IN THE SUPREME COURT FOR
THE STATE OF TENNESSEE

JARED EFFLER, *et al.*, Plaintiffs/Appellees, v. PURDUE PHARMA L.P., *et al.*, Defendants/Appellants.	Tennessee Supreme Court No. E2018-01994-SC-R11-CV On Appeal by Permission from the Court of Appeals Circuit Court for Campbell County, No. 16596

AMICUS BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS/APPELLANTS

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INTEREST OF AMICUS CURIAE

The International Association of Defense Counsel ("IADC"), established in 1920, is an invitation-only, peer-reviewed membership organization of approximately 2,500 in-house and outside defense attorneys and insurance executives whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. The IADC regularly advocates for the interests of its members in federal and state courts throughout the country.

The IADC respectfully submits this amicus curiae brief in support of Appellants to demonstrate that the trial court granted Appellants' motion to dismiss in accordance with the requirements of the Tennessee Drug Dealer Liability Act (the "Act") and that the Court of Appeals' decision to the contrary impermissibly expanded that Act to impose liability on companies in a highly-regulated industry.

INTRODUCTION

This case involves a highly unusual claim against pharmaceutical manufacturers under the Drug Dealer Liability Act, Tenn. Code Ann. §§29-38-101 to 116 (the "DDLA"). The model DDLA was authored by then United States Attorney Daniel Bent. Joel W. Baar, *Note: Let the Drug Dealer Beware: Market Share Liability in Michigan for the Injuries*

Caused by the Illegal Drug Market, 32 Val. U. L. Rev. 139, 140 (1997) (hereinafter "Baar"). As one commentator noted:

> Bent . . . devised the DDLA after working with other U.S. attorneys on illegal drug prevention, meeting individuals who had suffered from the illegal drug market, studying the sociology of illegal drug abuse and studying negligence and market share law.

Baar, 32 Val. U. L. Rev. at 140, n.10. (emphasis added).

Baar's analysis of the law's singular focus on illegal drug dealers in the illegal drug market parallels numerous other commentators who have written about the DDLA. *See* Clinton W. Taylor, *Comment: The Oklahoma Drug Dealer Liability Act: A Civil Remedy For A 'Victimless' Crime*, 52 Okla. L. Rev. 227, 239 (1999) ("Acting on the theory that producers and sellers of illegal drugs should be held to at least the same level of responsibility as are manufacturers of legitimate goods, dealer liability created a new cause of action loosely based on theories of market share or alternative liability") (emphasis added); Nicholas Reiter, *Note and Comment: Dollars for Victims of a 'Victimless' Crime: A Defense of Drug Dealer Liability Acts*, 15 J.L. & Pol'y 1329, 1353-56 (2007) (discussing "[n]otable cases brought under Drug Dealer Liability Acts" and stating that these statutes apply to "persons who knowingly distribute or participate in the distribution of an illegal drug …." (emphasis added)); Hayley Dean, *Through the Haze: Fashioning a Workable Model for Imposing Liability on Marijuana Vendors*, 49 Gonz. L. Rev. 611, 621 (2014) ("Drug Dealer Liability Acts (DDLAs) … create a tort cause of action for persons injured by illegal drugs" (emphasis added)).

ARGUMENT

I. The Drug Dealer Liability Act Does Not Apply To The Conduct Of Pharmaceutical Manufacturers Within The Highly Regulated Market For FDA-Approved Medications

In contravention of the plain text and manifest purpose of the Act, the Court of Appeals' decision in this case became the first appellate decision in the United States since the DDLA was proposed in 1992 to hold that the manufacturer of a legal FDA-approved medication lawfully sold to legal distributors may be liable under the DDLA.[1]

This Court held in *Fletcher v. State*, 951 S.W.2d 378, 381-82 (Tenn. 1997) that:

> It is well-established that the fundamental role of this Court in construing statutes is to ascertain and give effect to legislative intent. *State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993). The Legislature is presumed to know the state of the law at the time it passes legislation. *Wilson v. Johnson County*, 879 S.W.2d 807, 810 (Tenn. 1994). Courts must presume that the Legislature did not intend an absurdity and adopt, if possible, a reasonable construction which provides for a harmonious operation of laws. *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1996); *Epstein v. State*, 211 Tenn. 633, 366 S.W.2d 914 (1963).

