STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPREME COURT

STATE OF RHODE ISLAND,

V.

LEAD INDUSTRIES ASSOCIATION, INC., *ET AL.*

No. 04-63-M.P.
No. 06-158-A
No. 07-121-A

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AMERICAN CHEMISTRY COUNCIL, AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF APPELLANTS-DEFENDANTS

Jennifer Whelan (R.I. Bar No. 6952)
McGIVNEY & KLUGER, P.C.
72 Pine Street, First Floor
Providence, RI 02903
Tel: (401) 274-5300
Fax: (401) 331-7454

Counsel for *Amici Curiae*

Victor E. Schwartz
Mark A. Behrens
Phil S. Goldberg
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
Tel: (202) 783-8400
Fax: (202) 782-4211

Of Counsel

(Additional Of Counsel Listed on Next Page)

January 30, 2008

Of Counsel

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
Tel: (703) 741-5000

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 637-3000

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, N.W., Suite 1000
Washington, D.C. 20036
Tel: (202) 828-7158

Karen R. Harned
Elizabeth A. Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 314-2061

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 682-1163

Gregg Dykstra
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
Tel: (317) 875-5250

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

PUBLICATIONS

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPREME COURT

STATE OF RHODE ISLAND,

V.

LEAD INDUSTRIES ASSOCIATION, INC., *ET AL.*

No. 04-63-M.P.
No. 06-158-A
No. 07-121-A

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in Rhode Island and their insurers. Accordingly, *amici's* members have a substantial interest ensuring that Rhode Island's civil justice system is fair, follows traditional tort law rules, and promotes sound public policy. As explained below, *amici* believe the trial court's decision violates these core principles. *Amici*, therefore, urge this Court to reject the broad new duty rule sought by the State, as other state courts of last resort have recently done.

STATEMENT OF THE CASE

Amici adopt Appellants/Defendants' summary of the dispute in question.

INTRODUCTION AND SUMMARY OF ARGUMENT

The tort of public nuisance has centuries of jurisprudence defining its purpose and boundaries. *See generally* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003). It provides governments with the ability to stop and abate the effects of quasi-criminal behavior that could cause injury to someone exercising a public right. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 541 (2006). An attorney general, for example, could use public nuisance theory to seek an injunction against someone from unreasonably interfering with the right to use a public roadway, unreasonably operating a

loud tavern at night in a residential neighborhood, or unreasonably engaging in public vagrancy. *See, e.g., Hood v. Slefkin*, 88 R.I. 178, 187 (R.I. 1958) ("A nuisance is an injury resulting from an unreasonable or unlawful act."); Gifford, *supra*, at 782; William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966). The tort has not been broadly applied to govern how products are manufactured, designed, promoted or labeled. *See, e.g., City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (customer, not manufacturer, "was solely responsible for the nuisance it created" with the product). Those issues are properly addressed by the law of products liability.

Over the last several years, however, a few prominent personal injury lawyers, including the Motley Rice firm, often working on behalf of government attorneys, such as the Rhode Island Attorney General, have brought product manufacturing-based claims purporting to sound in public nuisance theory, but circumventing the purpose and requirements of this historic tort. *See* Schwartz & Goldberg, *supra*, at 552-561. Their goal has been to use what they believe is the amorphous nature of the word "nuisance" to develop a "super tort" that can overcome well-settled requirements of other areas of tort law, including products liability. *See id.; see also* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people . . . ."). The claim before this Court represents the first such case filed in the lead pigment context; it was created when the Motley Rice firm solicited the Rhode Island Attorney General to file this lawsuit and advance its novel legal theories. While this action has been pending, the broad new rule sought by Appellees/Plaintiffs has been rejected by other leading courts. *See, e.g., In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *City of St.*

Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007); *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126 (Ill. Ct. App.), *appeal denied* 833 N.E.2d 1 (Ill. 2005).

This Court should join with these other distinguished courts by rejecting the trial court's rulings in this case; otherwise the purpose of public nuisance actions in Rhode Island would be irretrievably changed and the tort's elements fundamentally redefined. In departing significantly from the tort's core requirements, the trial court created a near-defenseless claim. Any business that ever lawfully made or sold a product could be held liable in Rhode Island at the whim of the Attorney General if the product category as a whole were misused or not properly maintained by certain members of the public and, as a result, became associated with a potential hazard. No longer would a public nuisance action require harm to a public right, unreasonable or quasi-criminal conduct, or control over the nuisance at the time of creation or abatement. Further, causation would not need to be proved under traditional standards. It would be improperly presumed based solely on the fact that the defendant manufactured a product in the class.

In Rhode Island and other states, maintaining the standards for public nuisance injury, conduct, control, and causation has kept the broad term "nuisance" from creating sprawling lawsuits encompassing any condition that could be subsequently viewed as an annoyance or a possible danger to members of the public. As legendary torts scholar Dean John Wade observed, if "a plaintiff would need only to prove that the *product* was a factual cause in producing injury . . . [an automaker] would be liable for all damages produced by a car, a gun maker would be liable to anyone shot by the gun, [and] anyone cut by a knife could sue the maker." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973) (emphasis added). Without its traditional rational and well-defined boundaries, public nuisance

law would become a "monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

As stated, high courts in other states with similar legal environments as Rhode Island have largely rejected product-based public nuisance suits. *See, e.g., In re Lead Paint Litig.*, 924 A.2d at 484; *St. Louis*, 226 S.W.3d at 110; *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005). They and other intermediate appellate courts have expressed concern that these lawsuits would cause significant ambiguity in the law, raise serious due process concerns, and make end-runs around the basics of products liability law. *See In re Lead Paint Litig.*, 924 A.2d at 501 ("[W]ere we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action."); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (recognizing that courts should "enforce the boundary between the well-developed body of products liability law and public nuisance law").

As this brief will demonstrate, allowing the instant case to proceed would assign to product manufacturers liability for any harm caused by downstream use or misuse of their products beyond the manufacturers' control. This would be true regardless of intervening causes or other factors that in other areas of the law, namely products liability, are important to determining liability. Rhode Island law, fundamental tort principles, and sound public policy support rejection of Appellees/Plaintiffs' argument.

ARGUMENT

I. THIS LAWSUIT PURSUES A NEW AND UNSOUND PATH IN THE DECADES-LONG PURSUIT OF FORMER MANUFACTURERS OF LEAD PIGMENTS AND PAINTS

Lead pigment and paint litigation, generally, arises out of injuries incurred by children who ingest lead pigment in paint. The injuries have occurred disproportionately in low-income areas in inner cities, such as Providence, which have older housing stocks and some landlords who have allowed paint in their aging residential properties to deteriorate, crack or peel.[1] Lead pigment-based paints were used widely in residential communities in the early twentieth century. In 1955, spurred by potential health concerns, companies that manufactured lead pigments and paints supported a voluntary standard that effectively removed lead pigments from interior consumer paints (limiting it to one percent by weight). The standard was sponsored by the American Academy of Pediatrics and adopted by the American Standards Association, now the American National Standards Institute (ANSI). *See* American Standards Ass'n, *American Standards Specifications to Minimize Hazards to Children from Residual Surface Coating Materials* (Z66.1-1955) (approved Feb. 16, 1955). In 1971, Congress enacted the "Lead-Based Paint Poisoning Prevention Act," Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified at 42 U.S.C. §§ 4801 *et seq.*), which led to the 1978 ban of lead from paints for residential use by the Consumer Product Safety Commission. *See Requirements for Notification, Evaluation and*

---

[1] The federal government and most states, including Rhode Island, have decreed that well-maintained lead-based paint is not hazardous to the health of children residing in dwellings containing lead paint. *See* Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X), 42 U.S.C. §§ 4851(5), (15); R.I. Gen. Laws § 23-24.6-26 (adopting a "lead safe" approach, as opposed to a "lead free" approach to the problem of lead paint ingestion by children).

Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 64 Fed. Reg. 50,139, 50,141 (Sept. 15, 1999) (final rule).

Initial lawsuits to recover for alleged lead pigment-related injuries to children, which started in the 1960s, properly targeted individual landlords who failed to maintain their residential properties. *See* Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning and the Law*, 5 Stan. Envtl. L. J. 46, 58 (1990) (providing examples). Claims brought against landlords proved to be a successful means for compensating victims of lead poisoning throughout the country and provided incentive to others to maintain properties to prevent injuries. It has been said that "[d]amage awards in the hundreds of thousands or even millions of dollars against residential landlords in lead paint cases are not uncommon." Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong,* 71 Def. Couns. J. 119, 124 (2004). Similarly, in Rhode Island, responsibility for maintaining a lead safe building lies with the landowner. *See* R.I. Gen. Laws § 23-24.6-17 (requiring property owners to maintain lead safe premises); *accord Sanchez v. Guy,* 2004 WL 2821667, *4 (R.I. Super. Ct. Nov. 23, 2004) (action against landowner for child's alleged lead pigment injuries). These lawsuits did not assert claims against paint and pigment manufacturers because they were not the proximate cause of a given injury; the property owner was found to be the cause. *See Lead Paint Poisoning: Legal Remedies and Preventive Actions*, 6 Colum. L.J. & Soc. Probs. 325, 327 (1970).

A. Products Liability Claims

In the mid-1980s, some personal injury lawyers set their sights on "deep pocket" manufacturers who had, decades earlier, produced and legally sold lead pigment or paint. *See Mahoney, supra*, at 60 (the first lawsuit against a group of former lead pigment and paint

manufacturers was filed in neighboring Massachusetts). These actions, which asserted strict products liability and negligence against product manufacturers, uniformly failed because plaintiffs could not satisfy the basic elements of a products liability claim. *See* Smith, *supra*, at 119 (lead paint and pigment defendants had not lost any of these cases).

First, lead pigment was not defective in design. *See Cofield v. Lead Indus. Ass'n*, No. Civ. A. MJG-99-3277, 2000 WL 34292681, *3-4 (D. Md. Aug. 17, 2000) ("there can be no design defect in lead pigment, as lead is intrinsic to its nature," and the argument that the "[d]efendants should not have produced lead pigment at all" is not actionable.); *City of Philadelphia v. Lead Indus. Ass'n*, No. 90-7064, 1992 WL 98482, *3 (E.D. Pa. Apr. 23, 1992) (comparing the claim to "alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead"), *aff'd* 994 F.2d 112 (3d Cir. 1993); *Sabater v. Lead Indus. Ass'n*, 704 N.Y.S.2d 800, 805 (N.Y. Sup. Ct. 2000) ("[T]here is no duty upon a manufacturer to refrain from the lawful distribution of a non-defective product.").

Second, proximate cause could not be shown. *See, e.g., Spring Branch Indep. Sch. Dist. v. NL Indus.*, No. 01-02-010006-CV, 2004 WL 1404036 (Tex. App.-Hous. June 24, 2004) ("It is not enough that the seller merely introduced products of similar design and manufacture into the stream of commerce" even if it was "virtually the sole supplier" of lead pigment for paint in the area"); *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 547 (1st Cir. 1993) ("[p]laintiff could not and cannot identify . . . which, if any, of the defendants are the source of the lead she ingested").

Third, even if the claim were cognizable, the statutes of limitation had long expired. *See, e.g., City of Philadelphia v. Lead Indus. Ass'n,* 994 F.2d 112 (3d Cir. 1993) (holding that the latest such claims could have accrued was 1976, when Congress enacted federal law requiring the abatement of lead paint in federally funded public housing, thereby putting cities and states

on notice that lead paint was a health hazard); *City of New York v. Lead Indus. Ass'n*, 1991 WL 284454 *1 (N.Y. Sup. Dec. 23, 1991) (the statute does not restart based on new damages), *aff'd* 597 N.Y.S.2d 698 (N.Y. App. Div. 1993); *cf U.S. v. Kubrick*, 444 U.S. 111 (1979) (time barring claims represents a pervasive legislative judgment that "the right to be free from stale claims in time comes to prevail" over other considerations.).

B. The Birth of Industry-Wide Theories

In an effort to circumvent these defeats, particularly on the need to show causation, the next wave of lead paint lawsuits involved "novel and even radical" industry-wide theories of liability, such as market-share liability, enterprise liability, and concert of action. *See, e.g., City of Philadelphia*, 994 F.2d at 127. These initial approaches, too, were universally unsuccessful. *See, e.g., Brenner v. American Cyanamid Co.*, 699 N.Y.S.2d 848, 850 (App. Div. 1999) (finding that, unlike with DES cases, lead pigment and paint litigation did not meet the standards that support dropping the proximate cause requirement in products liability law); *Skipworth v. Lead Indus. Ass'n*, 665 A.2d 1288, 1291-92 (Pa. Super. Ct. 1995) (finding Pennsylvania does not recognize market-share liability), *aff'd* 690 A.2d 169 (Pa. 1997); *Spring Branch Indep. Sch. Dist.*, 2004 WL 1404036, at *4 (stating that plaintiff school district's position "disregards the bedrock principle of Texas law that a plaintiff must identify the manufacturer of the product that allegedly injured it").[2]

---

[2] In a more recent case, Wisconsin extended its existing "risk contribution" theory that was developed for DES claims in *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis.), *cert. denied*, 469 U.S. 826 (1984), to a private individual's claims involving lead paint and sounding in negligence and products liability. *See Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

C. The Public Nuisance Strategy

The current litigation strategy of using public nuisance theory to overcome products liability and causation requirements in lead pigment and paint cases was launched in the wake of many of these defeats. These lawsuits began with the instant case in 1999, when the nationally recognized personal injury law firm of Motley Rice convinced then-Attorney General Sheldon Whitehouse to hire the firm to bring a government public nuisance action against the former lead pigment companies. By cloaking their claims in the force and legitimacy of the State's police power, plaintiffs sought to take advantage of the general belief that "the participation of states and cities in a lawsuit brings credibility and a 'moral authority' to the cause." Bryce A. Jensen, *From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries,* 86 Cornell L. Rev. 1334, 1370 (2001). Armed with the power of the sovereign, Motley Rice, who took the litigation under a contingency fee agreement, sought the costs of abating lead paint in homes and buildings throughout the state, which they estimated at $4 billion. *See Paint Maker Seeks Ruling on Judge in Lead Case,* Providence J., Aug. 19, 2005, at B1.

