

ORIGINAL

In the
Supreme Court of Ohio

THE AMERICAN CHEMICAL SOCIETY,	:	Case No. 2010-1335
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
LEADSCOPE, INC, et al.,	:	
	:	Court of Appeals Case
Defendants-Appellees.	:	No. 08AP-1026

REPLY BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF
APPELLANT AMERICAN CHEMICAL SOCIETY

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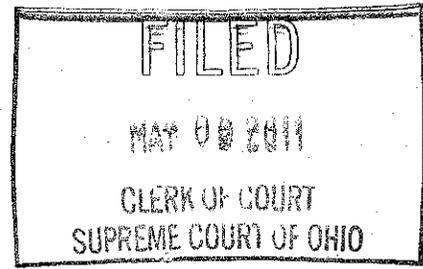


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT.....	2
A. No Ohio court has ever affirmed a jury award based on “malicious litigation.”	2
B. Leadscope’s other authorities do not recognize a malicious litigation tort.	5
C. Leadscope’s procedural and policy assertions are incorrect.....	7
CONCLUSION.....	10
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Ahmad v. AK Steel Corp.</i> , 119 Ohio St. 3d 1210, 2008-Ohio-4082	3
<i>Babb v. Superior Court of Sonoma County</i> (Cal. 1971), 479 P.2d 379	8
<i>Crawford v. Euclid Nat'l Bank</i> (1985), 19 Ohio St. 3d 135	2, 8
<i>Hall China Co. v. Public Utilities Comm'n</i> (1977), 50 Ohio St. 2d 206	2
<i>Harco Corp. v. Corrpro Cos.</i> (9th Dist. 1986), 986 Ohio App. Lexis 8925	4, 5
<i>Henry Gehring Co. v. McCue</i> (8th Dist. 1926), 23 Ohio App. 281	1, 3, 4, 5
<i>Lebron v. Nat'l R.R. Passenger Corp.</i> (1955), 513 U.S. 374	2
<i>McCue v. Wells</i> (1929), 121 Ohio St. 53	1, 4
<i>Patterson v. United States</i> (6th Cir. 1915) 222 F. 599	6, 7
<i>Re/Max Int'l, Inc. v. Realty One, Inc.</i> (6th Cir. 1999) 173 F.3d 995	3
<i>Robb v. Chagrin Lagoons Yacht Club, Inc.</i> (1996), 75 Ohio St. 3d 264	2, 8, 9
<i>Virtue v. Creamery Package Mfg. Co.</i> (1913), 227 U.S. 8	5, 6
<i>Water Management, Inc. v. Stayanchi</i> (1984), 15 Ohio St. 3d 83	3, 5
<i>Wiles v. Medina Auto Parts</i> , 96 Ohio St. 3d 240, 2002-Ohio-3994	9

Statutes, Rules and Constitutional Provisions

Civ. R. 112, 9
Civ. R. 122, 9
R.C. 2323.512, 9
R.C. 4165.022, 9

Other Authorities

Dan B. Dobbs, Law of Torts (2001)6, 8
Franklin Jones, Trade Associate Activities and the Law (1922)6
Prosser & Keeton, Law of Torts (5th ed. 1984).....6
Restatement (Third) of the Law: Unfair Competition (1993).....6

INTRODUCTION

In an effort to defend its verdict on malicious litigation, Leadscope invokes Ohio's "leading cases on unfair competition." Br. at 22. But it then fails to cite, and the State has not located, a single appellate decision affirming such an award. The complete absence of the malicious litigation tort from Ohio case law confirms the obvious—the tort does not exist.

