

SUPREME COURT OF OHIO

Sutowski v. Eli Lilly & Co.

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

OPINION

COOK, J.

Cook, J. Pursuant to S.Ct.Prac.R. XVIII, the United States District Court certified the following question of law to this court: “Whether market share exists in Ohio as a viable theory of liability in a DES products liability action[?]” We respond in the negative: In Ohio, market-share liability is not an available theory of recovery in a products liability action.

MARKET-SHARE LIABILITY DES is a form of synthetic estrogen that gained widespread use in the early 1940s. Its uses include hormone replacement during menopause, and the treatment of both senile and gonorrheal vaginitis. By the late 1940s, DES was also being used for the treatment of certain complications of pregnancy. Researchers in the early 1970s, however, discovered a high incidence of clear cell adenocarcinoma, a rare form of cancer, in women exposed to DES in útero.

As a result, *349use of DES during pregnancy ceased. Other reproductive disorders such as a predisposition to miscarry, the injury Sutowski claims, have also been attributed to in útero DES exposure. See, generally, Comment, Samuelson, DES, RU-486 and Deja Vu (1993), 2 J. Pharmacy & L. 56; Note, Russell, The Causation Requirement: Guardian of Fairness or Obstacle to Justice? — Making Sense of a Decade of DES Litigation (1991), 25 Suffolk U.L.Rev.

1071. See, also, Grover v. Eli Lilly & Co. (1992), 63 Ohio St.3d 756, 591 N.E.2d 696 (Petitioner’s deformed reproductive organs resulted in an inability to carry her son to full term.). Because DES was not patented, some two hundred to three hundred different drug companies produced DES in the years it was widely prescribed for use during pregnancy. Due to the long interval between DES use and manifestation of its effects a generation later, the great number of possible manufacturer-defendants, and the primarily generic form of the drug, many DES plaintiffs experienced difficulty identifying the particular manufacturer of the drug taken by their mothers years earlier.

Note, 25 Suffolk U.L.Rev. at 1071-1072. Many manufacturers were no longer in business, medical and pharmacy records were lost or destroyed, and memories had dulled over time. Strickland & Katerndahl, An Overview of the Development of Market Share Liability (1992), 446 Practising Law Institute — Litigation 277, 281-282.

In response to the DES plaintiffs inability to establish causation, the California Supreme Court fashioned the market-share theory of liability in its benchmark decision, Sindell v. Abbott

Laboratories (1980), 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924.

In *Sindell*, the trial court dismissed a DES plaintiffs complaint because she was unable to identify the particular manufacturer of the drug prescribed for her mother. The supreme court reversed, resolving in the plaintiffs favor the conflict between the traditional causation requirement of tort law and the desire to insulate an innocent plaintiff from bearing the cost of injury.

The California Supreme Court determined that the theory of alternative liability was inapplicable in light of the plaintiffs inability to join all DES manufacturers in the action. *Sindell*, 26 Cal.3d at 598-603, 163 Cal.Rptr. at 136-139, 607 P.2d at 928-931.

The court also rejected the theories of concert of action and enterprise liability. *Id.* at 604-606, 609-610, 163 Cal.Rptr. at 140-141, 143, 607 P.2d at 932-933, 935. Rather than affirming dismissal of the action, the *Sindell* majority adopted the novel theory of market-share liability proposed in a Fordham Law Review student comment. *Id.* at 611-613, 163 Cal.Rptr. at 144-146, 607 P.2d at 936-938, citing Comment, Sheiner, DES and a Proposed Theory of Enterprise Liability (1978), 46 Fordham L.Rev.

963. The court cited the following three policy considerations in favor of relieving the plaintiff of the burden of proving causation: (1) the manufacturer should bear the cost of injury as between it and an innocent plaintiff, (2) manufacturers are better able to bear the cost of injury resulting from defective products, and (3) because manufacturers are in a better position to discover and prevent product defects and to warn consumers of harmful effects, imposing liability would further ensure product safety.

Sindell, 26 Cal.3d at 610-611, 163 Cal.Rptr. at 144, 607 P.2d at 936. Recognizing that “there is a possibility that none of the five defendants in this case produced the offending substance,” the California Supreme Court nonetheless justified shifting the burden of proof of causation to the defendant. *Id.* at 611, 163 Cal.Rptr. at 144-145, 607 P.2d at 936-937.

To this end, the market-share plaintiff need only (1) identify an injury caused by a fungible product, and (2) join in the action a substantial share of the manufacturers of that product. *Id.*, 26 Cal.3d at 610-612, 163 Cal.Rptr. at 144-145, 607 P.2d at 936-937.

