Nos. 20-1774, 20-1776, 20-1777, 20-1780, 20-1781,
20-1782, 20-1783, 20-1784, 20-1785

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GLENN BURTON, JR., RAVON OWENS, and CESAR SIFUENTES,
Plaintiffs-Appellees,

v.

ARMSTRONG CONTAINERS INC.,
E.I. DUPONT DE NEMOURS AND COMPANY, INC., and
THE SHERWIN-WILLIAMS COMPANY,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin
(Nos. 2:07-cv-303, 2:07-cv-441, 2:10-cv-75)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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July 24, 2020

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1774, 20-1776, 20-1777, 20-1780, 20-1781, 20-1782, 20-1783, 20-1784, 20-1785

Short Caption: Burton, et al. v. Armstrong Containers Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Attorney's Signature: /s/ Cory L. Andrews Date: 07/24/2020

Attorney's Printed Name: Cory L. Andrews

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Corbin K. Barthold Date: 07/24/2020

Attorney's Printed Name: Corbin K. Barthold

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in important tort cases. See, e.g., *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410 (2011); *City of New York v. Chevron Corp.*, No. 18-2188 (2d Cir., argued Nov. 22, 2019); *Burningham v. Wright Med. Group*, 448 P.3d 1283 (Utah 2019).

Everyone wants safe products. But every use of a product creates risks, and any product can cause injury. Absolute safety is unobtainable. Some products are just safer than others. The market offers an evolving set of products that, in their mix of safety, quality, and price, is the best society can do at a given moment. To get better products we need innovation. Fortunately, much innovation has occurred in recent decades, and today's products are on the whole vastly safer (not to mention of higher quality and comparatively cheaper) than their predecessors.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

Further improvement will be imperiled, WLF believes, if courts and juries may stand arbitrary liability on denunciations, made from the comfort of the present, of products that were considered safe and useful in the rougher conditions of the past. That danger to progress—to the continuing advance of product safety—is the root subject of this brief.

SUMMARY OF ARGUMENT

When they came on the market at the turn of the 20th century, paints containing white lead carbonate pigments ("WLC") were not only perfectly legal, but highly valued. They were more durable and washable than other paints available at the time. And they were (and still are) safe when properly maintained. Just how valued were they? Some government bodies *required* that they be used in public buildings.

Gradually, however, attitudes shifted. Although the dangers of lead poisoning had long been known, scientists became increasingly aware in the later 20th century of the dangers of exposure even to small quantities of lead dust. Meanwhile, the state of public health, and of general product safety, dramatically improved. Standards changed. By 1978, the sale of lead paint for residential use was banned nationwide.

Eventually came the lawsuits. These ones involve three plaintiffs who lived in Milwaukee, at the turn of the 21st century, in homes that contained deteriorated lead paint. Each plaintiff was found, during a childhood medical exam, to have what is today considered an elevated blood-lead level. Each plaintiff's blood-lead level would have been considered within the bounds of normalcy fifty years ago, and no plaintiff displays any physical symptoms of illness. Yet the district court allowed the plaintiffs to proceed to a consolidated trial, and it relieved the plaintiffs of the duty to prove injury or causation. The jury awarded each plaintiff $2 million. The trial court reduced one of these awards, but rejected all the defendants' other post-trial challenges.

In place of the traditional proximate-cause standard, Wisconsin has a set of six public-policy factors. *Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co.*, 680 N.W.2d 345, 351 (Wis. 2004). This six-factor test "integrates elements of [the] historical proximate cause doctrine with more modern policy concerns." Kendall W. Harrison, *Wisconsin's Approach to Proximate Cause*, 73-FEB Wis. Law. 20, 54 (2000). The factors form a "flexible standard" that "strike[s] a balance between deterring socially irresponsible conduct and shielding individuals from

unlimited liability for the infinite results of their actions." *Id*. at 20, 54. Although she generally assesses whether a verdict is consistent with the public-policy factors after trial, the trial judge considers the factors as a matter of law. *Id*. at 53 & n.34. If the verdict is inconsistent with any *one* factor, the verdict should fall. *Fandrey*, 680 N.W.2d at 72.