Since the filing of this lawsuit, Motley Rice and other firms have persuaded public entities to file public nuisance-based lawsuits against the former manufacturers of lead pigment in several states, including Missouri, California, Wisconsin, New Jersey, Illinois and Ohio. *See St. Louis v. Benjamin Moore*, No. ED87702 (Mo. Cir. Ct., St. Louis County) (complaint filed Feb. 14, 2000); *County of Santa Clara v. Atlantic Richfield Co.,* No. CV 788657 (Cal. Super. Ct., Santa Clara County) (complaint filed Mar. 23, 2000); *City of Milwaukee v NL Industries*, No. 03-2786, (Wis. Cir. Ct., Milwaukee County) (complaint filed Apr. 9, 2001); *In re Lead Paint Litig.*, No. 702 (N.J. Super. Ct., Middlesex County) (complaints consolidated Feb. 15, 2002); *City of*

Chicago v. American Cyanamid Co., No. 02 CH 16212 (Ill. Cir. Ct., Cook County) (complaint filed Sept. 15, 2002); *City of Toledo, Ohio v. Sherwin-Williams Co.*, No. G-4801-CI-200606040-000 (Ohio Ct. Common Pleas, Lucas County) (complaint filed Sept. 29, 2006). Courts hearing the Chicago, New Jersey, St. Louis, and Toledo cases have already rejected the plaintiffs' public nuisance theories under final order, and the Santa Clara court significantly limited the one in that jurisdiction by ruling it unconstitutional for the attorney general to hire out the public nuisance suit to a private firm under a contingency fee arrangement. *See In re Lead Paint Litig.*, 924 A.2d at 484; *St. Louis v. Benjamin Moore*, 226 S.W.3d at 110; *Chicago v. American Cyanamid*, 823 N.E.2d at 126; *City of Toledo, Ohio v. Sherwin-Williams Co.*, No. G-4801-CI-200606040-000 (Ohio Ct. Common Pleas Dec. 12, 2007) (time for appeal has expired); *County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657 (Cal. Super. Ct. Apr. 4, 2007) (appeal pending).[3]

The public nuisance strategy featured in these cases is modeled after public nuisance actions brought by state and local governments in the 1990s, often with the aid and encouragement of contingency fee lawyers, against manufacturers of products that were either "unpopular" or could be used or misused in ways that created harm. *See, e.g., City of St. Louis v. Cernicek,* 145 S.W.3d 37, 43 (Mo. Ct. App. 2004) (firearms); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (tobacco); *Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984), *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *Miller v. Home Depot, USA., Inc.*, 2001 WL 1844232 at *4 (W.D. La. Dec. 7, 2001) (treated lumber); *DiCarlo v. Ford Motor Co.*,

---

[3] Thus far, the public nuisance claims in Wisconsin and California have survived initial appeal. *See City of Milwaukee v. NL Indus.*, Inc., 691 N.W.2d 888 (Wis. Ct. App. 2004), *review denied*, 703 N.W.2d 380 (Wis. 2005) (defense verdict June 22, 2007); *County of Santa Clara v. Atlantic Richfield, Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

409 N.Y.S.2d 417 (N.Y. App. Div. 1978) (automobile manufacturers); *ES Robbins Corp., v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1493-94 (N.D. Ala 1995) (plasticized chemical). The presumed goal of this strategy has been to find judges who might disregard precedent and the rule of law in order to address a perceived and potentially costly problem. *See, e.g., State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 976 (N.Y. Sup. Ct. 1983) (acknowledging that it allowed a public nuisance claim against a *non*tortfeasor with the surprising and open-ended observation that "[n]onetheless . . . [s]omeone must pay to correct the problem."), *aff'd as modified by* 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984).

Judges schooled in the rules and policies behind public nuisance law, as well as tort law generally, have not embraced this novel strategy. These courts have recognized that the new public nuisance actions are nothing more than another attempt to dodge the requirements of proving that a particular defendant caused a particular plaintiff's harm. *See, e.g., Chicago v. American Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003) (recognizing that the lawyers "deliberately framed [their] case as a public nuisance action rather than a product liability suit"), *aff'd*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *Sabater*, 704 N.Y.S.2d at 806 ("A products liability action, where damages are restricted to the user of the product and result from its allegedly negligent manufacture, does not give rise to a nuisance cause of action."). Similarly, the Federal court in Rhode Island rejected the application of public nuisance law to product manufacturers in the asbestos context. *See City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D. R.I. 1986) (rejecting the application of public nuisance to a manufacturer of asbestos products under New Hampshire law, which is comparable to Rhode Island's public nuisance law).

II. ALLOWING THIS CASE TO PROCEED WOULD IRREPARABLY DISTORT PUBLIC NUISANCE LAW

In order to shoehorn what ostensibly are private products liability claims into a government public nuisance action, the trial court in the instant case irreconcilably changed the elements of public nuisance law and erased the burden of proof for actual and proximate cause. This ruling is unsound and irreparably distorts the fundamental principles and public policies of public nuisance theory. It should be reversed.

A. The Purpose and Elements of Government Public Nuisance Actions

Government sponsored public nuisance actions, developed in English and American common law more than seven centuries ago, are specific types of lawsuits. *See* Restatement (Second) of Torts, §821B cmt. a. (1979). Public nuisance law started solely as an action by the state – through the King's sheriff, the equivalent of the modern state attorney general – to stop a private party from invading a common or public right. *See id.* (private parties were later permitted to bring public nuisance lawsuits, but only if they suffered injuries different in kind than the general public; such plaintiffs could only seek their own damages). The tort's modern purpose is to provide the state and local governments with the authority to terminate conduct that unreasonably conflicts with a societal right and could cause injury to someone exercising that public right. *See* Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. at 999.

Public nuisance is a conduct-based tort. It is based on activities engaged in by a defendant. Typical examples of defendants in public nuisance cases are those who obstruct a public highway, operate an illegal gambling hall, or allow high shrubs to grow too close to an intersection so as to block the view of drivers. *See, e.g., Moretti v. C.S. Realty Co.*, 78 R.I. 341 (R.I. 1951) ("The public has a right to the unobstructed use of the highway free from unnecessary hazards"); *Reitsma v. Recchia*, 2000 WL 1781960, at *6 (R.I. Super. Ct. Nov. 20,

2000) (operating a solid waste disposal facility in a way that emitted unpleasant odors); *Pine v. Vinagro*, 1996 WL 937004, at *23 (R.I. Super. Ct. Nov. 4, 1996) (maintaining a tailings stockpile in a way that caused harmful smoke); *Town of Scituate v. T. & J. Trucking Co., Inc.*, 1984 WL 560326, at *10 (R.I. Super. Ct. July 16, 1984) (collecting garbage in residential neighborhood in a way that caused obnoxious noise and vibrations). These cases show that despite the amorphous nature of the word "nuisance," the tort has well-defined elements. In Rhode Island, the elements of a public nuisance cause of action are:

Injury to a public right: The type of injury required to bring a public nuisance case is a specific kind of injury.[4] The injury must be against "a right *common* to the general public." *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 958 (R.I. 1994) (emphasis added, internal citations omitted). "A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." Restatement (Second) of Torts, §821B cmt. g. (1977). A public nuisance injury, therefore, is completely distinct from injury to a private person or property. For example, as this Court held in *Moretti*, 78 R.I. at 346, blocking a public road may be a public nuisance because such conduct interferes with the public right to walk or drive on a public roadway. Conversely, blocking a private driveway, commercial plaza, or church cannot amount to a public nuisance injury because no public right would be violated; the state

---

[4] The notion of a specific type of injury for a specific cause of action is not uncommon in American law. *See, e.g., Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 (1986) (to bring a suit in antitrust law, "a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

would not have a public nuisance claim even if such blockades of private ways caused injury to a substantial number of citizens.

