

IN THE SUPREME COURT OF OHIO

RENITA JACKSON, et al.,

Plaintiffs-Appellants,

vs.

THE GLIDDEN COMPANY, et al.,

Defendants-Appellees.

CASE NO. 2007-0457

On Appeal from the Cuyahoga  
County Court of Appeals, Eighth  
Appellate District

Court of Appeals  
Case No. 87779

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DEFENDANTS-APPELLEES' MEMORANDUM IN  
RESPONSE TO PLAINTIFFS-APPELLANTS'  
MEMORANDUM IN SUPPORT OF JURISDICTION

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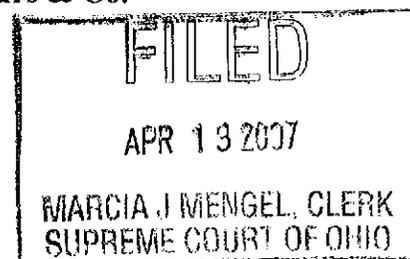
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**WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST  
AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Plaintiffs-Appellants (“Plaintiffs”) are three mothers and their children who claim the children were injured as a result of ingesting deteriorated lead paint at their residences. They assert product liability claims against Defendants-Appellees (the “Manufacturers”), seven companies that once made one type of lead pigment that could be used as a component in paint (or the alleged successors to such pigment manufacturers). Plaintiffs cannot identify any of the Manufacturers as the maker of the lead pigment contained in the paint that the children allegedly ingested. That deficiency is dispositive of their claims under Ohio tort law. A plaintiff “must establish a causal connection between the defendant’s actions and the plaintiff’s injuries, which necessitates identification of the particular tortfeasor.” *Sutowski v. Eli Lilly Co.* (1998), 82 Ohio St.3d 347, 351, 696 N.E.2d 187. The trial court applied this principle to enter summary judgment dismissing Plaintiffs’ claims, and the Court of Appeals affirmed.

Plaintiffs seek to save their claims by arguing that Ohio recognizes something called “collective liability” law that would excuse them from proving manufacturer identification. Pltf. 3/14/07 Mem. at 1. Their three Propositions of Law assert that they may rely on “collective liability” law, but the questions they present are neither novel nor of general interest.

Plaintiffs discuss two legal theories of “collective liability.” The First Proposition of Law involves the market share theory, which this Court categorically rejected in *Sutowski v. Eli Lilly Co.* (1998), 82 Ohio St.3d 347, 696 N.E.2d 187. Plaintiffs do not ask the Court to reconsider that decision, but instead argue that a 1995 decision by the Court of Appeals in this case accepting the market share theory must be followed as the law of this case, notwithstanding this Court’s subsequent decision to reject the theory in *Sutowski*. This argument is frivolous because it

ignores the fundamental legal principle that lower courts are bound to follow this Court's decisions and the established rule that an intervening decision by this Court alters the law of the case. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 322, 744 N.E.2d 759; *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 5, 462 N.E.2d 410. In addition to being wrong, Plaintiffs' "law of the case" argument is of no general significance. Acceptance of the argument would permit only these Plaintiffs to use the market share theory. Apart from the 1995 decision by the Court of Appeals, no decision of an Ohio appellate court accepts the market share theory.<sup>1</sup>

Plaintiffs' Second Proposition of Law involves another "collective liability" theory: alternative liability. Ohio law does recognize this theory, but only where a plaintiff can prove what these Plaintiffs cannot: each defendant committed a tortious act toward the plaintiff. *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, 473 N.E.2d 1199. In cases where the alleged tortious act is the sale of an allegedly harmful product, the alternative liability theory requires proof that each defendant's product is at the site of the claimed injury. *Id.*; *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 514 N.E.2d 691. As Plaintiffs in the present case concede, they cannot offer such proof. Because there is already established

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<sup>1</sup> Other than this case, there have been two post-*Sutowski* decisions by the Ohio Court of Appeals addressing the market share theory. Unsurprisingly, both state that *Sutowski* precludes reliance on that theory. *Carr v. Eli Lilly & Co.* (Feb. 24, 2000), Cuyahoga App. No. 75678, 75679, 75680, 2000 WL 217800; *Alder v. Eli Lilly & Co.* (Oct. 20, 1999), Summit App. No. 19400, 1999 WL 975107.