In these cases *every one* of the six factors warrants reversal. Here are the six factors, each framed as a question to which the answer is "yes":

First, is the harm too remote from the defendant's conduct to sustain liability? Of the six factors, this is the one that most resembles other states' traditional proximate causation test. Remoteness is an insuperable issue here, because many intervening factors sit between a manufacturer's production and sale of WLC and the plaintiffs' claimed injury—a supposed drop in IQ. Government bodies encouraged the use of WLC paint, for instance, and, later on, landlords illegally failed to remove lead paint after it deteriorated. Further, public health has improved dramatically since WLC was on the market. This improvement has altered perceptions about what qualifies as an injury to begin with, and it is itself another superseding cause.

Second, is the plaintiff's injury disproportionately larger than the defendant's culpability? The direction this factor points is unmistakable, for manufacturers were not *at all* culpable for making and selling WLC *in the era* they did so. To conclude otherwise is to misjudge the past from a safer and more comfortable present; it is to engage in chronological snobbery. And the passage of time has created disproportion in another way: it has killed off many of the major sellers of WLC and other lead products, thereby leaving liability to rest on just a few shoulders.

Third, is it simply too extraordinary, in hindsight, that liability would attach to the conduct in question? It clearly is. It was not foreseeable, when WLC was sold, that limited exposure to leaded dust could cause symptomless effects—effects that, at the time, could not even be detected. Nor was it foreseeable that courts would unilaterally dismantle key protections for corporate tort defendants, as they have done.

Fourth, is the potential liability too burdensome to the defendant? Obviously so. The few remaining former WLC manufacturers are being made to pay for injuries they could not have foreseen or taken

reasonable precautions to prevent. They are being forced, in effect, to act as insurers of the whole industry's products for those products' entire lifetimes and regardless of whether the products are properly maintained. Yet a core principle of tort law is that companies are *not* insurers of their products, precisely because making them so would be too burdensome.

Fifth, is imposing liability likely to make it too easy to bring fraudulent claims? The answer is yes. The injury element of tort law "is a particularly rich area for litigation fraud." *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 817 (7th Cir. 1994). Courts must, therefore, be vigilant about requiring plaintiffs to prove their injuries. Yet the trial court allowed the plaintiffs to recover without establishing either that their IQs in fact dropped or that any drop was caused by exposure to WLC. The rulings below open the way for anyone merely *exposed* to lead to collect an unwarranted court award.

Sixth, is the logic under which liability is imposed boundless? Indeed it is. This case should scare companies that sell meat, candy, videogames—anything that a future society with softer sensibilities might disapprove of. One generation cannot predict another

generation's attitudes about product liability. If a company must try to predict future attitudes anyway, and must pay tort awards for guessing wrong, there is no sensible stopping point to the liability a company can unwittingly generate for its later self.

Nobody wants an elevated blood-lead level, and nobody opposes wide-ranging efforts to make elevated blood-lead levels one of the next health hazards to become a thing of the past. But there are firm limits to what the tort system can do. The plaintiffs here cannot show that their elevated blood-lead levels injured them; they cannot show that any injury was caused by the defendants; and, above all, they cannot show that the defendants are blameworthy, are *at fault*, for any injury they might have caused selling products that were helpful and safe by the standards of their day. "In many accidents," no one "is at fault," and "then there is no liability." *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1556 (7th Cir. 1987).

ARGUMENT

EACH OF WISCONSIN'S SIX PUBLIC-POLICY FACTORS BARS LIABILITY.

The public-policy factors are only one item in a long list of reasons why this Court should direct entry of judgment for the defendants, or at

least order a new trial. The other items on the list are, for the most part, not addressed here. For example, we will not discuss the defendants' compelling argument that the jury was improperly allowed to find negligence in the absence of a product defect. Nor will we get into the district court's misuse of *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005), to find that WLCs are fungible as a matter of law. We will, for the purpose of this brief, take some of the trial court's erroneous rulings as we find them. That said, some of the defendants' freestanding arguments also support a finding of no liability on public-policy grounds. So we will explain for instance how the plaintiffs' failure to prove causation also supports a finding, under the public-policy factors, that the defendants' conduct is too remote from any harm to support liability.

The six public-policy factors overlap. *Steffen v. Luecht*, 608 N.W.2d 713, 721 (Wis. Ct. App. 2000). Permitting liability for conduct that is remote from the harm (factor one) might be an extraordinary turn of events (factor three). If a jury may impose extraordinary liability (factor three), there is potentially no sensible stopping point to what it may do

(factor six). And so on. None of the sections below "purport[s]" to be fully "separate and discrete" in its analysis. *Id.*

Although we will focus, for ease of discussion, on Sherwin-Williams, which sold WLC from 1910 to 1947, our analysis translates easily to the other defendants.