Unreasonable interference: Conduct that may constitute a public nuisance requires "unreasonable interference" with a public right. *See Hydro-Mfg.*, 640 A.2d at 957; *see also* Keeton, *supra*, at 618 (observing that public nuisance historically has been "a species of catch-all criminal offense[s]."); *see also* Schwartz & Goldberg, *supra*, at 564-565 (discussing factors and categories traditionally required for public nuisance conduct); Gifford, *supra*, at 828 ("Public nuisance law reaches its limitless extreme when an occasional court suggests that the liability of the defendant requires neither independently tortious conduct, violation of a statute, nor conduct that is intentional and unreasonable . . ."). Where a defendant's conduct at issue "does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act," the Restatement noted, "the court is acting without an established and recognized standard." Restatement (Second) of Torts, §821B cmt. e (1979).

Control: "The paramount question" in Rhode Island for assessing whether a particular defendant is responsible for abating a public nuisance "is whether the defendant was in control of the instrumentality alleged to have created the nuisance *when the damage occurred.*" *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633-34 (D.R.I. 1990) (emphasis added).

Causation: The causation analysis in public nuisance theory is the same as with claims for traditional negligence. *See Moretti*, 78 R.I. at 353 (R.I. 1951) (applying traditional causation requirement to public nuisance action); *Jackson v. Glidden Co.*, No. 87779, 2007 WL 184662 (Ohio Ct. App.) (unpublished) (dismissing all claims against former manufacturers of lead pigment and paint because "proximate causation is an essential element" of public nuisance, negligence, strict liability and other causes of action and plaintiff "failed to show that the paint

manufacturers proximately caused the injuries alleged"), *appeal denied*, 868 N.E.2d 680 (Ohio 2007); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992) (plaintiffs alleging "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover"). Thus, the injury to the plaintiff must be the type of injury that a reasonable person would see as a likely result of her conduct.

Importantly, the ability to satisfy these elements and hold a defendant liable for a public nuisance does not depend on whether the plaintiff is a government or private individual. *See Hydro-Mfg.*, 640 A.2d at 957 (explaining "special damages" rule for when a private person can sue under public nuisance). The distinction between private and public plaintiffs is only relevant in determining standing to sue and remedies. *See* Schwartz & Goldberg, *supra*, at 570-72.

B. Trial Court's Ruling Misstates All Four Elements

The trial court's ruling in the instant case fundamentally misstates all four foundational elements of public nuisance law. The ruling is not a slight extension of a single element to account for facts not previously considered; it is a wholesale re-writing of all four elements. *See generally* Victor E. Schwartz, *et al.*, *Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. Rev. 317 (2006) (discussing parameters for when courts have departed from tort law precedent).

1. The Trial Court Did Not Require Public Nuisance Injury

The trial court did not require the State to show the existence of any public nuisance injury. Rather, it allowed the State to bring a public nuisance claim based solely on the "cumulative presence" of alleged private injuries. *State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226, *48-50 (R.I. Super. Ct. Feb. 26, 2007).

In Rhode Island, and elsewhere, a public right is collective in nature. It must involve "the health, safety, peace, comfort or convenience of the *general community*." *Citizens for*

Preservation of Waterman Lake v. Davis, 420 A.2d 53 (R.I. 1980) (emphasis added); *accord Hydro-Mfg.*, 640 A.2d at 958 (requiring injury to "a right common to the *general public*") (emphasis added). The presence of lead pigment in a person's private residence or building does not involve the rights of the *general community* and, therefore, cannot form the basis of a public nuisance action. *See Moretti*, 78 R.I. at 346 (a condition in a private home was a public nuisance only because it was "a menace to the safety of person's traveling" on the public highway abutting the building). The same is true for personal injuries resulting from the ingestion of lead pigment. Cumulating the numbers of private buildings or persons allegedly affected, as the trial court did, does not change the nature of these alleged private injuries. *See Iafrate v. Ramsden*, 96 R.I. 216, 222 (1963) ("the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several") (internal citation omitted). Other courts have agreed, explaining that "harm to individual members of the public" – no matter how many – is not the same as harm "to the public generally." *Chicago v. Beretta*, 821 N.E.2d at 1115-16; *see also Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943) ("The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.") (internal quotation omitted).[5]

Public spending on private harms also does not create a public nuisance injury, despite the trial court's effort at times to define the public nuisance as the financial "burdens that all citizens of Rhode Island have to bear" for the State's lead paint program. *State of R.I. v. Lead*

---

[5] The court cannot deem intact lead paint a public nuisance injury now because, while not immediately harmful, it could deteriorate and cause harm in the future. *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *52. A condition can be considered a public nuisance without causing harm to anyone, but the condition must be currently present that could harm someone who comes into contact with it. *See Higgins*, 30 A.2d at 391.

Indus. Assoc., Inc., C.A. No. PC 99-5226 at *92, 108 ("where an element of public nuisance is that the State has suffered harms . . ."). As the Supreme Court of Missouri held in dismissing the City of St. Louis's lead pigment public nuisance action, the use of public funds to remediate an injury is not the same as the injury itself. *See St. Louis v. Benjamin Moore*, 226 S.W.3d 110 at 116. The Missouri Supreme Court rejected the notion that somehow the decision to spend tax-payer funds on a problem can create public nuisance liability where none existed before: "Although the city characterizes its suit as one for an injury to the public health and suggests that it is for this injury that it is suing, that is not the case. The damages [the City] seeks are in the nature of a private tort action for the costs of the city allegedly incurred abating and remediating lead paint in certain, albeit numerous properties." *Id.*

The consequence of these fundamental legal errors by the trial court can be seen throughout the court's opinion. For example, the trial court at one point states that "the State's position has been that it has incurred costs and has suffered harms due to lead pigment, and that many of those harms will go uncompensated." *State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *105-106 (using this statement as the basis for rejecting Defendants' objection to the Motley Rice lawyers' improper use of the "fair share" theme as prejudicial). But, compensation for funds already spent by the government is not at issue in this case and cannot be recovered under public nuisance theory. *See In re Lead Paint Litig.*, 924 A.2d at 502 (only a private plaintiff can seek "recompense" for damages; a public entity can only pursue "criminal penalties or civil actions to abate the nuisance."); Restatement (Second) of Torts, §821B cmt. a (1979); Gifford, *supra*, at 745-46 (stating that public nuisance historically was "a basis for public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct. Only in limited circumstances was a tort remedy available to an individual, and apparently never to the

state or municipality."). Rather, the remedy sought is the future abatement of buildings with lead pigment. *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *180 ("any abatement remedy should not be to duplicate programs run by the State, but rather to focus on areas in which the State's programs are inadequate and need supplementation").

