

SUPREME COURT OF OHIO

Sutowski v. Eli Lilly & Co.

82 Ohio St. 3d 347 (Ohio 1998) · Decided June 29, 1998

SUMMARY

The Ohio Supreme Court answered a certified question from the United States District Court and held that market-share liability is not an available theory of recovery in an Ohio products liability action involving DES. The court concluded that Ohio common law and the Ohio Products Liability Act require a plaintiff to establish causation attributable to a particular manufacturer, while distinguishing Ohio's alternative-liability doctrine. The court stated that any policy change allowing market-share liability should be made by the General Assembly.

CASE DETAILS

|                       |                                                                                                                                                                                               |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Ohio                                                                                                                                                                         |
| WRITING FOR THE COURT | Cook, J.; Moyer, C.J.; Douglas, J.; Quillin, J.; Lundberg Stratton, J.; Sweeney, J.; Pfeifer, J.; Resnick, J.                                                                                 |
| JURISDICTION          | Ohio                                                                                                                                                                                          |
| DECIDED               | June 29, 1998                                                                                                                                                                                 |
| DISPOSITION           | other                                                                                                                                                                                         |
| PROCEDURAL POSTURE    | The United States District Court certified to the Supreme Court of Ohio the question whether market-share liability is a viable theory of liability in an Ohio DES products-liability action. |
| STANDARD OF REVIEW    | De novo review of the certified question of Ohio law.                                                                                                                                         |
| PRECEDENTIAL VALUE    | Published and precedential opinion of the Supreme Court of Ohio.                                                                                                                              |
| PARTIES               | Sutowski v. Eli Lilly & Co., Abbott Laboratories, McNeilab, Inc., Dart Industries, Inc., Merck & Co., Inc., Pharmacia & Upjohn Company, E.R. Squibb & Sons, Inc.                              |

TOPICS

- products liability
- statutory interpretation
- proximate cause
- appellate procedure

PRACTICE AREAS

- products liability
- torts
- appellate procedure

## QUESTIONS PRESENTED

1. Whether market-share liability is a viable theory of recovery in Ohio for a DES products-liability action.
2. Whether Ohio common law and the Ohio Products Liability Act require a products-liability plaintiff to identify the particular manufacturer whose product proximately caused the injury.
3. Whether the Ohio Products Liability Act permits or preserves a market-share liability theory.

## HOLDINGS

1. Market-share liability is not an available theory of recovery in an Ohio products-liability action.
2. The court declined to create market-share liability judicially and left the policy decision to the General Assembly.

## KEY QUOTATIONS

*“We respond in the negative: In Ohio, market-share liability is not an available theory of recovery in a products liability action.”* (82 Ohio St. 3d at 347)

*“Manufacturers are not insurers of their products.”* (82 Ohio St. 3d at 352)

*“The Ohio Products Liability Act does not provide for market-share liability. Furthermore, based on the foregoing analysis, the market-share theory is not a part of Ohio common law that could be deemed, under Carrel, to survive the enactment of R.C. 2307.71 et seq.”* (82 Ohio St. 3d at 355)

## FACTUAL BACKGROUND

DES was a generic synthetic estrogen manufactured by hundreds of companies and prescribed during pregnancy before its later association with reproductive injuries. Because the exposure occurred in utero and the injury manifested a generation later, plaintiffs often lacked records or recollection identifying the particular manufacturer. Sutowski claimed a reproductive injury allegedly attributable to DES exposure and sought to proceed under a market-share theory despite being unable to identify the manufacturer of the product that caused her injury.

## PROCEDURAL HISTORY

Sutowski brought a DES products-liability action but allegedly could not identify the manufacturer responsible for the DES exposure. The federal district court certified the legal question to the Supreme Court of Ohio under S.Ct.Prac.R. XVIII. The Ohio Supreme Court answered the certified question in the negative.

## DISPOSITION

other

## REMAND INSTRUCTIONS

The court answered the certified question in the negative and returned the matter to the United States District Court for further proceedings consistent with that answer.

## CASES CITED

- Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980)
- Brown v. City & County of San Francisco Superior Court, 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988)
- Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986)
- State Farm Fire & Casualty Co. v. Chrysler Corp., 37 Ohio St. 3d 1, 523 N.E.2d 489 (1988)
- Minnich v. Ashland Oil Co., 15 Ohio St. 3d 396, 15 OBR 511, 473 N.E.2d 1199 (1984)
- Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948)
- Goldman v. Johns-Manville Sales Corp., 33 Ohio St. 3d 40, 514 N.E.2d 691 (1987)
- Carrel v. Allied Products Corp., 78 Ohio St. 3d 284, 677 N.E.2d 795 (1997)
- Byers v. Consolidated Aluminum Corp., 73 Ohio St. 3d 51, 652 N.E.2d 643 (1995)
- Curtis v. Square-D Co., 73 Ohio St. 3d 79, 652 N.E.2d 664 (1995)
- Kurczi v. Eli Lilly & Co., 113 F.3d 1426 (6th Cir. 1997)
- Cablevision of the Midwest, Inc. v. Gross, 70 Ohio St. 3d 541, 639 N.E.2d 1154 (1994)
- Foss-Schneider Brewing Co. v. Ulland, 97 Ohio St. 210, 119 N.E. 454 (1918)
- Miller v. Baltimore & Ohio Southwestern Railroad Co., 78 Ohio St. 309, 85 N.E. 499 (1908)
- Jeffers v. Olexo, 43 Ohio St. 3d 140, 539 N.E.2d 614 (1989)
- Shumaker v. Oliver B. Cannon & Sons, Inc., 28 Ohio St. 3d 367, 28 OBR 429, 504 N.E.2d 44 (1986)
- Kuhn v. Banker, 133 Ohio St. 304, 13 N.E.2d 242 (1938)
- St. Marys Gas Co. v. Brodbeck, 114 Ohio St. 423, 151 N.E. 323 (1926)
- Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45, 63 N.E. 604 (1902)