Any attempt to apply the market share theory to claims other than those of these particular Plaintiffs would face a further obstacle under Ohio Revised Code Section 2307.71. That statute, which took effect in 2005 while this litigation was pending, is intended to supersede *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 677 N.E.2d 795, and to abrogate all common law product liability causes of action. That enactment limits product liability claimants to their statutory claims under the Ohio Products Liability Act, which does not authorize reliance on the market share theory.

jurisprudence by this Court on the application of alternative liability to product liability cases, there is no novel question involved in Plaintiffs' Second Proposition of Law.

Finally, Plaintiffs' Third Proposition of Law offers a makeweight argument that the Court of Appeals erred by failing to discuss and analyze separately all of Plaintiffs' claimed assignments of error. This argument is without substance because the claimed assignments of error not separately discussed were moot in light of Plaintiffs' inability to prove causation. *See* Ohio App. R. 12(A)(1)(c). Since the adoption of the amended Ohio Rules of Appellate Procedure in 1992, this Court has never reversed or remanded a case solely because the Court of Appeals failed to review each assignment of error it considered moot. The Appellate Rule is clear that a Court of Appeals must decide each assignment of error "[u]nless an assignment of error is made moot by a ruling on another assignment of error." *Id.* (emphasis added). Plaintiffs' Third Proposition of Law also does not present a question of public or great general interest.

Plaintiffs have offered no valid reason why hearing this case would serve the public or general interest. Plaintiffs raise no constitutional issues, and indeed do not even mention the Ohio or United States Constitutions in their memorandum. For these reasons, this Court should decline jurisdiction over this case.

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

### **Historical Background**

In the early twentieth century, dozens of U.S. manufacturers made various lead pigments. Those pigments had distinct physical properties and chemical formulations, including white lead carbonate, lead sulfate, leaded zinc oxide, lead chromates, lead silicates, lead titanates and litharge, among others. R765, Heitmann 12/98 Aff. ¶ 32. Not every Defendant or alleged predecessor produced every type of lead pigment.

Paint manufacturers used lead pigments to make paints for many different applications, including residential and commercial interiors and exteriors, bridges and other exposed structures, marine vessels and automobiles.<sup>2</sup> R765, Heitmann 12/98 Aff. ¶ 36. Lead paints varied widely both in the type of lead pigment they used and in the concentration of lead they contained. *Id.* Lead pigments also were used to make non-paint products in other industries, including, among others, the ceramics industry. R765, Heitmann 12/11/02 Supp. Aff. ¶ 2.

### **Plaintiffs' Lack of Evidence Concerning Manufacturer Identification**

Plaintiffs have no evidence, direct or circumstantial, proving who manufactured either the lead paint they claim to have ingested or the pigment it contained. In answers to interrogatories, Plaintiffs admitted that they do not know, and could not identify anyone who did know, the chemical formula, name or composition of the particular type or types of lead pigments (*e.g.*, white lead carbonate) contained in the paint their children allegedly ingested. R797, Przybylko Supp. Aff., Exs. K, L, M, Resp. Interrog. 3(a), (b) and (f). Though they claimed that the landlords of their residences had knowledge concerning the application of paint containing lead to the buildings, the only such landlords who testified denied all knowledge on the issue. R797, Przybylko Supp. Aff., Exs. K, L, M, Resp. Interrog. 3(c); R765, Przybylko Aff., Ex. 2 at 44-45, Ex. 20 at 41-42, Ex. 7 at 80-81 & Ex. 11 at 162-63. (One landlord was deceased and did not testify. R797, Przybylko Supp. Aff., Ex. L, Resp. Interrog. 3(c).) There is therefore no proof that any Plaintiff ingested a lead pigment made by any specific Manufacturer, and indeed no proof that any Plaintiff ingested even the same type of pigment that any specific Manufacturer once made.

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<sup>2</sup> Some (not all) of the companies named as defendants in this case made paint in addition to pigment, but they are sued here only in their capacity as pigment manufacturers.