Additionally, the trial court should not be permitted to water down a public nuisance injury from a public right to any "interest" that belongs to the community-at-large. *Id.* at *92 (instructing the jury that "a right common to the general public is a right or an *interest* that belongs to the community-at-large") (emphasis added). "That which might benefit (or harm) 'the public interest' is a far broader category than that which actually violates 'a public right.'" *See* Gifford, *supra*, at 815-16. For example, while there may be a public interest in safety, there is no public right to be free from the threat that someone may use a legal product in a way that creates risk of harm to another. *See Chicago v. Beretta*, 821 N.E.2d at 1114-15.

2. The Trial Court Did Not Require Public Nuisance Conduct

The trial court did not require the State to show that the defendants engaged in any conduct that can give rise to public nuisance liability, namely that the defendants' conduct *unreasonably interfered* with a public right. *See Waterman Lake*, 420 A.2d at 59 (stating that a public nuisance requires such "*unreasonable interference*") (emphasis added). Rather, the court side-stepped this conduct element entirely by permitting the State's public nuisance claim to be predicated solely upon alleged *unreasonable injury* – that "persons have suffered harm or are threatened with injuries that they ought not to have to bear." *State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *62 (referencing Jury Instructions 10-11); *see also id.* at *89 (providing factors for when "*harm* may be unreasonable") (emphasis added).

The trial court's ruling mistakenly blended two very different torts: public nuisance and private nuisance. As this Court has itself recognized, "[p]rivate and public nuisances are two distinct causes of action." *Hydro-Mfg.*, 640 A.2d at 957. The notion that liability can be "imposed only in those cases in which the harm or risk to one is greater than he ought to be required to bear" is strictly limited to the tort of *private nuisance*. *Waterman Lake*, 420 A.2d at 59. In *Waterman Lake*, the Court properly distinguished between the completely separate torts of public nuisance and private nuisance; it stated that public nuisance was a conduct-based tort requiring "behavior" that unreasonably interfered with a public right, and that private nuisance was an injury-based tort involving interference with reasonable "use" of one's property. *Id.* The apparent confusion arises from the following passage where the court analyzes the *private nuisance* claim, but uses only the word "nuisance":

> Noise in and of itself can be a *nuisance* only if it unreasonably interferes with a person's use and enjoyment of his property. *DeNucci v. Pezza, 114 R.I. at 129, 329 A.2d at 810.* The law does not attempt to impose liability in every case in which one person's conduct has some detrimental effect on another. Liability is imposed only in those cases in which harm or risk to one is greater than he ought to be required to bear under the circumstances. 4 Restatement (second) Torts, s 822, comment g at 112 (1979).

Id. (emphasis added). In the next few years the Court in *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982) (citing *Waterman Lake*), and *Weida v. Ferry*, 493 A.2d 824 (R.I. 1985) (citing to *Wood v. Picillo*), repeated this generic language in broad brush references to "actionable nuisance." *See Wood*, 443 A.2d at 1247; *Weida*, 493 A.2d at 826. Neither *Wood* nor *Weida* properly distinguished, as the Court did in *Waterman Lake*, between the separate torts of private nuisance and public nuisance, leaving the misimpression for the trial court in the instant case that harm that ought not to be born by the plaintiff could replace the conduct requirement in the tort of *public* nuisance.

A careful reading of the above passage in *Waterman Lake*, as well as the entire opinion, shows that the Court's use of the shorthand "nuisance" in the first line did not suggest that this element applies to both torts. This passage only states a requirement for *private nuisance*. First, the passage refers to "a person's use and enjoyment of his property," which is solely a private nuisance concept. Second, *Waterman Lake* references *DeNucci v. Pezza*, 114 R.I. 123, 329 A.2d 807 (1974), which is a case sounding entirely in private nuisance. Third, *Waterman Lake* cites to the section of the Restatement (Second) of Torts that lists the requirements only for private nuisance. *Compare* Restatement (Second) Torts, §822 (1979) ("Private Nuisance: Elements of Liability") with Restatement (Second) Torts, §821B-C (1979) ("Public Nuisance" and "Who Can Recover for Public Nuisance"). Indeed, the torts of public nuisance and private nuisance do not overlap. *See* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 Alb. L. Rev. 359, 362 (1990) ("the shared name further confuses an already badly confused area of law."). Unreasonable harm is a core concept to private nuisance, which chooses between competing, lawful uses of property, but it is antithetical to a state public nuisance suit, which does not focus on personal injury or inconvenience at all. *See In re Lead Paint Litig.*, 924 A.2d at 499 ("public nuisance, by definition, is related to conduct").[6]

Under an unreasonable conduct analysis, it becomes clear that the former manufacturers of lead pigment cannot be liable under public nuisance theory because lawfully manufacturing, selling and promoting a product is not unreasonable conduct. *See id.* As the Supreme Court of

---

[6] The trial court stated that it admitted "knowledge evidence" so that the jury could determine whether "members of the general public ought not to be required to bear" the alleged harms. *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *63. Under a proper application of public nuisance law, this reason for allowing the testimony would be moot.

New Jersey recently held, "the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products, which legal when sold, and although sold no more recently than a quarter century ago, have become dangerous through deterioration and poor maintenance by the purchasers." *Id.* at 502; *accord Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992) ("The role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien," and public nuisance law does not allow recovery because the "manufacture and sale of a product [was] later discovered to cause injury."), *appeal denied* 512 N.W.2d 318 (Mich. 1993); *Camden County v. Beretta,* 273 F.3d at 540 ("If defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity."); 63A Am. Jur. 2d Products § 927; 1 Am. Law of Prods. Liab. § 1:18 (Timothy E. Travers et al., eds., 3d ed. 1987) ("A product which has caused injury cannot be classified as a nuisance to hold liable the manufacturer or seller for the product's injurious effects.").

Rather, products liability law is, and should continue to be, the "paramount basis of liability" for claims related to products. Victor E. Schwartz *et al.*, *Prosser, Wade and Schwartz's Torts Cases and Materials* 718 (11th ed. 2005); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991). Under products liability law, plaintiffs may recover for injuries caused by a defective product without having to prove a manufacturer was negligent in putting the product into the stream of commerce. *See* Wade, *supra*, at 825. This approach both facilitates plaintiffs' recovery and provides companies with legal incentive to

exercise due care in making products. *Id.* at 826. Accordingly, this Court has properly rejected applying conduct-based torts to product manufacturing when it refused to apply strict liability for engaging in abnormally dangerous activities to the manufacturing of an inherently dangerous product. *See Splendorio v. Bilray Demolition Co., Inc,* 682 A.2d 461 (R.I. 1996) ("Absolute liability attaches only to ultrahazardous or abnormally dangerous *activities* and not to ultrahazardous or abnormally dangerous *materials*. . . . if the rule were otherwise, virtually any commercial activity involving substances which are dangerous in the abstract automatically would be deemed as abnormally dangerous. This result would be intolerable.") (emphasis in original, internal citations omitted). Nuisance and abnormally dangerous activity relate to a defendant's conduct, not the manufacture and sale of products.