The burden then shifts to each defendant-manufacturer to prove that it did not make the particular injurious product. *Id.* Market-share liability thus enables a plaintiff who cannot identify a particular tortfeasor to sustain a tort cause of action despite an inability to show proximate causation. Any manufacturer unable to prove it did not produce the product at issue is held severally liable for the proportion of the plaintiff’s awarded damages that reflects the manufacturer’s total share of the product market.

Brown v. City & Cty. of San Francisco Superior Court (1988), 44 Cal.3d 1049, 1072-1076, 245 Cal.Rptr. 412, 426-428, 751 P.2d 470, 485-487; Sindell, 26 Cal.3d at 611-612, 163 Cal.Rptr. at 145, 607 P.2d at 937. In support of this unique method of damage allocation, the court reasoned that a defendant-manufacturer's percentage share of the total market for a product is proportional to the likelihood that the defendant-manufacturer produced the specific product that injured the plaintiff.

Id. The only causation a plaintiff need prove in order to recover under a market-share theory is the causal connection between exposure to, or use of, the product at issue and the injury sustained. This atypical theory of tort recovery has not gained wide acceptance outside California. Of the courts that have examined market-share liability in the DES context, most have not considered it a plausible theory of recovery.¹ Ohio may now be numbered among those that have considered and rejected the market-share theory in the DES context.

OHIO TORT LAW Ohio common law has long required a plaintiff to prove that a particular defendant caused his or her injury through negligence.² “ ‘The rule is elementary, that the defendant in an action for negligence can be held to respond in damages only for the immediate and proximate result of the negligent act complained of, and in determining what is direct or proximate cause, the rule requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act.’ ” Foss-Schneider Brewing Co. v. Ulland (1918), 97 Ohio St. 210, 218, 119 N.E.

454, 457, quoting Miller v. Baltimore & Ohio Southwestern RR. Co. (1908), 78 Ohio St. 309, 325, 85 N.E. 499, 504. See, also, Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 142-143, 539 N.E.2d 614, 616-617 (Proximate cause requires that the defendant foresee the injury; foreseeability depends upon the defendant's knowledge..).

The plaintiff must establish a causal connection between the defendant's actions and the plaintiff's injuries, which necessitates identification of the particular tortfeasor. Under the market-share theory, the plaintiff is discharged from proving this important causal link.

The defendant actually responsible for the plaintiff's injuries may not be before the court. Such a result collides with traditional tort notions of liability by virtue of responsibility, and imposes a judicially created form of industry-wide insurance upon those manufacturers subject to market-share liability.

In the end, “manufacturers are required to pay or contribute to ^{*352}payment for injuries which their product may not have caused.” Mulcahy v. Eli Lilly & Co. (Iowa 1986), 386 N.W.2d 67, 76.

This is not the law in Ohio: “Manufacturers are not insurers of their products.” *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988), 37 Ohio St.3d 1, 8, 523 N.E.2d 489, 496.

In *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, 15 OBR 511, 473 N.E.2d 1199, this court adopted the doctrine of alternative liability where the plaintiff “allege[d] two negligent defendants and a single proximate cause.” *Id.* at 398, 15 OBR at 512-513, 473 N.E.2d at 1201. John Minnich was injured in an ethyl acetate explosion while at work. He alleged that the chemical was delivered to his employer in a defective condition, and that both the Ashland Oil Co. and the M.J.

Daly Co. supplied all the ethyl acetate used by his employer. Minnich was unable, however, to identify which of the two companies supplied the particular ethyl acetate that exploded the morning of his injury. In applying alternative liability to the facts in *Minnich*, this court did not relieve the plaintiff of the burden of identifying the tortfeasors. See *id.* at 397-398, 15 OBR at 512, 473 N.E.2d at 1200-1201.

Rather, Minnich had to show that both companies were negligent and that his injuries were caused by the negligence of one of the two. *Id.* Alternative liability relieved Minnich only from proving which of the two identified tortfeasors caused his injuries. *Id.* See, also, *Summers v. Tice* (1948), 33 Cal.2d 80, 199 P.2d 1. Three years after *Minnich*, this court decided *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 514 N.E.2d 691, an asbestos-litigation case wherein the court rejected both alternative and market-share liability.

In rejecting application of alternative liability in *Goldman*, the majority stated: “The key point in alternative liability, then, is that the plaintiff must still prove that all the defendants acted tortiously. * * * “ * * * In this case, it is clear that Goldman has not been able to show that any of the defendants acted tortiously, because she is unable to show that any of the defendants remaining in this case supplied any asbestos products to the Sherlock Bakery.