## Proceedings Below

The trial court initially dismissed Plaintiffs' market share claim on the pleadings. The Court of Appeals reversed. Its decision stated that Plaintiffs' allegations in support of application of the market share theory "are sufficient, when viewed as true, to require the denial of the . . . motion to dismiss." *Jackson v. Glidden Co.* (Cuyahoga Cty. 1995), 98 Ohio App.3d 100, 107-08, 647 N.E.2d 879 ("*Jackson I*"). The Manufacturers did not seek leave to appeal that decision to this Court. The case was remanded to the trial court.

Three years later, this Court categorically rejected the market share theory in *Sutowski v. Eli Lilly Co.* (1998), 82 Ohio St.3d 347, 696 N.E.2d 187. In subsequent proceedings in the present case, both the trial and appellate courts followed *Sutowski*, recognizing that it overruled *Jackson I*'s decision to permit the market share claim to proceed to discovery. Plaintiffs made a motion to certify a class of children throughout the state seeking recovery for alleged injuries due to ingestion of lead paint. The trial court denied the motion, stating, *inter alia*, that *Sutowski* precludes reliance on the market share theory. *Jackson v. Glidden Co.* (Mar. 30, 2001), Cuyahoga C.P. No. 236835, 2001 WL 498580, \*2. Plaintiffs chose not to appeal the denial of class certification.

After discovery, Defendants moved for summary judgment on the named Plaintiffs' individual claims, arguing, *inter alia*, that *Sutowski* precluded reliance on the market share theory. Plaintiffs did not argue that *Jackson I* was the law of the case in opposing the motion. Instead, they conceded that "*Sutowski* forecloses these Plaintiffs' opportunity to utilize the market share theory of recovery" and sought only to preserve their rights under the theory if this Court ever reversed its decision in *Sutowski*. R794, Pltf. 2/7/03 Mem. at 46-47. The trial court granted summary judgment without a written opinion.

Plaintiffs appealed. Though they briefly asserted that *Jackson I* was the law of the case in their Statement of the Case, Plaintiffs did not assign as error the trial court's failure to follow it. Pltf. 5/3/06 Br. at 2, 18-19. Plaintiffs merely urged the Court of Appeals to "reconsider its decision [sic] in the *Sutowski* case should it determine that enterprise or alternative liability theory do not apply here." *Id.* at 18. The Court of Appeals declined Plaintiffs' invitation in *Jackson II*, the February 2007 decision that Plaintiffs now ask this Court to review. In *Jackson II*, the Court of Appeals stated that it was "constrained to follow the law as determined by the Supreme Court."<sup>3</sup> *Jackson v. Glidden*, No. 87779, 2007-Ohio-277, 2007 WL 184662, at ¶ 15 ("*Jackson II*"). The Court of Appeals also considered at length, and rejected, Plaintiffs' argument that the alternative liability theory would permit Plaintiffs to carry their burden of proving causation without establishing that any Manufacturer's product was present at the locations where the children allegedly ingested lead paint. *Id.* at ¶¶ 16-28. As Plaintiffs were unable to prove that any Manufacturer's product caused their injuries, the Court of Appeals also held that it need not decide the remaining assignments of error as they were moot. *Id.* at ¶¶ 29-30.

## ARGUMENT

### **I. Plaintiffs' First Proposition of Law: The Argument That the Law of the Case Permits Plaintiffs to Rely on the Market Share Theory Is Patently Incorrect, and in Any Event Was Not Preserved**

Plaintiffs argue that the Court of Appeals' recognition of market share theory in *Jackson I* remained the law of the case, binding the trial court and the Court of Appeals in future proceedings herein, notwithstanding this Court's 1998 decision categorically rejecting the market

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<sup>3</sup> Judge Nahra, who had sat on the Court of Appeals panel that decided *Jackson I* in 1995, also sat on the panel that unanimously decided *Jackson II*.

share theory. Pltf. 3/14/07 Mem. at 10 (“Regardless of the decision of *Sutowski* . . . Market Share Liability is the law for all purposes of this case and had to [be] applied . . .”). This argument provides no reason for this Court to accept this appeal, for two independent reasons.

