Supreme Court of Ohio Clerk of Court - Filed December 12, 2019 - Case No. 2019-0488

IN THE SUPREME COURT OF OHIO

DENNIS STINER, Administrator of the Estate of Logan James Stiner	*	Case No. 2019-0488
	*	
Plaintiff-Appellant,	*	On appeal from the Lorain County Court of Appeals, Ninth Appellate District
	*	
v.	*	
	*	Court of Appeals Case No. 17-CA-011215
AMAZON.COM, INC., et al.,	*	
	*	
Defendants-Appellees.	*	

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE OHIO CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AMAZON.COM ET AL.

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INTEREST OF *AMICI CURIAE*[*]

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ 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 and an Ohio business climate responsive to expansion and growth. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

This case presents a question of great importance to *amici* and their members: whether the Ohio Products Liability Act expands strict products liability on an online marketplace, as if it were a manufacturer, when facilitating sales between third-party sellers and buyers. The trial court and the intermediate appellate court correctly held that the term "supplier" in Ohio's strict products liability statute could not be expanded to impose strict liability beyond manufacturers in this

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[*] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

circumstance. Plaintiff-Appellant's contrary argument would impose tremendous negative consequences on the Nation's business community, including small- and medium-sized businesses that rely on such online marketplaces to reach consumers.

Amici and their members have an interest in cabining strict liability. The expansion of strict liability under tort law is harmful to American businesses, customers (due to higher prices and reduced availability of goods), and the national economy. The U.S. Chamber's Institute for Legal Reform has published a number of reports that detail the harmful consequences of such expansion of tort law. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Costs and Compensation of the U.S. Tort System* (2018) [hereinafter Chamber Report], https://www.instituteforlegalreform.com/uploads/sites/1/Tort_costs_paper_FINAL_WEB.pdf. And the U.S. Chamber routinely files *amicus curiae* briefs addressing state tort and products-liability law, especially in cases involving the potential for strict liability.[1]

Indeed, the U.S. Chamber recently filed an *amici curiae* brief in *Oberdorf v. Amazon.com*, 930 F.3d 136, *reh'g en banc granted, opinion vacated*, 936 F.3d 182 (3d Cir. 2019). *See* Br. of *Amici Curiae* Chamber of Commerce of U.S. et al., *Oberdorf v. Amazon.com*, No. 18-1041 (3d Cir. Oct. 24, 2019). In seeking this discretionary appeal, Plaintiff-Appellant relied heavily on the panel's opinion in *Oberdorf*. Yet just days after the Court accepted the appeal in this case, the U.S.

[1] *See, e.g.*, Br. of *Amici Curiae* Pa. Coal. for Civil Justice Reform et al., *Gregg v. Ameriprise Fin.*, No. 29-WAP-2019 (Pa. Sept. 5, 2019) (strict liability); Br. of *Amici Curiae* Chamber of Commerce of U.S. et al., *Baptiste v. Bethlehem Landfill Co.*, No. 19-1692 (3d Cir. Aug. 12, 2019) (nuisance under Pennsylvania law); Ltr. Br. of Chamber of Commerce of U.S., *Sherman v. Hennessy Indus.*, No. S228087 (Cal. Sept. 11, 2015) (strict liability); Br. of *Amici Curiae* Chamber of Commerce of U.S. et al., *Aubin v. Union Carbide Corp.*, No. SC12-2075 (Fla. Oct. 25, 2013) (strict liability); *Amici Curiae* Br. of Pa. Bus. Council et al., *Tincher v. Omega Flex, Inc.*, No. 17-MAP-2013 (Pa. June 4, 2013) (strict liability).

Court of Appeals for the Third Circuit granted rehearing *en banc* in *Oberdorf* and in the process vacated the panel's opinion.

Amici are thus uniquely situated to assist the Court in understanding the dangers of misreading Ohio law to expand strict liability in this context. In so doing, *amici* take no position on the meaning of the term "supplier" in other contexts. Nor do they express a view on the proper treatment of counterfeit or infringing goods sold through online platforms—matters governed by other laws not addressed in this brief.

SUMMARY OF ARGUMENT

I. The Ohio Products Liability Act extends manufacturer strict liability in certain circumstances to a "supplier," which the Ohio General Assembly has defined to include "[a] person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce." R.C. 2307.71(A)(15)(a)(i). The courts below correctly refused to interpret the statute in a way that would expand strict liability to companies that have no contact with or control over the product itself. Plaintiff-Appellant asks this Court to ignore the venerable *ejusdem generis* canon of statutory interpretation and interpret the residual term "or otherwise participates" as broadly as possible. Such an interpretation would render superfluous the specific actions enumerated previously in the statutory list. And it would absurdly expand supplier strict products liability under Ohio law to encompass a variety of peripheral actors who provide services that others use to put a product in the stream of commerce—including package-delivery services, credit-card companies, television and print media, and shopping-mall owners.

