

IN THE SUPREME COURT OF OHIO

THE AMERICAN CHEMICAL
SOCIETY,

Appellant,

v.

LEADSCOPE, INC. ET AL.,

Appellees.

Case No.

10-1335

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 08AP-1026

**MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICUS CURIAE*
OHIO CHAMBER OF COMMERCE, OHIO STATE BAR ASSOCIATION,
OHIO MANUFACTURERS' ASSOCIATION, AND OHIO COUNCIL OF
RETAIL MERCHANTS**

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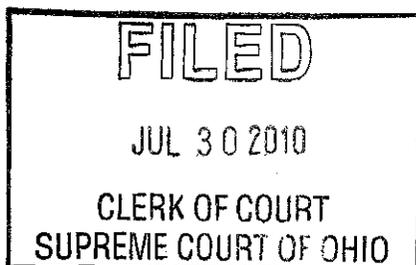


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CERTIFICATE OF SERVICE

I. INTRODUCTION

The undersigned *amicus curiae* represent members constituting every facet of business in the State of Ohio, from manufacturing to retail, from healthcare to transportation, and more. In addition, they represent Ohio trial attorneys and in-house counsel who are responsible for cases in the Ohio courts, including business law cases. These *amici* all have in common an interest in ensuring that Ohio's business litigation law is fair and efficient. As we explain below, the decision below causes substantial concern for *amici* because it adopted rules that will increase the cost of litigation and punish businesses for bringing legitimate claims. No business looks forward to litigating, but it is critical to the businesses of Ohio that they know the courts are open to their legitimate claims. The decision below casts serious doubt on that fundamental proposition, and it should be reviewed by this Court.

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members – including more than 100 non-profit organizations – while building a more favorable Ohio business climate. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The Ohio State Bar Association (“OSBA”) is an unincorporated association of more than 25,000 members, including lawyers, law students, and paralegals. The OSBA's lawyer members range from sole practitioners to members of the nation's largest law firms. Its members' practices include every kind of legal services, including business law and tort law. The OSBA's Constitution declares that one purpose of the OSBA is “to

promote improvement of the law, our legal system, and the administration of justice.” This amicus brief furthers those purposes.¹

The Ohio Manufacturers’ Association (“OMA”) is a statewide association of approximately 1,500 manufacturing companies in Ohio. Manufacturers employ roughly 600,000 men and women in the State of Ohio. The OMA’s members have a vital interest in ensuring that Ohio remains a desirable place to do business.²

The Ohio Council of Retail Merchants is a 2,800-member business trade association that represents various industries along the business supply-chain. The Council advances and protects the interests of the retail and wholesale distribution industries and helps these enterprises achieve lasting excellence in all areas of their business.

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

This case presents issues that are of substantial importance to the Ohio business community. The underlying facts are typical of litigation between business competitors: Appellant American Chemical Society (“ACS”) sued Appellee former employees and their company, Leadscope, Inc. (collectively, “Leadscope”) for misappropriation of ACS’s trade secrets. Leadscope counterclaimed, alleging that ACS’s suit was a form of unfair competition, and that ACS had defamed Leadscope. ACS’s affirmative claims were strong enough to survive Leadscope’s motions for summary judgment and a

¹ The OSBA joins this Memorandum in Support of Jurisdiction in connection with Proposition of Law III, and takes no position with regard to Propositions of Law I, II, and IV.

² The OMA joins this Memorandum in Support of Jurisdiction in connection with Propositions of Law III and IV, and is not opposed to the positions taken in Propositions of Law I and II.

directed verdict, although a jury ultimately ruled against ACS on them. What is extraordinary is that the courts below ruled that Leadscope was entitled to recover for unfair competition even if ACS's claims were not objectively baseless; Leadscope was required only to convince a jury that ACS acted in "bad faith" (*i.e.*, with the "intent of injuring a rival") against Leadscope in bringing suit. Leadscope was awarded \$8.5 million in damages, including punitive damages, on its unfair competition counterclaim.