Leadscope instead turns to an eighty-five-year-old decision, *Henry Gehring Co. v. McCue* (8th Dist. 1926), 23 Ohio App. 281, where, according to Leadscope, the Eighth District recognized "malicious litigation" as a basis for common law tort recovery. The State's amicus brief debunked that novel theory, and its survey of the *Gehring* litigation demonstrated that (1) the malicious litigation tort is conspicuously absent from case law and other authorities contemporary to the litigation; (2) the trial court in *Gehring* made no mention of "malicious litigation" in its jury instructions; and (3) this Court never referred to the tort when it reviewed the jury verdict in the case. See *McCue v. Wells* (1929), 121 Ohio St. 53. If *Gehring* was indeed "the 'seminal' and 'foundational' case on malicious litigation in Ohio" (Br. at 22), the trial court, this Court, and the leading commentaries would have presumably mentioned the issue. Their silence speaks volumes.

Leadscope's only response rings of policy. It accuses the State of entering this litigation to express its distaste for "substantial verdicts in commercial disputes." Br. at 50. Nothing could be farther from the truth. The State is unconcerned with the size of Leadscope's jury award; it cares only that Leadscope secured the award based on a non-existent and misguided theory of liability. *This Court* has already identified the hazards of allowing common-law tort recovery based on a meritless lawsuit: It would invite such allegations in every civil suit, extend the litigation process in those disputes, and deter plaintiffs from even lodging claims in the first

place. See *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St. 3d 264, 274; *Crawford v. Euclid Nat'l Bank* (1985), 19 Ohio St. 3d 135, 138.

Ohio law afforded Leadscope many opportunities to address what it viewed as ACS's meritless claims: a motion to dismiss under Civ. R. 12, a motion for sanctions under Civ. R. 11, or R.C. 2323.51(B)(1), or a deceptive trade practices suit under R.C. 4165.02(A)(10). Leadscope instead pressed a novel claim of "malicious litigation." No Ohio court has ever recognized this tort, and this Court should not do so now.

ARGUMENT

At the outset, Leadscope argues that ACS waived any argument as to the validity of the malicious litigation tort by not advancing the issue below. Br. at 22 n.3. Irrespective of what ACS did or did not say, the Tenth District passed on the validity of the tort, announcing that "Ohio recognizes malicious litigation as a basis for an unfair competition claim." *Am. Chem. Soc. v. Leadscope* (10th Dist.), No. 08AP-1026, 2010-Ohio-2725, ¶ 29 ("App. Op."). The issue is therefore before this Court. Well-established appellate "practice permits review of an issue not pressed so long as it has been passed upon" by the court below. *Lebron v. Nat'l R.R. Passenger Corp.* (1995), 513 U.S. 374, 379 (alteration and citation omitted). Moreover, both law and logic require the Court first to determine whether the malicious litigation tort even exists, before addressing its elements and constitutionality. *Hall China Co. v. Public Utilities Comm'n* (1977), 50 Ohio St. 2d 206, 210 ("[C]onstitutional issues should not be decided unless absolutely necessary.").

As to the merits, Leadscope fares no better.

A. No Ohio court has ever affirmed a jury award based on "malicious litigation."

As defined by the Tenth District, the malicious litigation tort has just one element—a party is liable if it instituted litigation "with the intent and purpose of harassing and injuring a rival."

App. Op., 2010-Ohio-2725, at ¶ 30 (citation omitted). This definition, Leadscope argues, “follows Ohio law that has been settled for almost a century.” Br. at 22.

Leadscope fails to substantiate that claim. It first invokes this Court’s opinion in *Water Management v. Stayanchi* (1984), 15 Ohio St. 3d 83, but that case “has nothing to do with malicious litigation.” *Re/Max Int’l, Inc. v. Realty One, Inc.* (6th Cir. 1999), 173 F.3d 995, 1025.

In *Water Management*, the plaintiff alleged that two former employees misappropriated trade secrets. Despite the absence of any such allegations in the complaint, the court of appeals inexplicably found the employees liable for “unfair competition.” 15 Ohio St. 3d at 85. This Court reversed the judgment. Although the Court suggested that “[t]he concept of unfair competition may . . . extend to . . . malicious litigation, circulation of false rumors, or publication of statements,” it emphasized that “[t]here were neither allegations nor findings at the trial level of any unfair competition.” *Id.* (emphasis added). Because no claim of unfair competition was ever pressed, the Court had no occasion to “implicitly endorse . . . the proposition that malicious litigation can constitute unfair competition.” Br. at 23. To accept Leadscope’s contrary argument would mean that this Court “answer[ed] a hypothetical question merely for the sake of answering it”—something that it does not do. *Ahmad v. AK Steel Corp.*, 119 Ohio St. 3d 1210, 2008-Ohio-4082, ¶ 3 (O’Connor, J., concurring).

