SUPREME COURT OF LOUISINA

NO. 10-CC-2379

TERRI DAVIS, ET AL.

Plaintiffs/Respondents

VERSUS

AMERICAN HOME PRODUCTS CORPORATION

Defendant/Applicant

ON THE APPLICATION OF DEFENDANT/APPLICANT, WYETH LLC,
FOR A WRIT OF CERTIORARI AND/OR SUPERVISORY REVIEW
DIRECTED TO THE COURT OF APPEAL,
FOURTH CIRCUIT, NO. 10-C-1404

ORIGINAL BRIEF OF THE LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, *AMICI CURIAE*

Of Counsel:
Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
Telephone: (202) 637-3000

James A. Babst, No. 2651
WEGMANN & BABST, LLC
228 St. Charles Ave., Suite 1028
New Orleans, LA 70130-2601
Telephone: 504-528-944
Fax: 504-309-5976

Attorneys for the *amici curiae*

May it please the court:

The Louisiana Association of Business and Industry ("LABI") and the National Association of Manufacturers ("the NAM") submit this brief in support of the application for certiorari or supervisory review brought by Wyeth LLC.

THE INTEREST OF THE *AMICI CURIAE*

LABI is the largest business advocacy group in Louisiana. It is a not-for-profit Louisiana corporation that includes within its membership over 5,000 businesses and their principals and 117 local chambers of commerce and trade associations. Over 80 percent of LABI's members are small businesses. LABI's mission is to foster a climate of economic growth by championing the principles of the free enterprise system and to represent the general interests of the business community through active involvement in the legislative, regulatory, and judicial processes.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

LABI has a particular interest in the proper interpretation and application of the products liability and summary judgment reforms on which this case turns, having been directly involved in the legislative processes by which they became law. Both *amici* have a vital interest, on behalf of their members, in setting right such misapplications of the positive law that threaten reforms, such as these, adopted specifically to allow the courts to bring to an early and certain end lawsuits of the sort that had, historically, consumed litigious and judicial resources without purpose, produced unsustainable results, and impeded economic development.

ARGUMENT

The *amici* support Wyeth's application for certiorari or supervisory review for all the following reasons, in addition to those put forth by Wyeth in its application:

Legislative background

In olden times, a manufacturer could be held liable in Louisiana for the damage caused by its products on a showing, simply but vaguely, that the product was "unreasonably dangerous to normal use." See *Weber v. Fidelity & Cas. Ins. Co*., 250 So.2d 754 (La. 1971). The standard, such as it was, provided little to no guidance to litigants or courts on how products cases were to be tried or decided. This court addressed the resulting confusion in *Halphen v. Johns-Manville Sales Corp*., 484 So. 2d 110 (La. 1986), where it laid out the various theories on which products liability actions might proceed but, in so doing, introduced to Louisiana an entirely new theory of products liability, according to which a manufacturer could be cast for injuries caused by a product that was found to be unreasonably dangerous *per se.* The perception was that the new theory was one of absolute liability, or something very like absolute liability. See *McCoy v. Otis Elevator Co*., 546 So. 2d 229 (La. App. 2nd Cir.), writ denied, 551 So. 2d 636 (La. 1989).

LABI saw Louisiana's products liability regime as a drag on the economy of the state, in that it discouraged manufacturing, sales, and related investment: the *Weber*-era prospect of expensive discovery, long trials, and unpredictable outcomes was unsustainable in the long run, and so was the *Halphen*-era prospect of near-absolute liability. Nearby states, such as Alabama, were advertising their products liability laws as more reasonable, in an attempt to entice manufacturers to re-locate. To protect the manufacturing base in Louisiana, LABI, working with manufacturers of all sorts, including the manufacturers of pharmaceuticals and medical devices, urged the Legislature to reform the law. The effort took several years, and it bore fruit in 1988 with the passage of the

Louisiana Products Liability Act ("LPLA"). Acts 1988, No. 64, adding La. R.S. 9:2800.51 - .59.