1. **The argument is patently wrong** -- The law of the case doctrine is well settled. Under that doctrine, 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.” *DeRolph v. State* (2001), 93 Ohio St.3d 309, 311, 754 N.E.2d 1184. However, the law of the case doctrine is subject to the vital qualification that an intervening decision by a superior court must be followed notwithstanding the prior decision that otherwise would be deemed the controlling law of the case. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 5, 462 N.E.2d 410; *State v. DeCessna* (1995), 73 Ohio St.3d 180, 182-83, 652 N.E.2d 742. This qualification of the law of the case doctrine is merely a specific application of the more general principle of *stare decisis*: lower courts must follow the law as interpreted by superior courts. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 322, 744 N.E.2d 759; *Jones v. Harmon* (1930), 122 Ohio St. 420, 172 N.E. 151. Where, as in this case, the law at issue is the common law of Ohio, this Court is the ultimate legal authority.

*Jones v. Harmon* illustrates this qualification of the law of the case doctrine. *Jones* was an automobile collision case that had to be retried because the Court of Appeals determined that the trial court erred by refusing to give a particular charge regarding a right-of-way statute. 122 Ohio St. at 422. Following that decision, but before the second trial had occurred, this Court rendered a decision in *Heidle & Schelle v. Baldwin* (1928), 118 Ohio St. 375, 161 N.E. 44, changing the interpretation of the right-of-way statute. 122 Ohio St. at 422. In the second *Jones* trial, the trial court gave an instruction consistent with the Court of Appeals’ decision in *Jones* but inconsistent with this Court’s decision in *Heidle*. The Court of Appeals affirmed, but this

Court reversed, holding that application of the “law of the case” in preference to this Court’s intervening authoritative statement of Ohio law was error. 122 Ohio St. at 423. This Court stated, “the trial judge was bound to take notice of the judgment of this court and to give the charge applicable under the latest decision of this court upon the facts presented at the second trial. Not to do so was reversible error . . .” *Id.*

In the present case, this Court’s decision in *Sutowski* foreclosed the use of the market share theory in Ohio and overruled any contrary decision by an inferior court of this state. The lower courts were bound to follow *Sutowski* notwithstanding the Court of Appeals’ decision in *Jackson I*.<sup>4</sup>

2. **Plaintiffs did not raise the issue below** -- This Court ordinarily declines to consider questions not presented to the court whose judgment is sought to be reversed. *E.g.*, *State ex rel. Ohio Civil Service Employees Ass’n v. State Employment Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶ 10; *Zakany v. Zakany* (1984), 9 Ohio St.3d 192, 193, 459 N.E.2d 870.

In the present case, Plaintiffs did not assert in the trial court that the 1995 decision on market share in *Jackson I* must be followed as the “law of the case” notwithstanding this Court’s

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<sup>4</sup> Plaintiffs do not ask that the Court reconsider *Sutowski* generally. The Manufacturers therefore will not review the many reasons why the Court should decline to do so, other than to observe that *Sutowski* placed Ohio in the mainstream nationally. *Sutowski*’s rejection of the market share theory was in accord with prior decisions by the highest courts in ten states (North Dakota, Iowa, Pennsylvania, Illinois, Rhode Island, Missouri, New Jersey, Texas, Oklahoma and Delaware). Only six states’ highest courts (California, Wisconsin, Florida, New York, Washington and Hawaii) have accepted the theory, and almost all such decisions have been rendered in the context of DES cases, the very type of case in which *Sutowski* held that the theory should be rejected. Indeed, New York has limited use of the market share theory to DES cases alone. *Hamilton v. Beretta U.S.A. Corp.* (2d Cir. 2001), 264 F.3d 21, 30. Federal courts hearing diversity cases have declined to apply the market share theory under the laws of ten states (South Carolina, Maryland, Kentucky, Michigan, North Carolina, Minnesota, South Dakota, Louisiana, Georgia, New Hampshire and Alabama) and the District of Columbia.