II. In defining "supplier" in the Ohio Products Liability Act, the Ohio General Assembly made the right policy decision *not* to impose strict products liability on peripheral or tangential actors who have no contact with or control over the product. The American tort system

imposes hundreds of billions of dollars in costs annually. These excessive costs adversely affect businesses and, ultimately, the consumers who shoulder the majority of such costs in the form of higher prices, stifled innovation, and less competition. Accordingly, the Court should reject Plaintiff-Appellant's policy-driven efforts to rewrite the Ohio Products Liability Act and, instead, apply the traditional tools of statutory interpretation to properly cabin the catch-all term in the statutory list defining "supplier."

ARGUMENT

I. THE NINTH DISTRICT COURT OF APPEALS AND THE TRIAL COURT CORRECTLY HELD THAT AMAZON.COM, AS AN ONLINE MARKETPLACE, IS NOT A "SUPPLIER" SUBJECT TO STRICT LIABILITY UNDER THE OHIO PRODUCTS LIABILITY ACT

The trial court and the intermediate appellate court both correctly concluded that listing a third-party seller's product on a website with no contact with or control over the product itself does not make a company a "supplier" under the Ohio Products Liability Act. *See* R.C. 2307.78(B) (providing in limited circumstances that "[a] supplier of a product is subject to liability for compensatory damages based on a product liability claim . . . as if it were the manufacturer of that product . . ."). The statutory definition of "supplier" is plain, and it plainly excludes companies with such a limited degree of contact and control over a product.

It is a fundamental principle of statutory interpretation that "[t]he starting point is the statute's text." *Spencer v. Freight Handlers, Inc.*, 2012-Ohio-880, 131 Ohio St. 3d 316, 964 N.E.2d 1030, ¶ 16. Importantly, "where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Hubbard v. Canton City School Bd. of Educ.*, 2002-Ohio-6718, 97 Ohio St. 3d 451, 780 N.E.2d 543, ¶ 14; *accord State ex rel. Lee v. Karnes*, 2004-Ohio-5718, 103 Ohio St. 3d 559, 817 N.E.2d 76, ¶ 23 ("If the statute is unambiguous, we must apply it as written."). Moreover, the Ohio "General Assembly's construction of a statute as provided by a definitional section controls

the application of the statute." *State v. S.R.*, 63 Ohio St. 3d 590, 595, 589 N.E.2d 1319, 1323 (1992).

Here, the Ohio Products Liability Act defines supplier as "[a] person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce." R.C. 2307.71(A)(15)(a)(i).[2] Both the trial court and intermediate appellate court properly concluded that Amazon.com did not sell, distribute, lease, prepare, blend, package, or label the product at issue. App'x 014–016, 039. Plaintiff-Appellant does not dispute that conclusion. *See* App. Br. 37–39. Instead, he argues that Amazon.com qualifies as a supplier under the residual or catch-all provision "otherwise participates in the placing of a product in the stream of commerce." *Id.* at 38.

To be sure, the term "otherwise participates in the placing of a product in the stream of commerce" is more general and sweeping than the specific actions that precede it in the list. Read in isolation, the residual term could encompass a broad swath of actors ranging from the United States Postal Service that delivers the product and the credit-card company that facilitates the financial transaction, to the television or print media firm that runs an advertisement of the product and the shopping mall that leases space to the seller of the product. But that is not how statutory interpretation works when it comes to residual terms in statutory lists. Indeed, as Justice Scalia warned, "Any lawyer or legislative drafter who writes two or more specifics followed by a general residual term without the intention that residual term be limited may be guilty of malpractice." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 212 (2012).

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[2] The statute includes a second definition of supplier, but there is no dispute that the second definition does not apply to Amazon.com. *See* R.C. 2307.71(A)(15)(a)(ii) ("A person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm.").