Amici are concerned that the bad faith rule adopted by the lower courts will chill legitimate Ohio business litigation, punish Ohio businesses that bring legitimate claims, and have a substantial detrimental effect on the Ohio business climate. In *Greer-Burger v. Temesi* (2007), 116 Ohio St.3d 324, 326, this Court recognized that the U.S. Constitution guarantees a right of petition to the courts, and that a litigant could be held liable for bringing a suit only where it is a "sham," which the Court defined as *objectively* baseless. That rule should apply here, both as a matter of federal and state law. Disputes between business competitors are common, and not every plaintiff will be entitled to relief. But bringing an unsuccessful lawsuit should not be a tort. An Ohio business with a legitimate claim should not have to worry that if its suit is unsuccessful, it could face substantial liability for attempting to seek redress.

Conversely, a standard that looks to whether there was ill will or hostility between the parties does not ask the right question. Some level of disagreement characterizes every litigated dispute between businesses. If the parties saw eye to eye on the merits of the claim, there would be no need for litigation. Asking a jury to determine the plaintiff's motive in bringing suit will encourage a wasteful second tier of "unfair competition"

litigation that serves as a referendum on the plaintiff's *attitude* toward its competitor rather than a proper assessment of whether the plaintiff's suit was *justified*.

Equally worthy of review are the lower courts' defamation rulings. Leadscope brought defamation counterclaims, for which it recovered a record-setting \$13.75 million award. The defamation in question took place in two statements made by ACS. The first was a statement that ACS made in a company-wide internal memorandum from its general counsel informing employees of the suit, and instructing them *not* to speak to others about it. The second was a statement made by ACS counsel in a local business magazine that repeated the allegations of ACS's complaint, alongside the journalist's materially identical account of the allegations.

That these two statements could support any damages, let alone \$13.75 million in damages is itself of enormous concern to the Ohio business community. When a company's counsel makes a statement to its employees letting them know of litigation and instructs them not to talk to others about it, that is a prudent decision to ensure that the company speaks with one voice. Likewise, a company counsel's statement to the press acknowledging a lawsuit and its legal allegations, particularly when those allegations have been independently included in the article by the author, is not defamatory. Such statements are part and parcel of modern business litigation and should be considered absolutely privileged just as the allegations that underlie them are. In addition, no one could understand such statements to be anything other than a reflection of the company's views on the matter. *See Early v. Toledo Blade* (6th Dist. 1998), 130 Ohio App.3d 302, 329; *Sethi v. WFMJ Television, Inc.* (7th Dist. 1999), 134 Ohio App.3d 796, 808.

The lower courts' defamation ruling also fell prey to the same subjective/objective error that characterized the rulings on unfair competition. Although the lower courts found that the statements were subject to the qualified privilege, they allowed Leadscope to defeat the privilege by showing that they were motivated by ill will, instead of requiring Leadscope to show that ACS had no objectively legitimate basis for making them. *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 115. Finally, the Court of Appeals also failed to address ACS's important claim that even if the statements were defamatory, they could not have been a cause of injury because they said nothing more than what was in the public record regarding the litigation.

These legal rulings on unfair competition and defamation are not just incorrect, they threaten to harm Ohio business. *Amici* and their members know that businesses have a choice about whether to come to Ohio and whether to stay in Ohio, particularly in these difficult economic times. Part of the business calculus is whether they will be treated fairly and reasonably in the Ohio courts. The decision below – with its expansive view of unfair competition, and its record-setting defamation award against a longtime Ohio employer – sends the wrong message.

Amici are particularly concerned because the facts of this case appear typical of commercial disputes and yet the judgment against ACS is so substantial. The Court of Appeals acknowledged that the Leadscope employees left ACS with the “express intent of developing and marketing a software product that would provide the same capability as [ACS's] Pathfinder.” Decision ¶ 5.³ ACS then took “concrete action” to examine whether there had been any misappropriation once Leadscope obtained its patent. *Id.*

³ The underlying decision of the Court of Appeals is reproduced in the appendix to ACS's Memorandum in Support of Jurisdiction.

Pursuant to its internal review process, ACS had to obtain the approval of two different boards within the organization before it could bring suit. Upon bringing suit, ACS supported its claims with substantial expert testimony. The trial court rejected Leadscope's motions for summary judgment and a directed verdict, finding that the claims had to be resolved by a jury. *Amici* are concerned that if liability of this magnitude can be imposed on a business that took steps to ensure the legitimacy of its claims, it will seriously chill other legitimate claims by Ohio businesses going forward. This Court should review these determinations.

III. STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and facts set out in Appellant's memorandum.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A party has a constitutional right to petition the courts for a redress of grievances and cannot be found liable for "malicious litigation" or "wrongful" interference unless a lawsuit is objectively baseless.

One of the issues of primary concern to *amici* is whether a business can be held liable for bringing a lawsuit simply because the jury finds that the suit was brought in bad faith (*i.e.*, with the intent to harm a rival), or whether the defendant must show that plaintiff's claims were objectively baseless. The lower courts held the former: that the jury could find ACS liable for "malicious litigation" simply if the jury found that the litigation was "not founded upon good faith," but was instituted with the intent and purposes of "harassing and injuring a rival engaged in the same business." Decision ¶ 31.

That determination is incorrect and warrants review. If a business believes that a competitor has infringed its legal rights, and that belief is not objectively baseless, the

business has the right to seek redress in the courts. It does not matter what the “motive” of the suit was, and it would be particularly unwarranted to make liability turn on whether the suit was intended to injure a rival, as the lower courts held. The reality is that every suit between business competitors – including legitimate suits, and even successful suits – is intended to obtain redress from a competitor. The prerequisite for a lawsuit should be that it has a legitimate basis in fact, not that it be brought without animosity.

This Court has recognized in the past that the U.S. Constitution does not permit imposing liability on a litigant for anything short of an “objectively baseless” “sham” lawsuit. *Greer-Burger*, 116 Ohio St.3d at 326. That rule should apply here. A subjective standard threatens to make an “unfair competition” counterclaim a fixture of business litigation suits. Defendants will bring such counterclaims knowing that so long as the plaintiff does not prevail, they will have a chance to collect a sizeable judgment so long as they can convince a jury – a jury that has just found the plaintiff’s claims to be meritless – that the suit was motivated by “ill will.” Such a rule will not only increase the cost of litigation for Ohio businesses, but will punish businesses that have legitimate claims. In order to provide certainty and fairness for Ohio businesses, this Court should hold that so long as a claim is not objectively baseless, it cannot support a claim of unfair competition.

Proposition of Law No. II: As a matter of Ohio law, a claim of malicious litigation requires *both* the lack of an objective basis in fact and subjective “bad faith” or malice.

In addition to providing guidance on the constitutional issues, *amici* believe that that this Court should address what *Ohio* law requires for unfair competition claims. The case presents the Court with an important opportunity to clarify the standard for an unfair

competition/malicious litigation claim. *Amici* strongly encourage this Court to adopt an objective baselessness standard as a matter of Ohio law. A subjective standard creates the same undesirable potential to punish legitimate litigants under state law as it does as a matter of constitutional law.

Proposition of Law No. III: A party may not be found liable for defamation, or to have acted with actual malice, where it makes limited statements about a lawsuit that have an objective basis in fact.

The ruling below affirmed a record-setting \$13.75 million defamation award that flowed from what even the Court of Appeals acknowledged were “two relatively brief statements made more or less contemporaneously with ACS’s initiating the lawsuit against Leadscope and the individual defendants.” Decision ¶ 47. These statements should not have been the source of any damages, let alone that record-setting amount.

The statements were contained in a communication from ACS counsel to ACS employees alerting them to the lawsuit and instructing them not to comment on the case, and in an article published at the time of the lawsuit that summarized ACS’s legal allegations. *Amici* find it a matter of serious concern that a memorandum to employees informing them not to comment on litigation could be the basis of a defamation suit. Such communications are a modern necessity for companies engaged in litigation. Without them, businesses risk that employees may make statements that are harmful to the company’s interests (including statements that may themselves be defamatory).

The Court of Appeals seemed to believe that such a communication could be absolutely privileged in theory, but should not have been sent to all of ACS’s employees, and should not have repeated – even in the exceedingly brief form that the communication took – the allegations against Leadscope. Decision ¶ 54. That is neither

a realistic nor a sensible rule. A business and its counsel will have no way of knowing precisely which employees in the company will have information relevant to a suit, and even less of an idea of who the press or others persons may contact in order to get information. Nor is it possible to tell employees what not to talk about unless the matter is identified in some brief manner. The one-sentence recitation of the allegations against Leadscope in the memorandum said no more than was necessary.