A. Proximity.

The remoteness factor "is a restatement of the old chain of causation test." *Cefalu v. Cont'l W. Ins. Co.*, 703 N.W.2d 743, 750 (Wis. Ct. App. 2005). "We cannot trace the effect of an act to the end, if end there is." *Palsgraf v. Long Is. R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). In assessing remoteness, therefore, a court should ask whether "a superseding cause should relieve the defendant of liability." *Cefalu*, 703 N.W.2d at 750.

Elevated amounts of lead—by modern standards—were detected in the plaintiffs' blood in 1993, 2001, and 2002. Although they showed no outward symptoms of injury, the plaintiffs argued, based on testing conducted for this litigation, that exposure to lead lowered their IQs. And they claimed that the offending lead came from the defendants, including Sherwin-Williams, which sold WLC. But while, or after,

Sherwin-Williams sold WLC, many other causes or likely causes of the plaintiffs' measured IQ were present:

- Most of the WLC was purchased by paint manufacturers or master painters. Aware that WLC made paint more washable and durable, those intermediaries chose to place WLC in paint that they then sold or applied.
- Government entities endorsed WLC paint as a superior product. They recommended, and in some instances even required, its use.
- By the mid-1950s, at the latest, the public was aware of the danger of ingesting lead-paint chips. Still, landlords, homeowners, and others let WLC paint deteriorate. (Defendants' Joint Appendix ("DJA") 2285.)
- Lead paint was the subject of research and educational campaigns throughout the 1970s and beyond. It became clear, starting in the late 1970s and early 1980s, that even lead-paint *dust* was dangerous. Still, landlords, homeowners, and others let WLC paint deteriorate.

- The State of Wisconsin declared deteriorated lead paint a health hazard and ordered landlords, by law, to ensure that lead paint on their premises does not deteriorate. Still, landlords, homeowners, and others let WLC paint deteriorate.
- The plaintiffs offered no evidence about (and the district court blocked discovery on) various factors that shape IQ, such as parental IQ, nature of childhood upbringing, and socio-economic status. It is impossible to say what the plaintiffs' IQ would have been, but for exposure to lead, when these unexplored factors could be dominant—or, in this context, "supervening"—causes of the plaintiffs' IQ.

Consider too that since Sherwin-Williams and others made WLC, the public's health, and the field of public health, have changed dramatically. In 1905, American life expectancy was 50.3 years; in 1947, when Sherwin-Williams stopped selling WLC, it was 66.7; and in 2015 it was 78.9. Max Roser, et al., "Life Expectancy," *Our World in Data*, https://bit.ly/2NSqkeK (2013). The average person's blood-lead level, meanwhile, has dropped precipitously. As late as the 1960s, the

blood-lead levels that precipitated this lawsuit were considered normal by the CDC and the medical profession. (DJA 3147.) The changes of the last fifty-plus years are so great that they can themselves be considered a further superseding cause. A blood-lead level that was not regarded as hazardous when Sherwin-Williams acted became so many years later, thanks to society's improved health and well-being.

"The injury for which the plaintiffs seek compensation is remote indeed, the chain of causation long." *Int'l Broth. of Teamsters v. Philip Morris Inc.*, 196 F.3d 818, 825 (7th Cir. 1999). Yet "we trace the consequences" of an act, "not indefinitely, but to a certain point." *Steffen*, 608 N.W.2d at 721. The trial court here let the jury proceed far beyond the point tolerated by Wisconsin public policy.

B. Proportionality.

The proportionality factor shields a defendant from liability when "the injury is wholly out of proportion" to the defendant's culpability. *Fandrey*, 680 N.W.2d at 354 n.12.

It bears repeating that WLC manufacturers operated in a world utterly different from ours. In 1913 the workplace fatality rate was twenty times higher than it is today. Marian L. Tupy, "How the Market

Helped to Make Workplaces Safer," *HumanProgress*, https://bit.ly/2Aq04p9 (Sept. 15, 2018). There were no airbags in automobiles between 1910 and 1947, and seat-belt usage rates remained low well into the 1970s. Polio paralyzed more than 15,000 Americans a year into the early 1950s. Centers for Disease Control and Prevention, *Polio: Elimination in the U.S.*, https://bit.ly/2C3nRLL (Oct. 24, 2019). It is not for us to declare, from our comparatively safer and more comfortable perch in 2020, that WLC was unduly dangerous when sold, or that its producers were *at fault* for selling it. Not when the sales were lawful, the product was widely considered useful, attitudes toward risk were different, and the dangers of minute amounts of household lead dust were unknown.