subsequent contrary decision in *Sutowski*. In fact, Plaintiffs conceded in the trial court that “the slim majority in *Sutowski* forecloses these Plaintiffs’ opportunity to utilize the market share theory of recovery.” R794, Pltf. 2/7/03 Mem. at 47. Plaintiffs also did not make this argument at the appellate level as the basis for an assignment of error, but instead asked the Court of Appeals to “reconsider its decision in the *Sutowski* case.” See Pltf. 5/3/06 Br. at 18-19. The latter request was misplaced, since *Sutowski* was not the Court of Appeals’ decision, and the Court of Appeals is not authorized to reconsider it. Plaintiffs characterized *Jackson I* as the law of the case in a short sentence in their brief to the Court of Appeals, but they did not argue that *Jackson I*’s status as the law of the case required either the trial court or the Court of Appeals to disregard *Sutowski*. They raise that argument for the first time in their memorandum to this Court. Pltf. 3/14/07 Mem. at 5-6, 9-10. Because Plaintiffs did not raise and preserve this issue below, this Court should not consider it now.

**II. Plaintiffs’ Second Proposition of Law: The Court of Appeals Properly Rejected Plaintiffs’ Alternative Liability Argument**

The Court of Appeals ruled that, in order to rely on the alternative liability theory, Plaintiffs must prove, among other things, that (1) two or more defendants committed tortious acts and (2) the plaintiff was injured as a proximate result of the wrongdoing of one of them. *Jackson II*, at ¶ 19, citing *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396. The Court of Appeals found that the record before it established Plaintiffs’ inability to offer such proof. That decision presents no basis for review in this Court, because it clearly was a correct application of this Court’s jurisprudence.

In order to prove that two or more defendants acted tortiously so as to permit the application of the alternative liability theory in a product liability case, a plaintiff must prove that

each such defendant's product was present at the site of the injury. This Court has twice so held. In *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, 473 N.E.2d 1199, the plaintiff suffered a workplace injury when ethyl acetate, a solvent he was using to clean a printing press, exploded. Two defendant manufacturers had supplied ethyl acetate to the plaintiff's employer, allegedly without warning that it was flammable. The plaintiff could not prove which defendant had supplied the ethyl acetate that caused his injury, because the ethyl acetate had been transferred to an unmarked container before the plaintiff used it. This Court held that the alternative liability theory of Restatement (Second) of Torts § 433B(3) (1977) should apply, and that the burden should shift to each manufacturer to prove that it did not supply the particular unit of the product that caused injury.

Subsequent to *Minnich*, in *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 514 N.E.2d 691, this Court held alternative liability inapplicable. In *Goldman*, plaintiff was the executrix of a deceased employee of a commercial bakery who had allegedly been exposed to asbestos-containing materials there. The bakery had burned down, so the plaintiff could not identify the manufacturer of any asbestos-containing materials present in the bakery. The plaintiff sued multiple asbestos manufacturers, relying on the alternative liability theory. The Court held that theory inapplicable, finding that the plaintiff's inability to prove that any defendant's product had been present in the bakery was "fatal to the application of alternative liability." 33 Ohio St.3d at 48. The plaintiff's failure to do so in *Goldman* meant that she "could not demonstrate that each of the defendants had acted tortiously." *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679, 687, 653 N.E.2d 1196 (describing this Court's decision in *Goldman*).

Plaintiffs argue that the Court of Appeals erred in the present case when it affirmed the summary judgment for the Defendants on their alternative liability claim because that decision “place[d] the burden of product identification upon the [Plaintiffs].” Pltf. 3/14/07 Mem. at 13. This argument is an overbroad and imprecise statement of what “product identification” means in this context. The alternative liability theory may relieve a plaintiff from proving precisely which of several manufacturers’ products injured him, but is applied only where the plaintiff can prove specifically as to more than one manufacturer that its product was actually present at the site of the injury. This is why the DES plaintiff in *Sutowski* could not rely on the alternative liability theory, as the Court noted in that case. *Sutowski v. Eli Lilly Co.* (1998), 82 Ohio St.3d 347, 352, 696 N.E.2d 187 (“In applying alternative liability to the facts in *Minnich*, this court did not relieve the plaintiff of the burden of identifying the tortfeasors . . . Alternative liability relieved Minnich only from proving which of the two identified tortfeasors caused his injuries.”). Plaintiffs in the present case are in no better position on this issue than the *Sutowski* plaintiff was. No Plaintiff can prove that any Defendant’s product was present in the house or houses where that Plaintiff allegedly ingested lead pigment. As the Court of Appeals noted, this case is directly analogous to *Goldman*, where this Court held the alternative liability theory inapplicable because the plaintiff could not prove that asbestos-containing products made by any individual defendant were present on the premises where the plaintiff inhaled asbestos fibers. *Jackson II*, at ¶¶ 20-23.