The proponents did not, as the legislative history shows, get everything they asked for. But they got a good law. It states clearly what kinds of cases it controls (§§ 2800.52, .53), sets out the theories on which those cases can be prosecuted (§ 2800.54), and – most important for present purposes – lays out precisely what is to be proved and by whom (§§ 2800.54, .56). The intent at the time was that the law would discourage fringe litigation, link a manufacturer's liability to its actual fault, produce consistent and predictable results, and conserve the resources of both the courts and the litigants.

The new law did a good job in all those areas, but the effect was enhanced when, in 1997, the Code of Civil Procedure was amended to bring its provisions on summary judgment in line with the federal civil rule[1] on the same subject matter. Acts 1997, No. 483, amending La. Code Civ. P. art. 966. LABI, working with the Foster administration, was in the forefront of this reform as well.

The amendment re-characterized the device, such that summary judgment is now favored, not disfavored. Art. 966(A)(2). And it directs that summary judgment be granted, regardless of the factual support submitted with the motion, where (1) the motion points out that the opponent's action, claim, or defense is factually unsupported in at least one essential element; (2) the opponent has the burden of proof at trial as to that element; and (3) the opponent fails to produce, in response to the motion, "factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial." Art. 966(C)(2).

Wyeth's summary judgment should have been granted. The district court's refusal to grant it was error, and the Fourth Circuit's refusal to grant Wyeth's application for review was error as well, although for a different reason. The rulings threaten both reforms and, therefore, the core interests of LABI, the NAM, and their respective members.

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[1] Fed R. Civ. P. 56. And with then-Judge Knoll's decision for the Third Circuit in Hayes v. Autin, 96-287 (La. App. 3 Cir. 12/26/96), 685 So. 2d 691; s*ee* La. Acts 1997, No. 483, Section 4.

The Fourth Circuit notwithstanding, there was no genuine issue of material fact

The Fourth Circuit simply got it wrong. For although a genuine issue of material fact, that is, a real controversy over a fact that might affect the outcome of a lawsuit, precludes summary judgment, there is in this case no genuine issue with respect to any of the facts material to the disposition of Wyeth's motion. The appellate court did not identify any such issue in denying Wyeth's writ application on October 11, 2010.[2] And the district court signed a *per curiam* the next day[3] in which it explained that its ruling on the motion had not, in fact, turned on an appreciation that a trial was necessary to resolve a factual dispute.[4]

The motion for summary judgment in this case need not have done more than to point out that the plaintiffs, who have the burden of proof, would be unable to demonstrate at trial a (a) practical alternative product design that (b) would have made a relevant difference and (c) was in existence when the allegedly defective product left the manufacturer's control. La. Code Civ. P. art. 966(C)(2); La. R.S. 9:2800.54(B)(2) &(D), .56. Discovery was complete, and the plaintiffs failed to produce evidence of an alternative design of the right vintage: plaintiffs' expert, retained more than a decade after the action was initiated, admitted that his (untested) alternative designs, developed *after* he was retained, were novel, sufficiently so that he applied for a patent[5] on one of them, and plaintiffs offered no other or earlier alternative designs.[6] That the alternative designs offered by the plaintiffs *came into existence too late* was, without more, sufficient to require that Wyeth's summary judgment be granted. That it was not is error, and the Fourth Circuit compounded the error by refusing to intervene and correct it.

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[2] Application, Ex. D.

[3] Application, Ex. E. And see the discussion at 6-8, *infra*.

[4] The *amici* do not read the Uniform Rules – Courts of Appeal to have precluded the Fourth Circuit's consideration of Wyeth's application for a rehearing. See Rules 4-9 & 2-18.7. That the appellate court read them otherwise is unfortunate. Application, Ex. F. No rule of mere procedure, the *amici* submit, should condemn the parties to an unnecessary trial simply because the appellate court, on first viewing, misapprehended question put to it on an application for review.

[5] In the terms of the patent law, the expert must have certified that his "invention," that is, the difference between the subject matter as to which he sought the patent and the "prior art," "would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains." 35 U.S.C. § 103(a).

[6] Application, Supplemental Appendix, pp. 2-12, 16-17, 201-21 & 25.