Alternative liability does not do away entirely with the burden of showing proximate causation; rather, this theory relaxes only the traditional requirement that the plaintiff demonstrate that a specific defendant (or defendants) caused the injury. But the relaxation is only warranted where plaintiff shows that all defendants acted tortiously.” (Emphasis sic.)

Id. at 45-46, 514 N.E.2d at 696. The *Goldman* majority also rejected application of the market-share theory of liability. While in dicta the *Goldman* court presumed that DES litigation was *353better suited to application of market-share liability, it did not, as Sutowski suggests, state that market-share liability is an available remedy in Ohio. Citing a lack of fungibility, difficulty in defining the asbestos market, and the absence, due to bankruptcy, of the largest asbestos supplier in the world, the court explained that adoption of the market-share theory was a matter singularly suited for the legislature.

Goldman, 33 Ohio St.3d at 50-51, 514 N.E.2d at 700-701. “ ‘Plaintiffs request that we make a substantial departure from our fundamental negligence requirement of proving causation, without previous warning or guidelines.

The imposition of liability upon a manufacturer for harm that it may not have caused is the very legal legerdemain, at least by our long held traditional standards, that we believe the courts should avoid unless prior warnings remain unheeded. It is an act more closely identified as a function assigned to the legislature under its power to enact laws.’ ” Id. at 52, 514 N.E.2d at 702, quoting Mulcahy, 386 N.W.2d at 75-76.

Codified in 1988, the Ohio Products Liability Act, R.C. 2307.71 et seq., provided: “Any recovery of compensatory damages based on a product liability claim is subject to sections 2307.71 to 2307.79 of the Revised Code.” Former R.C. 2307.72(A), 142 Ohio Laws, Part 1, 1676.3 Former R.C. 2307.71 et seq. provided that manufacturers were subject to liability under the Act only if the plaintiff established (1) that the product was defective at the time it left the control of its manufacturer, and (2) that the defective aspect of the product proximately caused the plaintiffs injury.

Former R.C. 2307.73(A), 2307.74, 2307.75, 2307.76, and 2307.77. Although enacted after Sutowski filed her claim, the current version of R.C. 2307.73(A) is also instructive. It provides: “A manufacturer is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, all of the following: “(1) * * * the product was defective * * *. “(2) * * * a defective aspect of the product * * * was a proximate cause of harm for which the claimant seeks to recover compensatory damages. “(3) The manufacturer designed, formulated, produced, created, made, constructed, assembled, or rebuilt the product.” (Emphasis added.)

Moreover, the General Assembly specifically stated that its purpose in enacting current R.C. 2307.791 was “to codify an essential requirement for the use of the alternative liability theory in actions brought under Ohio law, as enunciated by” *354this court in Minnich and Goldman. Section 5(Q), Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 4028. R.C. 2307.791 provides: “A manufacturer shall not be held liable for damages based on a product liability claim that asserts any of the following theories: “(A) Industrywide or enterprise liability * * *. “(B) Alternative liability, except when all possible tortfeasors are named and subject to the jurisdiction of the court.” Statutory language that is plain and unambiguous, and conveys a clear and definite meaning, needs no interpretation.

State ex rel. Richard v. Bd. of Trustees of Police & Firemen’s Disability Pension Fund (1994), 69 Ohio St.3d 409, 412, 632 N.E.2d 1292, 1295. In this instance, the 1988 version of the Products Liability Act applicable to Sutowski’s claim unmistakably required identification of a particular

tortfeasor: the successful plaintiff had to establish that the harmful product was defective when it left the manufacturer's control.

While not applied retroactively, the 1997 amendments to the Act serve to conclusively reinforce this identification requirement. In *Kurcz v. Eli Lilly & Co.* (1997), 113 F.3d 1426, the Sixth Circuit reviewed both Ohio decisional law and the Ohio Products Liability Act.

The court based its conclusion that "the Ohio Supreme Court would not adopt a market-share theory of liability in DES cases," *id.* at 1435, on the following: (1) Ohio common law embraces the fundamental principle of tort law that a plaintiff must prove that the negligence of a particular defendant caused injury, (2) the 1988 Ohio Products Liability Act "embodies the general common law principle that a plaintiff has to prove an injury proximately caused by a particular defendant," *id.* at 1432, and (3) presuming the General Assembly was aware of the *Minnich* and *Goldman* decisions, alternative and market-share liability schemes are noticeably absent from the 1988 Act.

Kurcz, 113 F.3d at 1430-1434. This analysis by the Sixth Circuit is unassailable, our decision in *Carrel* notwithstanding. The district court in *Sutowski's* case perceived a possible conflict between *Kurcz* and the majority decision in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 677 N.E.2d 795.