The Court of Appeals also held that Plaintiffs could not rely on the alternative liability doctrine because they did not join all potential tortfeasors as defendants as required by *Minnich*. *Jackson II*, at ¶¶ 26-28, citing *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 219, 556 N.E.2d 505; see also *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 46-47, 514

N.E.2d 691. There is no reported Ohio case in which a plaintiff has been permitted to recover under this theory without joining all possible tortfeasors. *See, e.g., Fiorella v. Ashland Oil, Inc.* (Summit Cty. 1993), 92 Ohio App.3d 411, 416, 635 N.E.2d 1306 (affirming summary judgment dismissing alternative liability claim where fewer than all suppliers of the benzene-containing products that allegedly caused injury were named as defendants). That requirement is central to the logic of the theory, which is that by process of elimination the actual tortfeasor may be identified. If all potential tortfeasors have been joined, and all but one can exculpate themselves, the one that remains must be the actual tortfeasor. But if fewer than all have been joined, and one cannot exculpate itself, that may just as easily be due to its lack of access to evidence as to its actual culpability. Plaintiffs in the present case purported to have joined all possible tortfeasors: they alleged that the Defendants “manufactured and/or produced substantially all lead pigment.” R323, Third Am. Compl. ¶ 175(iii). The undisputed factual record in this case shows that this allegation is inaccurate. There were multiple producers of lead pigments that are not named as defendants in this case. R765, Heitmann 12/98 Aff. ¶¶ 56, 59.

Plaintiffs’ alternative liability argument fails for another reason. In order to rely on the alternative liability theory, a plaintiff must show that all of the defendants created a substantially similar risk of harm. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 688, 653 N.E.2d 1196. In *Horton*, the plaintiffs were two former employees of a tire plant who allegedly had inhaled asbestos fibers at the plant. They sued multiple manufacturers of asbestos-containing products. In contrast to *Goldman*, they could prove that each defendant’s products were present in the plant. However, this Court held the alternative liability theory inapplicable, because the differences among the asbestos products meant that they did not create a substantially similar risk of harm:

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.” [citation omitted] The records in these cases fail to demonstrate that the level of risk posed by each of the defendants' products is substantially similar.

*Id.* at 688.

The present Plaintiffs cannot meet this requirement, because the different types of lead pigments used in paint did not all present a substantially similar risk of harm. By arguing that Defendants “collectively engaged in negligent (if not reckless and intentional) behavior when it came to lead pigment marketing and production,” Plaintiffs seek to treat all lead pigments as if each one in its different uses created the same risk. Ptlf. 3/14/07 Mem. at 11-12. The record does not support their effort. Lead pigments, and paints containing lead pigments, varied in the form and concentration of lead they contained, just as asbestos products varied in the form and concentration of asbestos they contained. See pp 3-4, *supra*. This means that different lead pigments or lead-containing paints present different risks. Risks also varied according to where the paint was applied, how it was applied, and how it was or was not maintained. In this respect, this case resembles *Horton*. Under *Horton*, such facts preclude application of the alternative liability theory. The Court of Appeals agreed with this argument. *Jackson II*, at ¶¶ 23-25.

**III. Plaintiffs' Third Proposition of Law: The Court of Appeals Properly Deemed the Other Assignments of Error Moot Because Plaintiffs Cannot Prove Causation**

Ohio App. R. 12(A)(1)(c) states that the Court of Appeals must decide each assignment of error raised by an appellant “[u]nless an assignment of error is made moot by a ruling on

another assignment of error.” Ohio App. R. 12(A)(1)(c) (emphasis added). This rule was specifically amended in 1992 to add the quoted language to the old rule, which read “[a]ll errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court’s decision as to each such error.” Ohio Appellate Rule 12 Staff Notes, July 1, 1992. After this Court in *Criss v. Springfield Twp.* (1989), 43 Ohio St.3d 83, 538 N.E.2d 406, interpreted the old rule to require the Court of Appeals to consider every assignment of error even if it considered an assignment moot, the rule was amended because “[r]equiring a court of appeals to rule on an assignment of error it finds moot in light of its ruling on another assignment is not in the interest of judicial economy.” Ohio Appellate Rule 12 Staff Notes, July 1, 1992.

