Is the Ohio Supreme Court's holding in *Schwartz v. Honeywell Int'l, Inc.* obviated due to an abundance of factual distinctions?

In February 2018, the Ohio Supreme Court held the "Cumulative-Exposure Theory" was not compatible with Ohio's Asbestos Statute (ORC 2307.91, et seq.) *Schwartz v. Honeywell Int'l, Inc.*, 153 Ohio St. 3d 175, 2018-Ohio-474. The *Schwartz* case originated in Cuyahoga County where the Eighth District Court of Appeals upheld the trial court's denial of a brake manufacturer's motion for directed verdict. Both lower courts allowed the cumulative-exposure test asserted by the plaintiff's experts.

The Ohio Supreme Court concluded that the cumulative-exposure theory is inconsistent with the test for causation outlined in ORC §2307.96 and, therefore, is not a sufficient basis for finding a defendant's conduct was a substantial factor in causing an asbestos-related disease. *Id.* at 181-182. ORC §2307.96 incorporates a standard for evaluating the potential causal link between exposure to a product and the claimed asbestos-related injury. In applying the Ohio statute, the *Schwartz* Court found that the cumulative exposure theory advanced by the plaintiff's expert was at odds with the requisite "individualized determination for each defendant" set forth in ORC §2307.96. *Schwartz,* 153 Ohio St. 3d at 180. The expert provided testimony at trial that the specific defendant's product "contributed to [plaintiff's] cumulative exposures" but stated it was "impossible to determine which particular exposure to carcinogens, if any, caused an illness." *Id.* at 179. The Eighth District Court of Appeals decision was reversed and the Ohio Supreme Court entered judgment for the manufacturer.

<u>How have Ohio courts responded to the *Schwartz* decision?</u>
The Ohio Supreme Court decision in *Schwartz* clearly requires a plaintiff to prove that the conduct of a *particular defendant* was a *substantial factor* in causing the claimed injury. The *Schwartz* opinion states what is NOT a substantial factor, but it does not address what is (or should be) deemed as a substantial factor. Courts in Ohio have had several opportunities to apply the *Schwartz* holding, but several have found ways to distinguish its application.

On September 5, 2018, the U.S. District Court for the Northern District of Ohio found that the *Schwartz* decision did not apply where there was claimed exposure to only one product. *See Alexander v. Honeywell Int'l, Inc.*, 2018 U.S. Dist. LEXIS 151229, 2018 WL 4220628 (N.D. Ohio Sept. 5, 2018). In other words, the federal trial court found that the cumulative exposure theory that the Ohio Supreme Court found to be inconsistent with Ohio law is not an applied theory of exposure when only one product is claimed to be at issue. *Id.* at *6. As such, the *Schwartz* opinion requiring proof that the conduct of a particular defendant was a substantial factor was not applied when considering the admissibility of two expert opinions. *Id*.

Two additional courts found that *Schwartz* didn't apply based upon the legal claims asserted (although the injury was claimed to be related to asbestos exposure). *See, Turner v. Certainteed Corp.*, 155 Ohio St. 3d 149, 2018-Ohio-3869 (Sept. 27, 2018) (holding *Schwartz* didn't apply when evaluating whether the plaintiff makes a prima facie showing that satisfies the Ohio Rev. Code 2307.92(C)(1) requirements that a smoker-plaintiff must provide competent medical authority that asbestos was a substantial contributing factor to the cause of their lung cancer); *Shaffer v. A.W. Chesterton Co.*, 2019-Ohio5022, 2019 Ohio App. LEXIS 5097, 2019 WL 6700448 (9th Dist. Ct. App. Dec. 9, 2019) (holding *Schwartz* didn't apply to asbestos claims asserted under the federal Jones Act or maritime laws).

And recently, the Eighth District Court of Appeals found that a witness' testimony was so ambiguous that it could not determine whether exposure to asbestos existed (or not) and, therefore, was not required to apply the *Schwartz* standard. *Maddy v. Honeywell Int'l, Inc.*, 2020-Ohio-3969, 2020 Ohio App. LEXIS 2872 (8th Dist. Ct. App. Aug. 6, 2020). Instead, the *Maddy* court stated it was required to

construe the ambiguities in the evidence in the light most favorable to the nonmoving party. *Id.* Further, the Court held that ORC §2307.96(B) states that the *trier of fact* shall consider the factors and determine whether an exposure is substantial and it was not the role of the court of appeals or trial court to weigh the evidence relevant to those facts. *Maddy* at ¶110.

In remanding the matter back to the trial court, however, did the Court make critical assumptions about the evidence purporting to show asbestos content that could be argued as a reason to avoid the application of *Schwartz* in the future cases?

What did the Eighth District Court of Appeals consider in distinguishing *Maddy* from *Schwartz*?
In *Maddy*, the plaintiff claimed exposure to asbestos from brake products while plaintiff's decedent was employed as a supervisor at a bus manufacturing facility from 1980 to 1996. *Maddy* at ¶2-3. The claimed exposure was based solely on the testimony of one co-worker witness presented by plaintiff despite the fact that the witness (1) was not certain about whether the defendant brake manufacturer's product was exclusively used at the facility; and (2) did not have knowledge about whether any of the brakes used at the facility were asbestos-containing. *Maddy* at ¶ 14-15.

The *Maddy* Court considered whether it was required to apply *Schwartz*, but ultimately found that case to be distinguishable. What were those distinctions? The *Maddy* Court concluded that (1) expert evidence was not raised as an issue in *Maddy*; (2) the plaintiff only claimed exposure to one type of product from one defendant; and (3) a plaintiff, generally, may provide exposure through circumstantial evidence and reasonable inference. *Maddy* at ¶105.

Does the Maddy decision raise more questions than answers regarding Ohio's substantial causation law codified in ORC §2307.96?
The *Maddy* opinion is based on a conclusion that there was more testimony relating to claimed direct exposures in *Maddy* than what was asserted in *Schwartz*. However, can ambiguous testimony be considered a substantial factor or proof of direct exposure? If not, then is the court's opinion based on evidence that is unreasonably inferred or assumed from ambiguous testimony? And if courts make rulings based upon unreasonable inferences, does that mean the *Maddy* decision may open the door for other courts to avoid application of *Schwartz*?

The *Maddy* Court acknowledged that the *Schwartz* decision rejects the cumulative exposure theory that includes the assessment of minimal exposures because that theory was incompatible with ORC §2307.96. However, the *Maddy* court based its rationale on specific phrasing referenced in the *Schwartz* opinion. For example, the court recited that, in *Schwartz*, "the evidence 'merely' showed that the decedent 'could have been exposed' to asbestos …and did not show that the decedent was exposure to asbestos…". *Maddy* at ¶ 102 *citing Schwartz*, 153 Ohio St. 3d at 182 (emphasis added). Further, the *Maddy* court identified that the exposures in *Schwartz* were found to be "limited and irregular exposures" from "occasional brake jobs". *Maddy* at ¶ 103 citing Schwartz, 153 Ohio St. 3d at 182 (emphasis added).

Each of those phrases were opined to support a conclusion that the Schwartz evidence was far less substantial (and, in turn, lower in weight) than the evidence in *Maddy*. However, in disregarding the sole co-worker's witness testimony that he did not have knowledge about asbestos content or knowledge about exclusivity of product supply, does the Maddy Court inadvertently step into the role it admonishes in its opinion as an evaluator of the weight of the evidence and, further, put its own inferences in the place of the actual evidence? It is unknown at this time whether any party will seek review of the *Maddy* decision by the Ohio Supreme Court.