[1] Under the Court of Appeals' decision, the Manufacturer Defendants may be held liable even though they do not learn of the identity of the purchaser until after a lawful medication was purchased.

This approach has been uniformly followed by the Court. Thus in *Wallace v. Metro Gov't of Nashville*, 546 S.W.3d 47, 52 (Tenn. 2018), this Court stated that:

> The overriding purpose of a court in construing a statute is to ascertain and effectuate the legislative intent, without either expanding or contracting the statute's intended scope. *Ray v. Madison City*, 536 S.W.3d 824, 831 (Tenn. 2017); [*Tenn. Dept. of Corr. v.] Pressley*, 528 S.W.3d [506] at 512 [(Tenn. 2017)]. Legislative intent is first and foremost reflected in the language of the statute.

See also Waters v. Farr, 291 S.W.3d 873, 881 (Tenn. 2009) ("When called upon to construe a statute, we must first ascertain and then give full effect to the General Assembly's intent and purpose. . . . Our chief concerns is to carry out the legislature's intent without either broadening or restricting the statute beyond its intended scope." (citations omitted); *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 420 (Tenn. 2013) ("[O]ur rule in construing a statute is to ascertain and give effect to the Legislature intent without unduly restricting or expanding the Statute's coverage or expanding a Statute's coverage beyond its intended scope. To do so we focus initially on the Statute's words, giving these words their natural and ordinary meaning in light of their statutory context." (citation and quotation omitted)); *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004) (same).

The IADC respectfully submits that the repeated references in the DDLA to "illegal" drugs demonstrates that in enacting the DDLA the legislature did not intend to punish manufacturers of lawful FDA-

approved medications which are lawfully sold and purchased. Indeed, the DDLA expressly defines an "illegal drug" as a "drug, the distribution of which is a violation of state law." Tenn. Code Ann. § 29-38-104(1). And it is not a violation of any law for a pharmaceutical manufacturer to distribute FDA-approved opioid medications to licensed distributors, registered with the Drug Enforcement Administration (DEA), who thereafter control distribution of the medications. Even if criminal third parties might *later* distribute opioids in violation of state law, that does not transform a manufacturer's earlier sales to licensed distributors "illegal."

It is therefore unsurprising that the novel decision of the Court of Appeals finds no support in any other jurisdiction and no support among any of the commentators who have analyzed the DDLA in the last 27 years. Indeed, courts from other jurisdictions construing similar versions of the DDLA have confirmed that the statute is intended only to reach the purveyors of *illegal* drugs. For example, in rejecting a claim against a pharmacy under the California DDLA, the California Court of Appeals, third appellate district found:

> The purpose of the Act is to enable persons injured as a consequence of the use of an "illegal controlled substance" to recover damages from persons who participated in their marketing and to shift the cost of damages "to those who illegally profit from that market." (§§11701, 11702).
>
> The Act applies both to users and specified others. It applies to "[s]pecified illegal controlled substance[s]'," which include any substance which violates section 11352, (§11703, subd(i)).

Whittemore v. Owens Healthcare-Retail Pharmacy, Inc., 185 Cal. App. 4th 1194, 1200-01 (2010) (emphasis added). This Court should similarly reject the impermissible broadening of the DDLA by the Court of Appeals to impose liability on lawful, highly-regulated pharmaceutical companies for the diversion and abuse of their FDA-approved medicines by third parties. This interpretation was not intended by the drafters of the model DDLA, nor endorsed by courts that have considered the matter.

CONCLUSION

The Court of Appeals' decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief consists of 1,358 words and complies with the Rule 3.02, Section 3, of Rule 46 of the Tennessee Supreme Court.

2. This brief complies with the typeface requirements of Fed. Tennessee Supreme Court Rule 46, § 3.02(a) because this brief has been prepared using Microsoft Office Word and is set in Century font in a size equivalent to 14 points or larger.

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