Likewise, ACS's statement to the press was also nothing more than an adjunct of the litigation. The lower court apparently believed that while it would be appropriate for ACS's counsel to refer the press to its absolutely-privileged court filings, it would be inappropriate for counsel to repeat directly what was in those filings. That is a distinction without a difference, and ACS's statement should receive the same absolute privilege that its underlying court filing enjoys.

Amici are also concerned that defamation liability could arise from statements that were so clearly one business's view of a contested proceeding. The statements at issue were nothing more than the equivalent of saying "we believe our competitor violated the law but ultimately it is a matter for the courts to decide." That is the type of anodyne statement that any business might make. To make it the basis of a \$13.75 million defamation action will cause litigants to scour the press looking for any statement, no matter how clearly speculative, in an effort to gain leverage by threatening defamation claims. There is no benefit from such a rule, and this Court should join the lower courts that have rejected defamation liability in similar circumstances. *Sethi*, 134 Ohio App.3d at 805; *Early*, 130 Ohio App.3d at 329.

Finally, the lower courts made the same mistake in confusing subjective intent with objective reasonableness regarding defamation as they did with unfair competition. In affirming the defamation verdict, the Court of Appeals acknowledged that actual malice “may not be inferred from evidence of personal spite, ill will, or deliberate intent to injure, as the defendant’s motives for publishing are irrelevant.” *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 80. Yet that is precisely what the Court of Appeals did. It made no effort to assess whether ACS had legitimate grounds for bringing suit. Instead, it upheld the actual malice finding by reasoning that the statements “suggest ACS’s inferable intent to suppress a competitor by any means necessary.” Decision ¶ 61.

Using a subjective standard in the defamation context threatens exactly the same harm as it does for unfair competition. Ohio businesses that have a basis for their claims as described in a statement should not be hit with substantial defamation verdicts because a defendant was able to convince a jury that the statement was made with a subjective intent to harm. If the qualified privilege is to afford any protection to business, it must employ an objective standard.

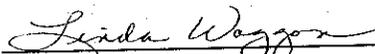
Proposition of Law No. IV: Damages for defamation must be based upon harm caused by the defamatory statements, as distinct from harm caused by a public lawsuit or other proceeding.

The most extraordinary aspect of the defamation ruling below was not just the size of the verdict, but the fact that the defamatory statements contained nothing that was not already in the public record (indeed, in the case of the *Business First* article, the statement went no further than what was independently reported on the same page by the journalist). No business should face a defamation claim for statements that were not the cause of any injury, and yet that is exactly what the Court of Appeals has allowed here. If the ruling below is allowed to stand, it will let defendants who are really complaining

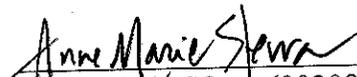
about undesirable publicity from the fact of a lawsuit (which is not actionable) recover defamation damages from businesses that make a statement about the lawsuit, even where the statement says no more than what is publicly known. That is not a sensible rule, and this Court should reaffirm that causation is required for claims of defamation injury. *E.g., Ferreri v. Plain Dealer Pub'g Co.* (8th Dist. 2001), 142 Ohio App.3d 629, 643 (not permitting defamation damages for lack of causation).

V. CONCLUSION

This case involves substantial constitutional questions and matters of public and great general interest. *Amici* respectfully request that this Court accept jurisdiction.

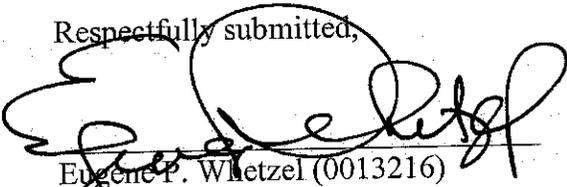

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I certify that a copy of this Memorandum in Support of Jurisdiction of Amicus Curiae was sent by ordinary U.S. mail to the following parties on July 30, 2010.

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