Leadscope next highlights the Eighth District’s decision in *Gehring*. The Tenth District did the same below, homing in on *Gehring*’s reference to the “numerous cases of successful recoveries because of malicious acts by way of litigation in the courts, where it appears that the litigation was not founded upon good faith.”¹ 23 Ohio App. at 283. This “seminal Ohio case,”

¹ The Eighth District did not reference any examples of such cases during this era, Leadscope has cited none, and the State cannot locate any.

the Tenth District said, “adopt[ed] malicious litigation as a basis for the tort of unfair competition.” App. Op., 2010-Ohio-2725, at ¶ 30.

That exalted label, however, does not square with the history of the *Gehring* litigation. After the Eighth District’s remand, the parties proceeded to trial. When the trial court issued instructions to the jury, it made no comment on “malicious litigation” or “good faith” when defining the tort of unfair competition. See Charge to the Court, *Henry Gehring Co. v. McCue*, No. 237561 (Cuyahoga CP.) (attached as Ex. 2 to Amicus Br. of State of Ohio). The jury then issued a verdict to the plaintiff. On appeal, this Court made no mention of “malicious litigation” when reviewing the validity of the trial court’s instructions. See *McCue*, 121 Ohio St. at 53-55.

If Leadscope is correct that *Gehring* is “the ‘seminal’ and ‘foundational’ case on malicious litigation in Ohio,” Br. at 22, the trial court would have surely discussed the tort in its jury instructions, and this Court would have commented on the tort in its later opinion. The fact that neither occurred confirms either (1) that *Gehring* recognized a powerful new common-law tort under everyone’s nose and it has taken eighty-five years for someone to notice; or (2) that Leadscope has misinterpreted the decision. The latter explanation is the only plausible one: *Gehring* did not create, recognize, or otherwise endorse “malicious litigation” as a basis for tort liability.

Finally, Leadscope invokes the Ninth District’s decision in *Harco Corp. v. Corpro Cos.* (9th Dist. 1986), No. 1465, 1986 Ohio App. Lexis 8925. That case too provides no insight on the validity of a malicious litigation tort. Although the trial court in *Harco* issued instructions to the jury on malicious litigation, the Ninth District declined to consider their validity on appeal. The Ninth District instead upheld “the jury’s general verdicts . . . under either of [two] *alternate*

theories” for unfair competition—the Valentine Act and trade disparagement. *Id.* at *10 (emphasis added).

Leadscope’s brief declares that the *Harco* jury instruction on malicious litigation is “the established law” of Ohio. Br. at 22. But that characterization defies the Ninth District’s own disclaimer. The court expressly stated that it was “leav[ing] open the question of whether the [malicious litigation] charge was erroneous.” *Harco*, 1986 Ohio App. Lexis 8925, at *10 n.2.

Not only does Leadscope misread the holdings of *Water Management*, *Gehring*, and *Harco*, but it neglects to offer a single example of a successful jury verdict based on malicious litigation. Not one. In short, far from being “long established,” the so-called malicious litigation tort is a stranger to the common law.

B. Leadscope’s other authorities do not recognize a malicious litigation tort.

Having failed to locate any relevant Ohio authority, Leadscope attempts to salvage its malicious litigation verdict by referencing a 1913 United States Supreme Court opinion and a 1922 book on “trade associate activities.” Br. at 22 n.3. Neither effort is persuasive.