Any unreasonable conduct giving rise to the alleged hazard associated with lead pigment in paint would be the conduct of those responsible for maintaining properties, rather than those who engaged in sale or distribution of lead pigment.[7] This Court found more than half a century ago in *Moretti* that a property owner may be liable under public nuisance for poorly maintaining his property. *See Moretti*, 78 R.I. at 346-347 (deteriorated ventilator fan flew into street hitting a passerby). As in the instant case, the hazard was the "natural and probable result of [a product's] age and poor condition." *Id.* at 346. The issue was whether the tenant or landlord was liable for the public nuisance; the manufacturer of the ventilator blade that deteriorated and caused harm was properly not targeted in the litigation. In the lead pigment context, the Court in *Pine v. Kalian*, 723 A.2d 804 (R.I. 1998), allowed an injunction against landlords to remediate a lead

---

[7] The Rhode Island General Assembly has acknowledged that the manufacturing and sale of lead pigment was approved, and conduct that is approved cannot be unreasonable. *See* R.I. Gen. Laws § 23-24.6-2(7) ("childhood lead poisoning in Rhode Island's older homes and urban (continued...)

hazard on the property because the landlords had been "obstructive and noncompliant" of state lead paint abatement laws by refusing to comply with orders to abate cracking and peeling paint on their properties. *Id.* at 805. This ruling should not be surprising. Where landlords allow their properties to deteriorate to the point that it can be dangerous to inhabitants or members of the public, they are violating the law, and the State should act accordingly.

3. The Trial Court Did Not Require Control Over the Public Nuisance

The trial court did not require the State to show that the defendants were "in control of the instrumentality alleged to have created the nuisance when the damage occurred," as required by Rhode Island law. *See Friends of the Sakonnet*, 738 F. Supp. at 633-34 (calling control "[t]he paramount question" in a public nuisance case). The trial court, however, "consistently rejected the proposition that control" was required at all. *State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *91 (replacing the element of control with a showing that the defendants "substantially participated in the activities which caused the public nuisance"). *Id.*

Most courts, as in Rhode Island, require control of the nuisance – either at the time of creation or abatement – as a separate, essential element of public nuisance liability. *See* Schwartz & Goldberg, *supra*, at 567-569. The fact that a product manufacturer has completely divested itself of any connection to an instrumentality upon selling it to a consumer, is one of the core reasons courts have held that product manufacturers are not liable for a public nuisance the instrumentality may create. *See, e.g., Manchester v. Nat'l Gypsum*, 637 F. Supp. at 656 (applying New Hampshire law that is congruent with Rhode Island's public nuisance doctrine) ("[A]fter the time of manufacture and sale, [the manufacturers] no longer had the power to abate

---

(...continued)

areas is a result of approved use of lead based materials over such an extended period in public
(continued...)

the nuisance. Therefore, a basic element of the tort of nuisance is absent, and the plaintiff cannot succeed on this theory of relief."); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D. N.H. 1984); *Johnson v. U.S. Gypsum*, 580 F. Supp. at 294; *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002); *Camden County v. Beretta,* 273 F.3d at 536. In *Bloomington v. Westinghouse*, 891 F.2d at 611, for example, the court held that while Monsanto made and sold PCBs to Westinghouse, Monsanto could not be held responsible for any public nuisance Westinghouse may have created by allegedly allowing the chemicals to leach into a city landfill and sewer system. *See id.* at 614 ("Westinghouse was in control of the product and was solely responsible for the nuisance it created by not safely disposing of the product.").

Even where control and causation are analyzed together, the element of control must be "a relevant factor in both the proximate cause inquiry and the ability of the court to fashion" an appropriate remedy." *Chicago v. Beretta*, 821 N.E.2d at 1132 (stating that control must be a separate element when property is involved); *accord Slefkin*, 88 R.I. at 187 ("it is essential to the establishment of liability for the maintenance of a nuisance to prove that the respondents in the instant case either unlawfully caused the condition from which the alleged nuisance resulted or had control over the circumstances which produced it."). Control of the nuisance – either at creation or abatement – is fundamental to public nuisance liability. *Id.* Reason dictates it should not be jettisoned entirely, as the trial court did here. In this case, defendants did not maintain control over the pigment after selling their products to paint manufacturers, professional painters and other consumers. Thus, they did not have control of the pigment "when the damage

---

(...continued)

buildings and systems as well as private housing").

occurred," which is the law in Rhode Island, nor do they have control of the pigment now such that they can abate any alleged nuisance in individual buildings.

4. The Trial Court Did Not Require Causation

The trial court did not require the State to show that the defendants' conduct was the factual or legal cause of the alleged nuisance. In fact, the trial court did not even require that defendants substantially participated in the activities which allegedly caused the claimed public nuisance. *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *16. Rather, the trial court, as a practical matter, assumed causation as a matter of law; it ruled that a manufacturer of a product is always a substantial cause of such harm. *See id.* at *15-17 (using the circuitous logic that "the underlying cause of the nuisance is the manufacturing activity . . . because without the manufacturing there could be no nuisance" and "in order to have lead pigment on buildings, the pigment had to have been manufactured, so manufacturing is a cause of the public nuisance"). "[T]he chain of causation," the court concluded, "begins at manufacture, and ends with the existence of the public nuisance." *Id.* at *18. But, the chain of *commerce* is not the same as the chain of *causation.*

In addition, the court did not even require this chain of commerce/causation be proved. It based its existence solely on the fact that defendants' products *could be* in Rhode Island buildings. It told the jury:

> You need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable for creating, maintaining, or substantially contributing to the creation or maintenance of a public nuisance in this case nor do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island . . .

Id. at *11-12; *see also id.* at *17-18 (stating that the commerce/causation chain would be inferred solely based on the fact that there currently is lead paint in Rhode Island and that these

defendants were among the many companies that made lead pigment for paints for the national market more than fifty years ago). There was never any showing that any *specific* defendant was responsible for any alleged injury.