The passage of time creates a further proportionality problem. As the decades pass, fewer former sellers of WLC or lead paint remain around to share in paying a judgment. The surviving companies are being penalized for having survived. The unfairness of handing a few companies the tab for the conduct of an entire long-vanished industry is especially acute because the companies that have survived controlled only a small piece of the WLC market to begin with.

C. Foreseeability.

A defendant is not liable when "in retrospect it appears too highly extraordinary that the negligence should have brought about the harm." *Steffen*, 608 N.W.2d at 720-21.

What this factor contributes to sound public policy should be obvious. "Estimation of the benefits of accident prevention implies foreseeability." Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 42 (1972). Removing foreseeability from tort law increases the uncertainty in the cost-benefit analysis of developing a product. As that uncertainty about costs and benefits rises, the incentive to produce products in the first place falls. True enough, companies faced with unforeseeable liability might just "continue making and selling their wares, offering 'tort insurance' to those who are injured." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 217 (7th Cir. 1990) (Easterbrook, J., concurring). But if "the judgment bill becomes too high," they are more likely to throw up their hands and leave the pertinent market. *Id.* Unforeseeable liability discourages the creation of new products, which means that "older, and more dangerous, products stay in use longer."

Id. at 216. Requiring foreseeability ensures that tort law is not a self-defeating endeavor.

It was reasonable when WLC paint was sold, and probably even now, to see it as not only superior to, but also safer than, the alternatives—including bare walls—then available. It was, to repeat, washable and durable; it therefore promoted domestic hygiene. Even if an unfortunate child of the early twentieth century had ingested WLC paint chips, sued a paint or WLC producer, and won, that would not show that by the standards of the day, the dangers of WLC paint outweighed the benefits. "Because the legal system prefers the interests of identified plaintiffs to invisible future victims, manufacturers often do not (and ought not) modify their products in response to verdicts finding them 'unreasonably dangerous.'" *Id.* Although the dangers of ingesting lead-paint chips were clear early on, it appears to have made sense, to those making their own cost-benefit assessments at the time, to embrace lead paint anyway.

But in any event, the case at hand is not about the hazards of consuming leaded *chips*; it's about the hazards of being around invisible leaded *dust*. And *those* hazards were utterly unforeseeable when WLC

was sold. Unlike the palpable effects of extreme lead poisoning, the effects of exposure to lead dust were generally undetectable until long after Sherwin-Williams and others stopped selling WLC for residential use. Widespread testing of blood-lead levels was not possible until the 1960s (DJA 2145), and the danger of household lead dust was not known until the late 1970s (and remained a subject of debate into the 1990s, see Ellen Ruppel Shell, "An Element of Doubt," *The Atlantic*, https://bit.ly/3irVFD0 (Dec. 1995)).

The district court claimed (Sherwin-Williams Appendix ("SWA") 76) that distinguishing the respective hazards of leaded chips and leaded dust is "splitting hairs." Not so. Again, integral to foreseeability is the notion that a company developing a product be able to conduct cost-benefit analysis and plan ahead. That a company making WLC could plan for litigation over ingested lead chips does not mean that it could plan for litigation over ingested lead dust.

The problem, moreover, is not simply that the danger of the dust was neither known nor detectable. It was also—to say it once again—that no one could be expected to foresee that, over the long run, vast social progress would lead society to define danger down. Nor, for that

matter, could anyone be expected to know that that future society would grade the past on a curve fitted to the present.

Another element of unforeseeability can be found in the way some state courts have recently altered the common law. When the defendants started making WLC, most lawyers and judges still believed that "the common law was . . . a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely 'discovered' rather than created." Antonin Scalia, *A Matter of Interpretation* 10 (1997). This attitude ensured that changes to the common law, although inevitable, would be slow and incremental. It was not necessary to worry that judges would "run roughshod over established principles of causation," as the Wisconsin Supreme Court did in applying the "risk-contribution theory" to WLC. *Thomas v. Mallett*, 701 N.W.2d 523, 568 (Wis. 2005) (Wilcox, J., dissenting).