Virtue v. Creamery Package Mfg. Co. (1913), 227 U.S. 8, 57 L. Ed. 393, was an antitrust case arising from a patent dispute over two rival churn-and-butter machines. Plaintiffs brought an antitrust suit against the defendants based on an array of actions, including the allegation that the defendants violated the antitrust laws by engaging in “the destruction of plaintiffs’ interstate trade by a malicious litigation of their rights.” 227 U.S. at 31-32, 57 L. Ed. at 404. The defendants responded that plaintiffs’ antitrust claim was just a pretext, that plaintiffs were “in fact prosecuting a suit for malicious prosecution,” and that they could not recover under the tort. 57 L. Ed. at 399. Having the final word, the U.S. Supreme Court found that plaintiffs had advanced a proper “action under the Sherman Anti-trust Act,” but that the testimony “show[ed] that no wrong whatever was committed.” 227 U.S. at 38, 57 L. Ed. at 406.

At no point did Leadscope's so-called "malicious litigation" tort enter into that conversation. The Supreme Court held that this was an antitrust case through and through. And insofar as the *parties* bickered over whether this was actually a tort case, they were debating the (entirely different) tort of *malicious prosecution*, not malicious litigation. For Leadscope to say that *Virtue* implicated the malicious litigation tort disregards the content of the parties' briefs and the Court's opinion.

Leadscope's other source—Franklin Jones, *Trade Associate Activities and the Law* (1922)—is just as off base. No published court opinion has cited this work. By contrast, the State's authorities—Dobbs, Prosser & Keeton, and the Restatement—are widely recognized as leading commentaries on common law torts, and these treatises' discussions of unfair competition nowhere acknowledge the concept of "malicious litigation." See Dan B. Dobbs, *Law of Torts* (2001) 1300-05; Prosser & Keeton, *Law of Torts* (5th ed. 1984) 1013-26; Restatement (Third) of the Law: Unfair Competition (1993).

But most devastating is what the "trade associate activities" book actually says. The cited chapter discusses *federal antitrust law*, not state common law. When discussing federal law, the author states that "[t]he systematic institution of legal proceedings in bad faith in order to use the courts as instrumentalities of oppression and thereby eliminate competitors, is unlawful." Jones, *supra*, at 271. He then cites an old Sixth Circuit antitrust case that says much the same: "The means covered by the seventh item were in effect malicious prosecutions against those competitors—the bringing of suits for infringement, not in . . . good cause of action against them, but . . . in bad faith or without probable cause." *Patterson v. United States* (6th Cir. 1915), 222 F. 599, 647.

In *Patterson*, however, the Sixth Circuit also stated that such a suit “cannot be brought until *the termination* of the prosecution.” *Id.* (emphasis added). Even if this Court accepts the book’s discussion of federal antitrust law as authoritative and relevant to the state common-law question at bar (and it should not), Leadscope faces an additional and fatal hurdle. It alleged “malicious litigation” as a counterclaim to ACS’s original lawsuit. Because Leadscope raised the claim *before* the termination of the original proceeding, Leadscope’s own sources confirm that “[t]he suit cannot be maintained.” *Patterson*, 222 F. at 648.

Common law in Ohio does not recognize a distinct tort of “malicious litigation,” and Leadscope presents no evidence to the contrary. Its verdict therefore rests on an illegitimate theory of tort liability.

C. Leadscope’s procedural and policy assertions are incorrect.

At the close of its brief, Leadscope lobs several procedural and policy attacks at the State. Br. at 48-50. None withstands scrutiny.

First, Leadscope claims that the State is interjecting arguments not raised by the parties or addressed by the court below. It is mistaken. The Tenth District unambiguously recognized “malicious litigation as a basis for an unfair competition claim,” App. Op., 2010-Ohio-2725, at ¶ 29, and the parties are quarreling over the proper articulation of the tort’s elements and their constitutionality. The State’s position here—that Ohio does not even recognize malicious litigation as a basis for an unfair competition claim—falls squarely within this litigation. Indeed, the Court must determine whether the malicious litigation tort even exists, before addressing its elements and constitutionality.

