the trial

court's ruling that granted the defendants' motion for summary judgment, and held that there was [\*107] no evidence that all defendants acted tortiously. See, also, *Fiorella v. Ashland Oil, Inc.* (1993), 92 Ohio App. 3d 411, 635 N.E.2d 1306.

Here, where the allegations of the complaint are taken as true, the appellants' amended complaint states that the appellees committed tortious acts and that the appellants were injured as the proximate result of those acts. These allegations are sufficient [\*\*884] to meet the burden set out by the Supreme Court in *Minnich* and in *Goldman*. The appellants have set forth sufficient allegations [\*\*\*13] to withstand a motion to dismiss, even though all potential defendants have not been joined in the action.

The appellants' third assignment of error is well taken.

The appellants' fourth assignment of error asserts that the appellees may be held accountable under the theory of market share liability. The amended complaint alleges that the appellees manufactured, promoted, sold, distributed, supplied and/or applied a substantial share of all of the lead products and/or lead paint products in the state of Ohio; that lead products and/or lead paint products are completely fungible commodities; and that as a direct and proximate result of the appellees' activities, any and all of the appellees have caused injury to the appellants.

In *Goldman, supra*, the court held that market share liability is fundamentally a theory of assessing liability, and was advanced by the California Supreme Court in *Sindell v. Abbott Laboratories* (1980), 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, to provide redress where alternative liability was inapplicable. In *Sindell*, the court was faced with a class action brought by daughters of women who had taken DES during pregnancy. The daughters [\*\*\*14] developed a rare form of cancer years later.

The *Sindell* court based the market share theory on the fungibility of a drug that is harmful to consumers, but

which cannot be traced to a specific producer. The court held that as long as a substantial share of the market was present in the suit as defendants, each defendant could be held liable for the proportion of the judgment represented by its share of the market unless that defendant could demonstrate that it could not have made the product which caused the plaintiff's injuries.

In *Goldman*, the Ohio Supreme Court held that market share liability is inappropriate as a viable theory of recovery in asbestos litigation, especially where it cannot be shown that all the products to which the injured party was exposed are completely fungible.

In the case *sub judice*, the appellants have alleged that lead paint and lead paint products are completely fungible, and that a substantial share of all of [\*108] the lead paint producers in the state are present in the suit. These allegations are sufficient, when viewed as true, to require the denial of the appellees' motion to dismiss.

The appellants' fourth assignment of error [\*\*\*15] is well taken.

The appellants' fifth assignment of error:

"V

"If enterprise liability, alternative liability and market share liability are interpreted as being inapplicable to the facts and injuries at bar, then such interpretation violates both or either the Due Process Clause or the Right to Remedy Clause of the Ohio Constitution."

In light of the ruling on the third and fourth assignments of error, this assignment of error is moot under *App.R. 12*.

The judgment is affirmed in part and reversed in part, and the cause is remanded in part.

*Judgment accordingly.*

Nahra, C.J., and Weaver, J., concur.