The trial court fundamentally misstated Rhode Island law. In *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991), this Court unequivocally held that "the establishment of liability requires the identification of the specific defendant responsible for the injury." *Id.* at 1364; *accord Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1132 (R.I. 2004) (the "identification element of causation-in-fact requires the plaintiff to establish a sufficient connection between the product and its alleged manufacturer or supplier") (internal citation omitted). In so ruling, the Court joined with the overwhelming number of state courts in rejecting liability based solely on market share or other alternative theories. *See Gorman*, 599 A.2d at 1364 ("We are not willing to adopt the market-share doctrine."); Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond Des Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. Rev. 115, 118 (2006) (most attempts at market share liability have failed). Here, the trial court's causation standard is even lower than market share; it presumes causation based solely on the fact that defendants manufactured a product in the class of products at issue, regardless of their market share. *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *82 (not requiring testimony on Rhode Island market share and stating that national market share evidence is simply "probative" as to whether defendants' products *could have* reached Rhode Island); *see also Brenner*, 699 N.Y.S.2d at 852-53 (observing that different paint manufacturers used different amounts of lead pigment). To cast *Gorman* aside, the trial court simply, but improperly, held that the holding "does not apply to a public nuisance case where the plaintiff is the State, and not an individual." *Id.*

Granting the State a greater ability to sue than private plaintiffs in public nuisance would be a significant departure from centuries of English and American jurisprudence, as well as long-standing precedent in Rhode Island. *See, e.g., Moretti*, 78 R.I. at 353 (proximate cause is a required element in public nuisance actions); William A. McRae, Jr., *The Development of Nuisance in the Early Common Law,* 1 U. Fla. L. Rev. 27, 36 (1948). As discussed above, the traditional plaintiff in a public nuisance suit *is* the government. The "special damage" requirement for individual suits was later allowed so that those individuals suffering distinct harm from the public nuisance would not go without redress. *See Hydro-Mfg.*, 640 A.2d at 957-58 (adopting the special damages rule in Rhode Island); Schwartz & Goldberg, *supra,* at 570-572 (the special damages rule does not change the tort's elements or lessen its liability standards; it only creates a distinction between private and public plaintiffs for the purposes of determining standing and remedy). Using this distinction, as the trial court did, to lower standards or eliminate elements of the tort for government plaintiffs is completely unfounded, is antithetical to the special damages rule, and violates a fundamental tort law policy – that governments are not to be "super-plaintiffs" with greater rights to sue than a person actually injured by a tortious act. *See Iowa v. Philip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998) (denying State's claims for damages based on injuries to individuals under the remoteness doctrine because allowing such claims would "open the proverbial flood gates of litigation"); *State of Maryland v. Philip Morris, Inc.*, No. 96122017, 1997 WL 540913 (Md. Cir. Ct. May 21, 1997) (holding that a state should not be better positioned to recover from a defendant for injuries to private individuals allegedly caused by defendant's tortious acts).

Thus, as the Supreme Court of Illinois has carefully explained, even when a public nuisance action is brought by the government, an "element of the public nuisance claim that must

be present . . . is resulting injury, or, more precisely, proximate cause." *Chicago v. Beretta*, 821 N.E.2d at 1118. Highly respected tort treatises are in accord with this reasoning. *See, e.g.*, Dan B. Dobbs, *The Law of Torts* § 180, at 443 n.2 (2001) ("proximate cause limitations are fundamental and can apply in any kind of case in which damages must be proven"); Fowler V. Harper *et al.*, *The Law of Torts* § 20.2 (1986) ("Through all the diverse theories of proximate cause runs a common thread; almost all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability."). Further, as the Supreme Court of Missouri has found, even where market share theory has been accepted, its fundamental goal is not to create industry-wide liability, but to reverse the burden of proof under the belief that each defendant would be in a better position to exonerate itself or join culpable parties. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245 (Mo. 1984). In the instant case, defendants are not in a better position to identify the course of harm than individual tenants or property owners where the lead pigment is posing a potential health hazard. *See* R.I. Gen. Laws § 23-24.6-2(7) (stating that intact lead paint does not pose a hazard, meaning that where lead paint does cause a hazard, it was allowed to deteriorate).

It is similarly inappropriate for the trial court to categorically rule out intervening causes by framing the issue as the foreseeable and natural deterioration of a product. *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 at *31; *see also Moretti*, 78 R.I. at 346 (alleging a public nuisance stemming from the "age and poor condition" of a product); R.I. Gen. Laws § 9-1-32 (preventing liability under a theory of failure to warn where a product is altered or modified); *La Plante v. American Honda Motor Co.*, 27 F.3d 731, 735 (1st Cir. 1994) (holding that R.I. Gen Laws § 9-1-32 equally applies where deterioration or maintenance failure is at

issue). Otherwise, the manufacturer of any product that naturally deteriorates or is hazardous by nature would be strictly liable if its products caused harm or potential harm to others.

Indeed, the sum total of the trial court's errors in this case guided the jurors into finding liability to exist here. In a rare look at jury deliberations, the *New York Times* reported that after the jury informed the court that it was deadlocked four to two in favor of the defense, several jurors switched their support to the State only "after rereading the judge's instructions": "It took several more days of intense discussions over the judge's instructions, before the remaining jurors, with some reluctance, decided that lead paint was a public nuisance in the state and that three of the paint companies were responsible for it." Julie Creswell, *The Nuisance that May Cost Billions*, N.Y. Times, Apr. 2, 2006, at 31, *available at* 2006 WLNR 5514600.

III. The Trial Court's Creation of a Defenseless Lawsuit Contravenes Public Policy

Under the trial court's application of public nuisance law in this case, the government would have near limitless ability to impose liability on an industry if its products could at some point contribute to an inherent risk to enough people. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecology L.Q. 755, 774-75 (2001) (advocating similar changes to public nuisance law as the trial court provided because it "gives plaintiffs the opportunity to obtain damages and injunctive relief, lacks laches and other common tort defenses, is immune to administrative law defenses such as exhaustion, avoids the private nuisance requirement that the plaintiff be a landowner/occupier of affected land, eliminates the fault requirement, and circumvents any pre-suit notice requirement"). The only elements that would need to be proved would be that (1) a company made a product that, according to a speculated chain of commerce, could be in Rhode Island; (2) the class of products to which the company's product belongs could be harmful to a sufficient number of people,

regardless of whether the product is used properly, misused, or not properly maintained; and (3) those people ought not to have to bear their injuries. Businesses that made such products would satisfy the first and second elements and have few, if any, defenses or means to exculpate themselves from liability because few individuals would deserve to be injured. The usefulness of the product, the lack of any wrongdoing by the defendants, and the passage of time after the product ceased to be sold would all be irrelevant. Consequently, no business would have fair notice or adequate warning that they were engaging in behavior that would result in a tort through government action. *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991) (O'Connor, J., dissenting) (stating in a punitive damages case that the vagueness doctrine under the United States Constitution applies to court-made law, such as tort liability, enforced by civil courts and juries).

A. Liability Would Be Unpredictable

If the major alterations the trial court seeks to make in public nuisance law are permitted, governmental plaintiffs, often in coordination with private lawyers, could "convert almost every products liability action into a nuisance claim." *Johnson v. U.S. Gypsum*, 580 F. Supp. at 294. "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D. 91, 96 (N.Y. App. Div. 2003).

Product manufacturers would be thrust into the almost impossible role of policing their customers to ensure that products are not used or neglected in ways that could create a public nuisance or other social ill. For example, cell phone manufacturers would have to stop people

from talking on their cell phones while driving or be liable to others injured in such accidents. Food producers could be liable for heart disease caused by cumulative consumption of meats or other food products. Sporting good manufacturers would have to make sure that athletes wore sufficient protective gear in order to avoid injury on the field. Such industry-wide liability would require manufacturers to be absolute insurers of their products, a concept this Court has soundly rejected. *See Castrignano v. Squibb & Sons, Inc.*, 546 A.2d 775, 782 (R.I. 1988) (rejecting an expansion of products liability law because the change would have made manufacturers "virtual insurers of their products"); *Buonanno v. Colmar Belting Co.*, 773 A.2d 712, 716 (R.I. 1999) ("[A] component part supplier should not be required to act as an insurer for any and all accidents that may arise after that component part leaves the supplier's hand."). This Court should similarly reject the trial court's ruling in the instant case, as it would require manufacturers to be insurers of an entire industry's products, regardless of how or when they were made and sold and the state of medical or scientific knowledge at that time.