This interpretive canon is the "well-known legal maxim of 'ejusdem generis,'" which commands that "where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term is conjoined having perhaps a broader signification, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms." *State v. Aspell*, 10 Ohio St. 2d 1, 4, 225 N.E.2d 226, 228 (1967). This canon of statutory interpretation dates back in English law to at least 1596 and has been routinely applied by American courts, this Court included. *See* Scalia & Garner, *supra*, at 200–02 (listing examples); *see, e.g.*, *Fraley v. Estate of Oeding*, 2014-Ohio-452, 138 Ohio St. 3d 250, 6 N.E.3d 9, ¶ 23 ("When, as in R.C. 2307.381, a statute contains a list of specific terms followed by a catchall term linked to the specific terms by the word 'other,' we consider the catchall term as embracing only things of a similar character as those comprehended by the preceding terms.").[3]

Courts have long embraced *ejusdem generis* for two principal reasons. First, "[w]hen the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind of the entire passage." Scalia & Garner, *supra*, at 199. Second and related, "when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous." *Id.* at 199–200; *see also State ex rel. Myers v. Bd. of Educ. of Rural Sch. Dist. of Spencer Twp. Lucas Cty.*, 95 Ohio St. 367, 372–73, 116 N.E. 516, 517 (1917) ("[The

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[3] The *ejusdem generis* canon is similar to the *noscitur a sociis* canon, which commands that "[a]ssociated words bear on one another's meaning" to narrow in context a potentially broader meaning of the words read in isolation. Scalia & Garner, *supra*, at 195. *Ejusdem generis*, however, is a narrower canon that expressly applies to "a series of specifics followed by a general." *Id.* at 205; *see id.* (noting that "[c]ourts have often gotten sloppy in stating the rule" of *ejusdem generis* by confusing it with *noscitur a sociis* and "disregard[ing] the necessary specific-general sequence in the enumeration").

statute] must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.”). In other words, legislative drafters have long included more-general residual provisions—signaled by the inclusion of “or other,” “or otherwise,” etc.—to sweep into a statutory definition residual actors or conduct that is of the same category of actors or conduct specifically enumerated. Such inclusion is not intended to make the prior specifications superfluous, but to capture additional actors or conduct of the same genus.

Both the trial court and the intermediate appellate court rejected a broad reading of the statute’s residual provision, properly limiting “otherwise participates” to actions similar to “sells, distributes, leases, prepares, blends, packages, [or] labels.” R.C. 2307.71(A)(15)(a)(i); *see* App’x 015–019, 039–041. The trial court found that Amazon.com’s actions here fell well outside this narrowed definition of the residual term:

> Plaintiff has failed to demonstrate that the actions of Amazon *in this particular transaction*, amounted to anything more than providing an online forum for the seller, Defendant Tenkoris . . . . Amazon never had physical possession of the product, the product was never moved or stored in a facility owned by Amazon. Furthermore, Amazon never fulfilled the sale by labeling, packaging or shipping the product. Plaintiff has failed to provide any evidence that Amazon was so connected to the overall chain of distribution to suggest a relationship with Tenkoris that went beyond their immediate sale.

App’x 040. The appellate court agreed with the trial court, holding that Amazon.com’s “peripheral role” and “tangential participation” did not fall within the residual term of the statutory definition of supplier. App’x 017, 018.

The unifying characteristic or genus of the specific actions that make one a “supplier” under the Ohio Products Liability Act seems to be that the person has to at least have contact with or control over the product at some point—something Amazon.com indisputably did not have here.

The lower courts, however, should not be faulted for not attemping to identify with precision the category covered by the specific actions in the statutory decision. Nor does this Court need to identify the unifying characteristic with exactness. As Justice Scalia counseled, "it will often not be necessary to identify the genus with specificity in order to decide the case at hand." Scalia & Garner, *supra*, at 208.

It is sufficient to conclude, as the lower courts did, that to interpret the residual term to encompass such tangential or peripheral participation in the sale would render superfluous the specific definitions that precede it. And, as noted above, Plaintiff-Appellant's broader definition would absurdly expand strict products liability to actors such as USPS, credit-card companies, television stations, and shopping-mall owners. *Cf. State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 371, 92 N.E.2d 390, 392 (1950) ("The General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences. Hence it is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result.").

Plaintiff-Appellant makes no serious effort to apply *ejusdem generis* to demonstrate how Amazon.com's alleged participation here could reasonably fall within the category of specific actions that precede the residual term in the statutory list. Indeed, it is telling that Plaintiff-Appellant dedicates a mere two pages (Proposition of Law No. 2, App. Br. 37-39) to attempt to rebut the lower courts' statutory interpretation, while spending some 25 pages (Proposition of Law No. 1, App. Br. 12-37) arguing that purported public policy concerns should override the statutory definition.