To foresee liability in this case, in fact, someone in the early twentieth century would have had to foresee more than just the rise of a new brand of judicial policymaking. More than just that "modern judges, either more sentimental than their predecessors or more confident of their ability to screen out phony cases," would seek to

expand the scope of tort liability. *Kuehn v. Childrens Hosp., Los Angeles*, 119 F.3d 1296, 1299 (7th Cir. 1997). The people of Wisconsin, acting through their representatives, passed a law declaring that the Wisconsin Supreme Court "improperly expan[ded] application of the risk contribution theory of liability" to cover WLC. Wis. Stat. § 895.046(1g). Yet this Court ruled that the state high court's changing of the rules created vested rights the legislature was powerless to remove retroactively. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 608-09 (7th Cir. 2014). The state *judges* created new law that the state *lawmakers* could not fully rescind. The plaintiffs here are the beneficiaries of a judicial expansion of liability that was unforeseeable—that would seem "highly extraordinary"—to those whose conduct is now being condemned. *Steffen*, 608 N.W.2d at 720-21.

D. Burden.

"Tort law should not seek to deter all conduct that involves risk, just conduct that involves too much risk." *Fandrey*, 680 N.W.2d at 354 n.12. Thus the fourth factor asks "whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor." *Id.*

When Sherwin-Williams was selling WLC, the hazards of household lead dust were unknown. Equally unknown were the hazards of symptom-free elevated blood-lead levels; throughout the pertinent period, blood-lead levels were either unmeasurable or not widely measured. Former WLC manufacturers are effectively being punished for failing to predict an unpredictable future. That is the burden being placed on them. The upshot is that there is no way they could have avoided liability, under the trial court's view of Wisconsin law, short of simply not selling products.

"The manufacturer is not an insurer of his product." *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868, 875 (7th Cir. 1960); see, e.g., *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1407 (7th Cir. 1993); *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984); *Peck v. Ford Motor Co.*, 603 F.2d 1240, 1247 (7th Cir. 1979); *Collins v. Ridge Tool Co.*, 520 F.2d 591, 594 (7th Cir. 1975); *Borowicz v. Chicago Mastic Co.*, 367 F.2d 751, 760-61 (7th Cir. 1966); *Dippel v. Sciano*, 155 N.W.2d 55, 63 (Wis. 1967). That's a good thing: "Products liability law as insurance is frightfully expensive." *Carroll*, 896 F.2d at 217 (concurrence). Yet the judgment below amounts to a declaration that

companies *are* insurers. It even embraces a radical version of that already radical doctrine. Even Justice Traynor, in his famous *cri de coeur* for turning tort law into insurance, acknowledged that liability "should not extend to injuries that cannot be traced to the product *as it reached the market*." *Gladys Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 461-68 (Cal. 1944) (Traynor, J., concurring) (emphasis added). The defendants have been declared liable for WLC in paint that deteriorated long after it left (if it was ever in) their control.

The burden in these cases is too high almost by definition. Our tort system pays lawyers exorbitant sums to argue over findings of fault. If the liability in this case stands, that process is a charade.

E. Potential for Fraud.

The fifth factor empowers a court "to limit liability" when "allowing recovery would be too likely to open the way to fraudulent claims." *Fandrey*, 680 N.W.2d at 348 n.1.

This factor is particularly important if tort law is to remain a vehicle for remedying only genuine injuries. "No injury, no tort, is an ingredient of every state's law." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002); see *Avery v. Diedrich*, 734 N.W.2d 159,

164 (Wis. 2007). "If [a plaintiff] wants damages," therefore, "he must prove them"; he is "not permitted to throw himself on the generosity of the jury." *Taliferro v. Augle*, 757 F.2d 157, 162 (7th Cir. 1985). "The extent of [his] injuries, short of death, should never be taken for granted, as this is a particularly rich area for litigation fraud." *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 817 (7th Cir. 1994).

One can be *exposed* to lead without being *injured* by lead. The record here shows exposure but not injury. The plaintiffs had blood-lead levels considered normal in the 1960s; one of them even tested at a level that would have been close to *average* in those days. (Sherwin-Williams AOB 11.) The plaintiffs displayed no symptoms of illness. There is nothing abnormal about their brains—nothing that could be detected in a brain scan. Although they claim that exposure to lead diminished their IQs, the plaintiffs submitted no evidence that would enable a factfinder to infer what their expected IQs were in the absence of an elevated blood-lead level. The plaintiffs made no effort to isolate the variable—exposure to lead—that they blame for their unproven drops in IQ. And other than a doctor's rank speculation that each lost IQ point

is worth about $15,000 in lifetime earnings (and that each plaintiff was therefore owed about $150,000), the plaintiffs offered no calculation of damages. (DJA 2275.) The plaintiffs simply appealed to "the generosity of the jury," *Taliferro*, 757 F.2d at 162, and were duly rewarded with—distinctions in their individual cases notwithstanding—exactly $2 million each.