B. Undermining Public Nuisance Law Could Lead to Unsound Regulation Through Litigation

Another potential danger in allowing governments a reduced standard for public nuisance actions is that it would allow city attorneys and state attorneys general to subvert the legislative process. They could "use [their] injunctive powers to mandate the redesign of" products and regulate business methods. *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App.), *review denied* 799 So.2d 218 (Fla. 2001). For example, governments could bring public nuisance claims against food manufacturers of high calorie food items because people's consumption habits have led to obesity. *See* Victor E. Schwartz & Phil S. Goldberg, *Closing the Food Court: Why Legislative Action Is Needed to Curb Obesity Lawsuits*, Briefly 2 (Nat'l Legal Center for the Pub. Int., Wash. D.C. Aug. 2004).

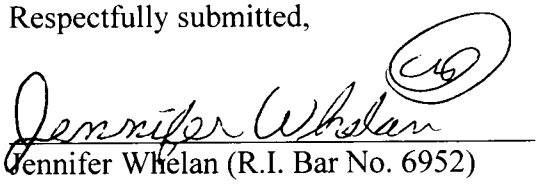
But, "the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief." *Penelas*, 778 So. 2d at 1045. Former Labor Secretary Robert Reich has called such regulation through litigation "faux legislation, which sacrifices democracy." Robert B. Reich, *Don't Democrats Believe in Democracy?,* Wall St. J., Jan. 12, 2000, at A22. Nevertheless, the desire to create a revenue source or regulate an industry can be a powerful motivation for a city or state attorney to bring these new types of actions, such as in California, where Attorney General Lockyer brought a public nuisance claim against U.S. and Japanese automakers for making cars with emissions that contribute to global warming. *See* Complaint, *State ex. rel. Lockyer v. General Motors Corp.,* No. 06CV05755, 2006 WL 2726547 (N.D. Cal. Sept. 20, 2006), *dismissed* (Sept. 17, 2007) (ruling that "the claim presents a non-justiciable political question"). As the Michigan Attorney General, who filed an *amicus* brief in the case stated, "These kinds of determinations are fundamentally political questions that should be addressed by Congress and the executive branch, not the Courts." Assoc. Press, *Michigan AG Urges Judge to Throw Out Calif. Global Warming Suit*, Jan. 20, 2007.

Public nuisance law is well-reasoned and sound. It "involves a balancing of interests" and a "delicate weighing of values." *Clancy v. Sup. Ct. of Riverside County*, 705 P.2d 347, 353 (Cal. 1985) (public nuisance law requires the same kind of discretion as prosecutors bringing criminal actions), *cert denied* 475 U.S. 1121 (1986). It also has worked well for several centuries. Its basic elements should not be abandoned, and the tort converted into an absolute liability substitute for the law of products liability. The former lead pigment manufacturers lawfully manufactured a non-defective product, which is not a tort and does not open them to liability.

CONCLUSION

For these reasons, *amici* respectfully request that this Court overturn the trial court and reject the broad new duty sought here by Appellees/Plaintiffs.

Respectfully submitted,



Jennifer Whelan (R.I. Bar No. 6952)
McGIVNEY AND KLUGER, P.C.
72 Pine Street, First Floor
Providence, RI 02903
(401) 272-5300

Counsel for *Amici Curiae*

Victor E. Schwartz
Mark A. Behrens
Phil S. Goldberg
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
Tel: (202) 783-8400

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 637-3000

Karen R. Harned
Elizabeth A. Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
LEGAL FOUNDATION
1201 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 314-2061

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, N.W., Suite 1000
Washington, D.C. 20036

Tel: (202) 828-7158

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
Tel: (317) 875-5250

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
Tel: (703) 741-5000

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 682-1163

Of Counsel

Dated: January 30, 2008

CERTIFICATE OF SERVICE

The undersigned certifies that copies of this brief were sent by United States Mail, first class, postage prepaid, this 30th day of January, 2008, addressed to the following:

Attorney General Patrick C. Lynch
Neil F. X. Kelly, Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
150 South Main Street
Providence, RI 02903

John J. McConnell, Jr.
Fidelma L. Fitzpatrick
MOTLEY RICE LLC
P.O. Box 6067
321 South Main Street
Providence, RI 02940-6067

Neil T. Leifer
THORNTON & NAUMES LLP
100 Summer Street, 30th Floor
Boston, MA 02110

John A. Tarantino
David A. Wollin
ADLER POLLOCK & SHEEHAN, P.C.
One Citizens Plaza 8th Floor
Providence, RI 02903-1345

Philip H. Curtis
Nancy G. Milburn
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022

Gerald J. Petros
Alexandra K. Callam
HINCKLEY, ALLEN & SNYDER
1500 Fleet Center
Providence, RI 02903-2393

Joseph A. Kelly
Scott D. Levesque
CARROLL, KELLY & MURPHY
Turks Head Building, Suite 400
Providence, RI 02903

Richard W. Mark
Elyse D. Echtman
ORRICK, HERRINGTON & SUTCLIFFE
666 Fifth Avenue
New York, NY 10103-0001

Timothy S. Hardy
837 Sherman Street
Second Floor
Denver, CO 80203

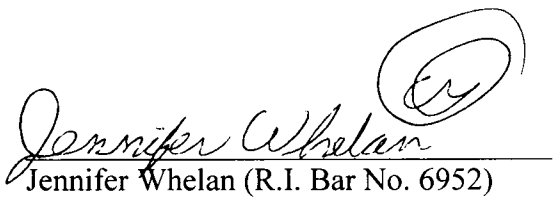
Donald E. Scott
Andre M. Pauka
BARTLIT BECK HERMAN PALENCHAR & SCOTT
1899 Wynkoop, Suite 800
Denver, CO 80202

Gerald C. DeMaria
HIGGINS, CAVANAGH & COONEY
The Hay Building
123 Dyer Street, 4th Floor
Providence, RI 02903

Michael T. Nilan
Courtney E. Ward-Reichard
Scott Smith
HALLELAND, LEWIS, NILAN, & JOHNSON, P.A.
220 US Bank Plaza South
Minneapolis, MN 55402

Paul M. Pohl
Charles H. Moellenberg Jr.
Laura E. Ellsworth
Bryan Kocher
JONES DAY
One Mellon Center, 31st Floor
500 Grant Street
Pittsburgh, PA 15219

Joseph V. Cavanagh, Jr.
Kristin E. Rodgers
BLISH & CAVANAGH LLP
Commerce Center
30 Exchange Terrace
Providence, RI 02903



Jennifer Whelan (R.I. Bar No. 6952)
MCGIVNEY AND KLUGER, P.C.
72 Pine Street, First Floor
Providence, RI 02903
Tel: (401) 272-5300