"Policy" notwithstanding, the LPLA is not ambiguous and is to be applied as written

The rub for the district court was not in the facts, but rather in the law. For although the district court's *per curiam*[7] does not spell it out in sacramental language, its ruling was that *Wyeth had failed to show*, despite a factual record as to which there was no genuine issue, *that it was entitled to judgment as a matter of law*, that is, that it had failed to demonstrate that La. R.S. 9:2800.56 compelled the court to enter judgment for it. See La. Code Civ. P. art. 966(C)(1).

Section 2800.56 reads, in pertinent part:

> A product is unreasonably dangerous is design if, at the time the product left the manufacturer's control:
> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. . . .

The district court, indulging "policy" misgivings about the wisdom of applying creaky legislation from 1988 in the context of modern pharmaceutical litigation:[8]

> found that the meaning of the word "existed" within the statute is ambiguous, and in so finding, . . . determined that the word "existed" could be read to include a claim on behalf of the plaintiffs if the scientific knowledge and/or technology [used in the plaintiff's expert's alternative design] was available at the time a product left a manufacturer's control.

Per curiam, at 2.[9]

It is in order to correct the manifold errors that are packed in those few lines that this court should grant Wyeth's application for review, all in accordance with the fourth of the writ-grant considerations set out at Rule X, § 1(a).

Policy, first of all, is grist for the legislative mill, not the judicial. La. Const. Arts. II, § 2; III, § 1; V, § 1; La. Civil Code arts. 1, 4 & 9; La. R.S. 1:4; see *Hunter v. Morton's Seafood Restaurant*, 2008-1667 (La. 3/17/09), 6 So. 3d 152; *Unwired Telecom Corp. v. Parish of Calcasieu*, 2003-0732 (La. 1/19/05), 903 So. 2d 392. That the Legislature has not seen fit to amend the LPLA since its enactment, over twenty years ago, [10] despite the

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[7] Application, Ex. E.
[8] Application, Ex. A, pp. 22, 25-26, 28.
[9] Application, Ex. E, p. 2.
[10] La. R.S. 2800.60, on the liability of firearms manufacturers, was added in 1999. Acts 1999, No. 1299. The original LPLA remained intact.

unanimous-until-now jurisprudence[11] on what it means for an alternative design to have "existed" within the meaning of § 2800.56(1), argues strongly that there is no legal space left for judicial misgivings about the policy that informs the law.

The district court has the legal history wrong, too. Pharmaceutical litigation pre-existed the LPLA, and it was, in fact, very much on the minds of those who pushed for and adopted the reform in 1988. To understand how active the field was, and the extent to which it had evolved, by the time the Louisiana legislature intervened, one need only survey the decisions in such cases as *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L. Ed. 2d 650 (1986)(on removal jurisdiction); *In re Bendectin Litigation*, 857 F. 2d 290 (6th Cir. 1988) (reviewing a judgment rendered on a jury finding, after 22 days of trial on the issue of causation alone, that exonerated the morning-sickness drug Bendectin); *McBride v. Merrill Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983)(reviewing a judgment on an action in defamation by one of plaintiffs' experts in the Bendectin litigation, stemming from an article in *Science* that was critical of his findings); and *Sterling Drug v. Yarrow*, 408 F.2d 978 (8th Cir. 1969),. The edition of DRUGS IN LITIGATION that Michie Butterworth published in 1997 notes that the series started in 1976. It was argued in D. Vinson & A. Slaughter, eds., PRODUCTS LIABILITY: PHARMACEUTICAL DRUG CASES (Shepard's/McGraw-Hill 1988), at § 4.05, that design liability has no proper place in a pharmaceutical case. The Practicing Law Institute published a volume entitled DRUG LIABILITY LITIGATION in 1978 and another entitled