"Until there is hurt, there is no tort." *Heil v. Morrison Knudsen Corp.*, 863 F.2d 546, 550 (7th Cir. 1988). Yet the plaintiffs collected in tort, collected big, without proving that they were hurt, let alone that they were hurt by WLC used in paint. In this "particularly rich area for litigation fraud," their injuries were "taken for granted." *Transcraft*, 39 F.3d at 817. This is not to say the plaintiffs acted in bad faith. But honest people can obtain judgments to which they are not entitled, and faulty precedents can be exploited by those with less pure motives. The way is now open for anyone simply *exposed* to lead to come before a jury and bid for riches.

F. Stopping Point.

Finally, liability should not be imposed in a way "that has no sensible or just stopping point." *Fandrey*, 680 N.W.2d at 360.

There is no sensible stopping point to a discussion of how the liability imposed here lacks a sensible stopping point. With the conventional legal conceptions of injury and causation set aside, a company can be shook down in the courtroom for almost anything. The possibilities are as boundless as an enterprising trial lawyer's imagination.

Take a hypothetical this Court once used as an illustration of outlandish runaway liability. "The food industry puts refined sugar in many products, making them more tasty," the Court said; and "as a result some people eat too much (or eat the wrong things) and suffer health problems and early death." *Int'l Broth. of Teamsters*, 196 F.3d at 823. "No one supposes, however, that sweet foods are defective products on this account; chocoholics can't recover in tort from Godiva Chocolatier." *Id.*

Well, why can't they? The law as applied in these cases wouldn't stop them. Declining to dismiss the cases on public-policy grounds, the district court wrote: "the jury found that the defendants breached a duty of care by manufacturing and marketing products that they knew could cause harm to children, and by failing to adequately warn about

the risk." (SWA 75.) That sentence could apply to sugar as easily as it could apply to lead. And we shouldn't simply assume that no jury would impose liability. "If a defendant has violated no legal obligation, his liability for pecuniary damages must not be submitted to the possible prejudices, sympathies or whims of a lay jury." *Borowicz*, 367 F.2d at 761. "Once a case gets to the jury," after all, "all bets are off." *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999). Especially if the plaintiff's lawyer gets to tell the jurors that sugar is poison, that candy does great harm to society as a whole, and that the defendants must "clean up the mess that they created" and pay for their dishonesty. (Cf. DJA 3357-58, 3365, 3374, 3379-80.)

And even if the chocolatiers still seem comparatively safe *today*, the most pernicious aspect of the rulings and verdict at hand are their overweening sense of perfect hindsight about *the past*. Even when a lawsuit is grounded in recent events, "the *ex post* perspective of litigation exerts a hydraulic force that distorts judgment." *Carroll*, 896 F.2d at 215 (concurrence). "*Ex post* claims are overvalued and technical arguments discounted in the process of litigation." *Id.* at 216. The jury is invited "to apply hindsight and to favor the interests of visible victims

over invisible losers—those who must pay higher prices, who will be deprived of beneficial products, or who will be injured in turn if manufacturers change their designs to be jury-proof." *Id*. at 217. This case extends the *ex post* distortion across decades. The jury was invited to apply hindsight to another era altogether. Under the standards applied here, there is no telling whether companies selling candy bars today will face ruinous liability a generation from now. There is likewise no telling what sort of ruinous liability a company might suffer today for conduct that was perfectly reasonable a generation ago.

Beware the tyranny of the present. Our attitudes *seem* so intuitive, so inherent, so obviously correct. But they're not. We cannot foresee the distant future's attitudes about risk, health, safety, and costs versus benefits. Equally, the people of the distant past could not foresee our attitudes about risk, health, safety, and costs versus benefits. Imposing liability for what cannot be foreseen is arbitrary, and what is arbitrary by nature has no sensible stopping point.

CONCLUSION

The judgments should be reversed, and the district court directed to enter judgment in favor of the defendants.

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Respectfully submitted,

/s/ Cory L. Andrews

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 4,865 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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July 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2020, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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