In *Kurcz*, the Sixth Circuit stated that "the Products Liability Act is clear: it does not by its express terms provide for market share liability and it is by its express terms exclusive. Thus, the Ohio Supreme Court would be precluded from adopting a new legal cause of action." *Kurcz*, 113 F.3d at 1434.

In contrast, the *Carrel* court held that " 'all common-law products liability causes of action survive the enactment of R.C. 2307.71 et seq., the Ohio Products Liability Act, unless specifically covered by the Act * * *.' " (Emphasis *sic.*) *Carrel*, 78 Ohio St.3d at 289, 677 N.E.2d at 800, quoting *Byers v. Consol. Aluminum Corp.* (1995), 73 Ohio St.3d 51, 52, 652 N.E.2d 643, 644 (Douglas, J., dissenting); and *Curtis v. Square-D Co.* (1995), 73 Ohio St.3d 79, 652 N.E.2d 664 (Douglas, J., dissenting).

Although *Carrel* and *Kurcz* are at odds in their analysis of the scope of the Ohio Products Liability Act, the *Carrel* decision does not undermine the validity of the Sixth Circuit's ultimate conclusion in *Kurcz*. 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. Accordingly, we hold that in Ohio, market-share liability is not an available theory of recovery in a products liability action. CONCLUSION We recognize that the DES plaintiff who, without fault, is unable to identify the manufacturer responsible for her injury engenders sympathy. It is, however, the role of the court to interpret the law, not to legislate.

Cablevision of the Midwest, Inc. v. Gross (1994), 70 Ohio St.3d 541, 544, 639 N.E.2d 1154, 1156. We believe the General Assembly should decide the policy question of whether Sutowski's claims, or others like hers, warrant substantially altering Ohio's tort law. Judgment accordingly. Moyer, C.J., Quillin and Lundberg Stratton, JJ., concur. Douglas, F.E. Sweeney and Pfeifer, JJ., dissent.

Daniel B. Quillin, J., of the Ninth Appellate District, sitting for Resnick, J.. See Wood v. Eli Lilly & Co. (C.A.10, 1994), 38 F.3d 510 (applying Oklahoma law); Tidler v. Eli Lilly & Co. (C.A.D.C.1988), 851 F.2d 418 (applying the law of both Maryland and the District of Columbia); Mizell v. Eli Lilly & Co. (D.S.C.1981), 526 F.Supp. 589 (applying South Carolina law); Gorman v. Abbott Laboratories (R.I.1991), 599 A.2d 1364; Smith v. Eli Lilly & Co. (1990), 137 Ill.2d 222, 148 Ill.Dec.

22, 560 N.E.2d 324; Mulcahy v. Eli Lilly & Co. (Iowa 1986), 386 N.W.2d 67; Zafft v. Eli Lilly & Co. (Mo.1984), 676 S.W.2d 241. See, also, Braune v. Abbott Laboratories (E.D.N.Y. 1995), 895 F.Supp. 530 (stating Georgia has not recognized market-share liability); Abel v. Eli Lilly & Co. (1984), 418 Mich. 311, 343 N.W.2d 164 (In recognizing the applicability of concert of action and alternative liability theories in DES cases, the court avoided adopting market-share liability; instead, the court held that DES plaintiffs must bring into court all actors who may have caused the injury, with those who are unable to exculpate themselves being held jointly and severally liable.); Namm v. Charles E. Frosst & Co., Inc. (1981), 178 N.J.Super.

19, 34-35, 427 A.2d 1121, 1128-1129 (The court rejected alternative liability and enterprise liability as theories that would "distort or abando[n] altogether" traditional concepts of tort law.).. See Shumaker v. Oliver B. Cannon & Sons, Inc. (1986), 28 Ohio St.3d 367, 28 OBR 429, 504 N.E.2d 44 (The general rule is that a medical malpractice plaintiff must prove causation to establish that the injury was, more likely than not, caused by the defendant's negligence.); Kuhn v. Banker (1938), 133 Ohio St. 304, 10 O.O.

373, 13 N.E.2d 242 (A directed verdict is appropriate where plaintiff failed to prove defendant's negligent actions were the proximate cause of injury.); St. Marys Gas Co. v. Brodbeck (1926), 114 Ohio St. 423, 151 N.E. 323 (Where res ipsa loquitur is inapplicable, negligence will not be presumed from fact of injury — plaintiff must prove defendant's acts were the direct and proximate cause of injury.); Cleveland City Ry.

Co. v. Osborn (1902), 66 Ohio St. 45, 63 N.E. 604 (Plaintiff must show injury was proximately caused by an act of culpable negligence on the defendant's part.).. The Products Liability Act contains recent amendments, effective January 27, 1997, that do not substantively change former R.C. 2307.72(A).