COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

DOCKET NUMBER: 2010-C-1404

TERRI DAVIS, ET AL.
Plaintiffs/Respondents

VERSUS

AMERICAN HOME PRODUCTS CORPORATION
Defendant/Applicant

ON SUPERVISORY WRITS FROM THE JUDGMENT
OF THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA,
DOCKET NO. 94-11684 CONSOLIDATED WITH NOS. 94-12699 & 95-3139
THE HONORABLE PIPER D. GRIFFIN, DISTRICT COURT JUDGE

CIVIL PROCEEDING

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION FOR WRIT OF SUPERVISORY REVIEW

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STATEMENT OF INTERESTS

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent its members' interests in court on issues of concern to the business community. To this end, the Chamber has filed more than 1,700 *amicus curiae* briefs in various courts throughout this country, including the United States Supreme Court, the United States Courts of Appeals, and various state appellate courts.

The Chamber submits this brief in support of the Application for Writ of Supervisory Review filed by Wyeth LLC ("Wyeth") because it is intently interested in the proper enforcement of laws applicable to its members to allow for the clarity and predictability necessary for those members to operate their business and order their affairs. Specifically in this case, the Chamber is interested in uniform application of the plain language of the Louisiana Products Liability Act (the "LPLA"), a law that defines the liability of all companies that manufacture and sell products in Louisiana. The judgment of the district court casts aside the carefully crafted language of the LPLA and improperly introduces a drastic change in the law in the name of unidentified, judicially-created public policy. Unless reversed, the district court's disregard for the plain language of the LPLA will create uncertainty in the law and raise a critical question important to businesses throughout the country: Can companies that manufacture and sell products in Louisiana continue to rely on the enforcement of the LPLA as expressly written? This Court should grant Wyeth's writ application to answer this question in the affirmative and ensure the proper and consistent application of Louisiana law.

ARGUMENT IN SUPPORT OF WRIT GRANT

It is a fundamental principle of Louisiana law that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written." La. Civ. Code art. 9. Thus, "[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *State v. Benoit*, 2001-2712, p. 3 (La. 5/14/02), 817 So. 2d 11, 13 (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989)) (internal quotations omitted). This principle ensures that courts do not infringe on the legislative function of making law. *Sanidfer v. Louisiana State Bd. of Practical Nurse Exam'rs*, 2008-1159 (La. 3/17/09), 8 So. 3d 546, 547 (Knoll, J., concurring) (citing *State v. Vallery*, 34 So. 2d 329, 331 (1948)). It also promotes certainty and equal application of the law to all individuals. *See Southland Oil Co. v. Jenkins Bros. Asphalt Co.*, 563 So. 2d 1238, 1240 (La. App. 1st Cir. 1990) (applying plain meaning of statute in part to ensure "uniformity and certainty" within the business community).

The LPLA defines the liability of individuals and companies who manufacture and sell products in Louisiana. In enacting the LPLA, the Legislature determined that liability should attach only when a product is unreasonably dangerous in design or construction, or unreasonably dangerous because of an inadequate warning or failure to conform to a warranty. *See* La. R.S. 9:2800.54. To prove that a product is unreasonably dangerous in design – the only allegation that plaintiffs make in this case – the LPLA requires plaintiffs to prove, *inter alia*, that "at the time the product left its manufacturer's control … [t]here existed an alternative design for the product that was capable of preventing the claimant's damage." La. R.S. 9:2800.56 (hereinafter, "Section 2800.56").

Courts throughout Louisiana have held that the plain language of Section 2800.56 requires that any alternative design must have been *in existence* at the time the product at issue left the manufacturer's hands. *See Guidry v. Coregis Ins. Co.*, 2004-325 (La. App. 3 Cir. 12/29/04), 896 So. 2d 164, 174; *Seither v. Winnebago Indus., Inc.*, 2002-2091 (La. App. 4 Cir. 7/2/03), 853 So. 2d 37, 41, *writ denied*, 2003-2797, 2003-2799 (La. 2/13/04), 867 So. 2d 704, 705; *Jaeger v. Automotive Cas. Ins. Co.*, 95-2448 (La. App. 4 Cir. 10/9/96), 682 So. 2d 292, 297, *writ denied*, 96-2715 (La. 2/7/97), 688 So. 2d 498; *Morgan v. Gaylord Container Corp.*, 30 F.3d 586, 590 (5th Cir. 1994); *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 181 (5th Cir. 1990), *overruled on other grounds*, *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Thompson v. Nissan N. Am., Inc.*, 429 F. Supp. 2d 759, 771-76 (E.D. La. 2006); *Sisk v. Sears, Roebuck & Co.*, 959 F. Supp. 337, 339-40 (E.D. La. 1996). As these cases show, the language of Section 2800.56 is clear and unambiguous, and requires that a plaintiff put forth evidence to show that there actually existed an alternative design at the time the product in question left the manufacturer's control. *See* La. R.S. 9:2800.54(D) (claimant has the burden of proving all elements of his claim under Section 2800.56). If a plaintiff fails to put forth such evidence, summary judgment is proper as a matter of law. *See Morgan*, 30 F.3d at 590.