Rewriting statutes to advance personal policy preferences is not, of course, this Court's proper role. "A fundamental principle of the constitutional separation of powers among the three

branches of government," this Court has repeatedly explained, "is that the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, 116 Ohio St. 3d 468, 880 N.E.2d 420, ¶ 21 (quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 21). The maxim is particularly compelling in this substantive context, where "the General Assembly has repeatedly sought to reform some aspects of the civil tort system for over 30 years." *Id.* Accordingly, the Court should faithfully apply *ejusdem generis* to interpret "supplier" to not include those that have no contact with or control over the product, leaving to the General Assembly the various public policy considerations raised by the parties.

II. THE EXTENSION OF STRICT LIABILITY HARMS AMERICAN BUSINESSES, CONSUMERS, AND THE NATIONAL ECONOMY

The Ohio General Assembly, moreover, made the right public policy decision by not imposing strict products liability on peripheral or tangential actors who have no contact with or control over the product but merely provide services that others use to put a product in the stream of commerce. The American tort system imposes hundreds of billions of dollars in costs annually. In 2016 alone, such costs in the United States amounted to $429 billion or 2.3% of the gross domestic product. *See* Chamber Report, *supra*, at 4. The U.S. Chamber's Institute for Legal Reform found that only about 57% of such amounts constituted compensation paid to plaintiffs. *Id.* The remaining 43%—or roughly $185 billion—"covered the cost of litigation of both sides, operating costs for the insurers, and profits to effectuate risk transfer." *Id.*

The tort system's excessive costs adversely affect businesses and, ultimately, consumers. Elevated liability risks also introduce substantial negative externalities. For example, the risk of frivolous or abusive litigation can discourage the development and sale of new products, slowing innovation and competition. *See, e.g.*, Peter W. Huber & Robert E. Litan, *The Liability Maze: The*

Impact of Liability Law on Safety and Innovation 16 (1991). They also can make American businesses less competitive in international markets. One study, for instance, found that liability costs in the United States decrease manufacturing cost competitiveness by at least 3.2%. Jeremy A. Leonard, *How Structural Costs Imposed on U.S. Manufacturers Harm Workers and Threaten Competitiveness*, at 16 (report prepared for the Manufacturing Institute of the National Association of Manufacturers) (2003). Excesses in the tort system also have been linked to lower worker productivity and employment. *See, e.g.*, Thomas J. Campbell, Daniel P. Kessler & George B. Shepherd, *The Causes and Effects of Liability Reform: Some Empirical Evidence*, NBER Working Paper No. 4989, at 18–22 (1995).

In addition to having a substantial aggregate cost and accompanying negative externalities, the tort system is highly inefficient. A large portion of the total expenditures go to prosecuting and defending claims and lawsuits rather than compensating claimants. One study of insured personal injury claims in Texas, for example, found that for every $1.00 received by a claimant, an average of $0.75 was paid in legal and administrative costs, with those costs rising to $0.83 when the claimant retained legal counsel and filed a lawsuit. Joni Hersch & Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 Am. L. & Econ. Rev. 330, 358–62 (2007). The U.S. Chamber's Institute for Legal Reform has arrived at similar estimates on the compensation paid to claimants relative to costs of litigation. *See* Chamber Report, *supra*, at 6.

Expanding the use of strict liability—where liability does not depend on proof of a defendant's negligence or intent to do harm—only exacerbates these problems. "High litigation and administrative costs constitute the majority of the price increases" passed onto consumers. Joanna M. Sheperd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 287 (2013).

Price increases resulting from litigation costs can even go so far as to "discourage most consumers from purchasing the product and consequently cause the manufacturer to withdraw the product from the marketplace or to go out of business." A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1472 (2010).

Let's return to the context of imposing strict products liability on online marketplaces—or even brick-and-mortar shopping malls for that matter. The Amazon.com third-party marketplace connects entrepreneurs and small businesses to customers around the world, driving down prices for consumers and encouraging competition in the market. If online marketplaces were subject to strict liability for the products third parties sell on these platforms, the marketplaces would become more expensive places for third parties to list their products for sale, which in turn would result in higher prices for consumers or, even worse, could make the marketplaces cost-prohibitive for entrepreneurs and small businesses.

Therefore, precisely at a time in our history when innovation is essential to America's economic competitiveness, strict liability reduces the incentives for innovation, competition, and entrepreneurial activity. *See* Sheperd, *supra*, at 287–88. Accordingly, the Court should reject Plaintiff-Appellant's attempt to rewrite the Ohio Products Liability Act to impose strict liability on even more commercial activity than the Ohio General Assembly has contemplated.

CONCLUSION

For these reasons, the Court should affirm the Ninth District Court of Appeals.

Respectfully submitted,

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