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[11] See the authorities cited in the application, at pp. 15-18, notwithstanding plaintiffs/respondents' response to the amicus brief filed on behalf of the Product Liability Advisory Council, pp. 3-7. Consider, for example, the decision in Garcia v. Brown, 38,825 (La. App. 2 Cir. 11/24/04), 889 So. 2d 359, writ denied, 2004-3197 (La. 3/24/05), on which the plaintiffs/respondents rely at pp. 3-4. The court there reversed a directed verdict for Ford in a roll-over case, noting explicitly that plaintiffs had shown "that there were a number of vehicles *on the road at the time*, *including several models made by Ford* that had roof structures with the strength necessary to withstand the impact sustained in this accident and not crush in more than five inches." 889 So. 2d at 362 (emphasis supplied). Plaintiffs/respondents offer Bernard v. Ferrellgas, Inc., 06-6211 (La. App. 3 Cir. 2/5/97), 689 So. 2d 554, for the spurious notion that the existence of the alternative design of which the statute speaks cannot be shown except by production of a blueprint, that is, that evidence of an alternative design cannot be inferred from the existence of an alternative product that incorporates the features of the alternative design. Where, as in *Bernard*, the existence of "alternative products," incorporating safety devices that might have kept the propane-fired smoker from exploding, is "established" by the testimony of the manufacturer's installer and former manager, 689 So. 2d at 558-59, *amici* would be hard pressed to say that the *existence* element of the claim had not been proved. *Garcia* is similar. But where in this case is there evidence of a Norplant alternative, in design or in production, at the relevant time?

FOOD & DRUG COMPLIANCE in 1984; the latter volume reprints U.S. Senate Report No. 98-476 (98th Congress, 5/23/84), on a proposed federal product liability act. Citations could, of course, be multiplied.

Courts are not, finally, to disregard the plain meaning of a law, like this one, by indulging in its unnecessary interpretation. Interpretation is appropriate only where there is no straightforward reading of a law or the straightforward reading produces an absurd result. Where interpretation is to be engaged in, it is to be guided by the ordinary uses of the ordinary words the law, by the technical uses of its technical words, by the plain meaning of those words as they are used in laws on related subject matters, and – ultimately – by the legislature's intent as revealed in the legislative history. See *State v. Dick*, 2006-2223 (La. 1/26/07), 951 So.2d 124, 130; *Colvin v. Louisiana Patients Compensation Fund Oversight Board*, 2006-1104 (La. 1/17/07), 947 So.2d 15. It does not appear that the district court here engaged in an examination of the legislative history. Its conflation of *design* with the *science and technology out of which a design might flow* is anything but straightforward, offends the ordinary use of ordinary words, reads *design* out of the law altogether, and introduces absurdity where there was none before. None of that is permitted by the rules of statutory interpretation. It is the straightforward reading of the LPLA that compels summary judgment for Wyeth, and that reading is far from absurd.

CONCLUSION

The appellate courts regularly grant supervisory writs to intervene when a district court's denial of a properly supported and inadequately opposed motion for summary judgment threatens the parties, and the judicial system, with the expense of an unnecessary trial, and this court has intervened when the appellate courts decline to. See *Batiste v. Bayou Steel Corp*., 2010-1561 (La. 10/1/10).

These consolidated cases were filed fifteen years ago. It has been a central part of *amici's* missions for longer even than that to promote legal reforms that discourage the waste of judicial and private resources that cases like these entail. Positive law sufficient

to the task is available, indeed, governs. This court must review the district court's refusal to avail itself of that law and the Fourth's Circuit refusal to intervene, intervene itself, and reverse.

Respectfully submitted,

Of Counsel:
Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
Telephone: (202) 637-3000

James A. Babst, No. 2651
WEGMANN & BABST, LLC
228 St. Charles Ave., Suite 1028
New Orleans, LA 70130-2601
Telephone: 504-528-9444
Fax: 504-309-5976

Attorneys for the *amici curiae*

CERTIFICATE

The undersigned certifies that a copy of the foregoing *amicus* brief has been distributed to each of the following by US Mail:

Hon. Piper D. Griffin
Judge, Civil District Court
421 Loyola Avenue
New Orleans, LA 70112

Darleen J. Jacobs
823 St. Louis Street
New Orleans, LA 70112

Hon. Danielle A. Schott, Clerk
Court of Appeal, Fourth Circuit
Royal Street
New Orleans, LA 70130

Bruce C. Dean
110 Veterans Mem. Blvd.
Suite 360
Metairie, LA 70005

Michael H. Rubin
MCGLINCHEY STAFFORD PLLC
One American Place, 14th Floor
Baton Rouge, LA 70825

and also by e-mail to Mr. Dean.

New Orleans, Louisiana this 3rd day of November, 2010.

James A. Babst