Since the adoption of amended Rule 12(A)(1)(c), this Court has never reversed and remanded a Court of Appeals decision on the sole ground that it did not review all assignments of error.<sup>5</sup> It is only when this Court has reversed the Court of Appeals’ decision that cases have been remanded for review of the remaining assignments of error. *See, e.g., Gibson v. Drainage Prods., Inc.*, 95 Ohio St.3d 171, 2002-Ohio-2008, 766 N.E.2d 982; *Wagner v. Roche Labs.* (1999), 85 Ohio St.3d 457, 709 N.E.2d 162.

In this case, the Court of Appeals determined that Plaintiffs had no evidence of causation against any Defendant in its review of the assignment of error on alternative liability. *Jackson II*, at ¶¶ 29-30. Because causation is an essential element of all of Plaintiffs’ claims, the Court of

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<sup>5</sup> Plaintiffs cited *Criss* in support of their Third Proposition of Law. As explained above, this Court relied on the previous version of Appellate Rule 12(A) to hold that the Court of Appeals must review every assignment of error in that case. The other cases cited by Plaintiffs for this Proposition of Law also were decided before the adoption of the amended Rule in 1992. *See* Pltf. 3/14/07 Mem. at 14, citing *Lumbermen’s Underwriting Alliance v. Am. Excelsior Corp.* (1973), 33 Ohio St.2d 37, 294 N.E.2d 224; *Danner v. Medical Ctr. Hosp.* (1983), 8 Ohio St.3d 19, 456 N.E.2d 503; *Dougherty v. Torrence* (1982), 2 Ohio St.3d 69, 442 N.E.2d 1295; *State v. Jennings* (1982), 69 Ohio St.2d 389, 433 N.E.2d 157.

Appeals held that Plaintiffs' other assignments of error were moot.<sup>6</sup> *Id.* Under the amended Appellate Rule 12(A)(1)(c), the Court of Appeals was not required to review and analyze separately the remaining assignments of error.

### CONCLUSION

For the reasons set forth above, the Court should decline Plaintiffs-Appellants' request that it exercise jurisdiction over this case.

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<sup>6</sup> Plaintiffs' additional assignments of error included assertions that the trial court erred by granting summary judgment on their claims under the theories of enterprise liability, conspiracy, strict liability, failure to warn, breach of express warranty, negligence, fraud and nuisance. Plaintiffs' inability to prove that Defendants' alleged tortious conduct caused them harm is fatal to each of these claims. The record in this case shows that they cannot prove (1) who manufactured the paint they allegedly ingested, (2) who manufactured the lead pigment contained in that paint, (3) when the paint was applied, (4) who applied it, (5) whether the person who applied it knew about the potential hazards of lead pigment or paint, or (6) whether that person received or relied upon any representation from any Defendant. Indeed, as to two of the children, there is no evidence that the house in which they resided contained lead paint at all.

Plaintiffs assert that the Court of Appeals erred in not separately reviewing their second assignment of error on the enterprise liability theory. Pltf. 3/14/07 Mem. at 14. That theory, originally articulated in *Hall v. E.I. Du Pont de Nemours & Co.* (E.D.N.Y. 1972), 345 F. Supp. 353, posits that all participants in an industry may be held jointly liable for an injury caused by any participant's product if they delegated product safety and design functions to a trade association and manufactured their products in accordance with standards promulgated by the association. R323, Third Am. Compl. ¶¶ 165-173. The theory has never been accepted as valid under Ohio law and has been rejected in multiple lead pigment cases outside Ohio. Plaintiffs assert that enterprise liability is part of Ohio's "collective liability" law for over a hundred years. Pltf. 3/14/07 Mem. at 8-9. The cases they cite involve joint ventures and other similar factual circumstances rather than attempts to hold all participants in an industry liable for harm caused by products. *Id.*

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