Nevertheless, plaintiffs assert – without any legal support – that they can satisfy their burden under Section 2800.56 merely by showing that the science, engineering, materials and technology to develop the alternative design existed when the product left the manufacturer's control. (R. 262, 264.)[1] But, that is not what the Louisiana Legislature said. Instead, the Legislature chose to require that

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[1] The record cites included throughout this brief refer to the consecutively numbered exhibits attached to Wyeth's Application for Writ of Supervisory Review.

claimants establish an alternative design that was actually in existence. Therefore, Louisiana courts have consistently rejected plaintiffs' misinterpretation of the LPLA in dismissing claims predicated upon proposed alternative designs that were not conceived or developed at the time the products were manufactured and sold. *See, e.g.*, *Guidry*, 896 So. 2d at 174; *Thompson*, 429 F. Supp. at 771-76; *Sisk*, 959 F. Supp. at 338. As stated by the United States Fifth Circuit Court of Appeal, Section 2800.56 "imposes on the plaintiff the requirement of showing that an alternative design was *in existence* at the time the product left the manufacturer's hands," not "that a design modification capable of preventing the accident was theoretically possible." *Lavespere*, 910 F.2d at 181 (emphasis in original). Put simply, "the fact that the technology for an alternative design was available does not satisfy the requirement that an alternative design actually be in existence at the time the product left the manufacturer." *Bonnette v. Shopsmith Woodworking Promotions, Inc.*, No. 96-0526, 1996 WL 1353653, at *4 (W.D. La. Dec. 11, 1996).

This case allows for a straight-forward application of the plain language of Section 2800.56. Plaintiffs admitted that their proposed alternative design was first formulated many years after the subject product was manufactured by Wyeth. (R. 35, 132-33.) Thus, it is undisputed that at the time the product left Wyeth's control, "an alternative design for the product that was capable of preventing the claimant's damage" did *not* exist. *See* La. R.S. 9:2800.56. Under the plain terms of Section 2800.56, plaintiffs' claims should have been dismissed as a matter of law.

Despite the undisputed facts and its own acknowledgment of the applicable law,[2] the district court refused to apply the plain language of Section 2800.56 on

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[2] The district court recognized that the alternative design "has to be in some form such that the other side has an ability to know about it. . . ." (R. 32.)

undefined "public policy" grounds. (R. 33-34.) This was legal error. As the Louisiana Supreme Court held long ago, "courts must take the law as they find it" and "cannot legislate on the pretense of doing equity." *Gulf Refining Co. of La. v. Glassell*, 171 So. 846, 854 (La. 1936); *accord Cacamo v. Liberty Mut. Fire Ins. Co.*, 1999-3479, p. 4 (La. 6/30/00), 764 So. 2d 41, 44 ("Courts are not free to rewrite laws to effect a purpose that is not otherwise expressed."). The district court should have applied the law as written.[3] Its failure to do so requires reversal.

Finally, the district court's ruling finds no support in plaintiffs' attempt to avoid the clear language of Section 2800.56 by relying on the affirmative defenses provided by La. R.S. 9:2800.59. (R. 267-70.) La. R.S. 9:2800.59 provides that a manufacturer shall not be liable under Section 2800.56 if "[h]e did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the alternative design identified by the claimant under R.S. 9:2800.56(1)." Thus, the plain language of La. R.S. 9:2800.59 contemplates that a plaintiff has identified a then-existing alternative design before a court will ever examine whether the manufacturer knew, or should have known, of that design. It in no way alleviates plaintiffs' burden under Section 2800.56.

La. R.S. 9:2800.59 also allows a manufacturer to avoid liability if it can show that "[t]he alternative design identified by claimant under [Section 2800.56] was not feasible, in light of then-existing reasonably available scientific and technological knowledge or then-existing economic practicality." Again, this

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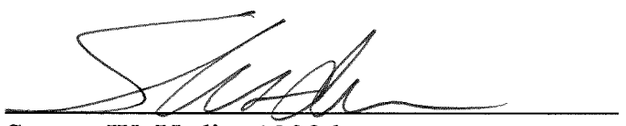
[3] This is not one of those "rare" cases where application of the law as written "will produce absurd or unreasonable results," *Pumphrey v. City of New Orleans*, 2005-979, p. 14 (La. 4/4/06), 925 So. 2d 1202, 1211, or "produce a result demonstrably at odds with the intentions of its drafters," *Benoit*, 817 So. 2d at 13. Indeed, the district court recognized that there is nothing absurd about the Legislature expressly limiting causes of action under the LPLA, stating that "the legislature can narrowly as they choose or as broadly as they choose allow for these causes of action to proceed." (R. 32.)

affirmative defense requires that the plaintiff first prove that an alternative design existed at the time the product left the manufacturer's control. *See Sisk*, 959 F. Supp. at 339 ("[F]easibility is not an issue except as an affirmative defense once the plaintiff has established the elements set out by § 2800.56, including that the alternative design was in existence."). It contemplates a situation where an alternative design existed, but was impractical because of technological or economic restrictions. Again, this affirmative defense in no way obviates plaintiffs' burden under the plain language of Section 2800.56 – a burden plaintiffs failed to meet in this case.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America respectfully submits that this Court should grant Wyeth's Application for Writ of Supervisory Review and reverse the decision of the district court. Doing so will give meaning to the plain language of La. R.S. 9:2800.56, and ensure its uniform application to all individuals and companies who manufacture and sell products in Louisiana. That uniformity is necessary to provide companies with the clarity and predictability required to operate their business and order their affairs.

Respectfully Submitted,



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BEFORE ME, the undersigned authority, came and appeared:

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this 6th day of October, 2010.

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Notary Public, my commission is for life.