Second, Leadscope complains that the State is accepting ACS’s portrayal of the facts. This charge is also false. The State’s amicus brief relied exclusively on the Tenth District’s recitation

of the factual record, nothing more. More important, whether or not “malicious litigation” exists as a tort is a pure question of law. The answer does not turn on any issue of fact.

Third, Leadscope claims that the State’s amicus brief expresses a mere “policy argument disfavoring substantial verdicts in commercial disputes.” Br. at 50. That is false. As the preceding discussion and the State’s opening amicus brief show, the State’s position is grounded in case law and commentary from leading treatises.

To be sure, the State harbors genuine policy concerns. If the Court adopts Leadscope’s position, malicious litigation counterclaims will infect every run-of-the-mill commercial dispute. Because “few tort suits are brought without a degree of rancor,” Dobbs, *supra*, at 1230, any defendant can plausibly allege that the plaintiff’s “litigation [was] not founded in good faith, but brought for the purpose of harass[ment].” App. Op., 2010-Ohio-2725, at ¶ 31. And once the claims are introduced into litigation, the discovery process will lengthen, the acrimony among the parties will increase, and settlement prospects will diminish. Moreover, malicious litigation allegations will negatively impact trial proceedings. As the California Supreme Court recognized, “the introduction of evidence on issues of malice and probable cause [through a counterclaim] may prejudice the trier of fact against the plaintiff’s underlying complaint.” *Babb v. Superior Court of Sonoma County* (Cal. 1971), 479 P.2d 379, 381-82.

And *this Court* has expressed the very same concerns. In *Crawford* and *Robb*, the Court refused the plaintiff’s request to relax the common-law requirements for malicious prosecution torts. Doing so, the Court said, would tempt “[e]very successful summary judgment defendant . . . to file a malicious prosecution claim, *Robb*, 75 Ohio St. 3d at 270, “mak[ing] litigation interminable,” *Crawford*, 19 Ohio St. 3d at 138 (citation omitted). Imposing liability for an

unsuccessful civil action would also deter potential plaintiffs “from utilizing the court to resolve legal disputes for fear of reprisal via a counter suit.” *Id.* (citation omitted).

Those concerns have even greater resonance here. Unlike the malicious prosecution tort at issue in *Crawford* and *Robb*, the malicious litigation tort pressed by Leadscope contains no limiting principle—no termination requirement, no prejudgment seizure of property element, and no probable cause standard.

Broad liability is needed, Leadscope insists, to “dissuad[e] a large, powerful company from using its substantial resources and political clout to destroy” “entrepreneurs and small, start-up businesses” through litigation. Br. at 50. But whatever relevance the David-and-Goliath trope might have to Leadscope’s *factual* storyline, it is immaterial to the legal question at hand. There is no basis for Leadscope’s assumption that the potent new tort it proposes would arm only the Davids of the world; it will just as surely arm the Goliaths and everyone else in between, thereby chilling all types of plaintiffs from seeking justice in the courts.

At bottom, the so-called malicious litigation tort is not only non-existent and perilous, but it is wholly unnecessary. “[O]pportunities [are] already built into the civil system to deal with a meritless lawsuit”—a motion to dismiss under Civ. R. 12, or a motion for sanctions under Civ. R. 11 or R.C. 2323.51(B)(1). *Robb*, 75 Ohio St. 3d at 270. And if the plaintiff employs litigation as a vehicle to publicly “[d]isparage the goods, services, or business of another by false representation of fact,” a defendant can press a deceptive trade practices suit under R.C. 4165.02(A)(10).

“There is no need to recognize a common-law action . . . if there already exists a statutory remedy that adequately protects society’s interests.” *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240, 2002-Ohio-3994, ¶ 15. Given the existence of such remedies and the dangers to the civil

justice system in play, the Court should reject Leadscope's invitation to recognize a new common law tort of "malicious litigation."

CONCLUSION

For all of the foregoing reasons, the Court should reverse the decision below.

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