IN THE SUPREME COURT OF OHIO

LINDA ACKISON, Administratrix of the estate of Danny Ackison,	:	Case Nos. 2007-0219; 2007-0415
Appellee,	:	On appeal from the Lawrence County Court of Appeals, Fourth Appellate District
v.	:	
	:	Court of Appeals Case No. 05 CA 46
ANCHOR PACKING Co., et al.,	:	
Appellants	:	

APPELLANTS' MERIT BRIEF AND APPENDIX – PART I

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Introduction

This appeal is about the General Assembly's reform of Ohio's asbestos litigation system. Both that body and this Court have recognized that the old way of litigating asbestos cases did not work. This Court responded to the problem by appointing extra judges to deal only with asbestos cases. Later, this Court – over the objection of the Commission on the Rules of Practice and Procedure – amended Civil Rule 3(B)(11) to restrict the possible venues for asbestos cases. See Oh. R. Civ. P. 3(B)(11). The General Assembly responded to the crisis by passing a law that gives courts a tool to prioritize the undifferentiated mass of asbestos cases that fill Ohio's court dockets. This law, Amended Substitute House Bill 292, draws on courts' inherent authority to control their own dockets. Giving shape to that power, the law directs courts to focus judicial attention on those asbestos cases involving the most serious injuries and those cases where the plaintiff has demonstrated that the injury is linked to asbestos. The law instructs courts to administratively dismiss cases where there is no present injury or no present evidence that the injury is linked to asbestos. This administrative dismissal does not dispose of a claim, it sets it aside – tolling the statute of limitations and preserving the court's jurisdiction over the matter – until the plaintiff shows that the injury is manifest and the plaintiff offers evidence demonstrating that the injury was caused by asbestos.

This early evaluation of tens of thousands of asbestos cases is a reasonable response to a system where courts' inability to give every case the attention it deserved meant that asbestos cases often languished for years or decades without the plaintiff getting relief or the defendant winning dismissal. The multiyear purgatory of most

asbestos cases meant that both sides wasted their own, and the courts' resources. That way of litigating asbestos lawsuits benefited no one except the lawyers.

In this case, the Fourth District Court of Appeals reversed a trial court that applied H.B. 292 to the case of Linda Ackison. The Fourth District reasoned that H.B. 292 – because it changed the way asbestos cases were litigated in a system that did not work – was a retroactive law, in violation of Section 28, Article II of the Ohio Constitution. The Fourth District's decision is in conflict with an earlier opinion of the Twelfth District, holding that H.B. 292, as a remedial law, is within the General Assembly's constitutional authority. The Fourth District's opinion is also in tension with decisions of this Court interpreting the reach of the Retroactivity Clause of Section 28, Article II. Therefore, this Court should reverse the decision below and let the General Assembly's reforms take their place alongside those of this Court in fixing a system of asbestos litigation that failed those it should have served.

Statement of Facts

Appellee Linda Ackison filed this suit for wrongful death in May 2004, alleging that asbestos caused her husband's injury and death. (Supp. 1). In September 2004, H.B. 292 took effect. That law requires plaintiffs with pending asbestos suits to submit certain evidence showing that their claims are related to asbestos. In response, Ackison challenged the constitutionality of the law and submitted four items of evidence: 1) a chest x-ray showing minor opacities of the lung, 2) a diagnosis of esophageal cancer that does not mention asbestos, 3) a death certificate listing the cause of death as congestive heart failure (again, without mentioning asbestos), and 4) a fill-in-the-blank affidavit alleging that her husband, Danny Ackison, worked around asbestos. (Supp. 82-89).

The trial court rejected Appellee's constitutional challenge, found that the proffered evidence did not satisfy the statute, and administratively dismissed the case.

On appeal, the Fourth District reversed, concluding that the new law contravened the Retroactivity Clause of Ohio's Constitution because it imposed more stringent requirements than at common law for prosecuting an asbestos suit. The appellate court keyed on the act's definition of "competent medical authority," believing the requirements attendant to that definition improperly changed existing law.

Recognizing that its decision was in conflict with the Twelfth District's decision in *Wilson v. AC&S Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, the Fourth District certified the following question to this Court: "Can R.C. 2307.91, 2307.92, and 2307.93 be applied to cases already pending on September 2, 2004?"

Argument

Proposition of Law: R.C. 2307.91, 2307.92, and 2307.93 apply to cases pending on September 2, 2004.

A. Standard of Review.

The appellate court's judgment rests on a matter of constitutional interpretation. Although a savings clause in the Act (R.C. 2307.93(A)(3)(a)) prevents a ruling that the act itself is unconstitutional, that clause directs courts to engage in a constitutional inquiry

before applying the act to pending cases.[1] Id. This means that the lower court's decision is only supportable if this Court agrees that application of H.B. 292 to pending cases would violate the Ohio Constitution.

A party challenging legislation on constitutional grounds confronts a high hurdle. Appellee's constitutional challenge to H.B. 292 invokes a judicial power that judges wield only with "great caution and in the clearest of cases." *Yajnik v. Akron Dept. of Health,* 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16. Courts strike down laws on constitutional grounds with caution because there is a "strong presumption that statutes are constitutional." *State ex rel. Taft v. Campanella* (1977), 50 Ohio St.2d 242, 246, 364 N.E.2d 21. This presumption means Ackison carries a heavy burden to sustain the appellate court's judgment, a burden this Court has described as requiring a "clear conflict" or "incompatibility" between the law and the Constitution. *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (law and Constitution must be in clear conflict); *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus (law and Constitution must be clearly incompatible).

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[1] The savings clause reads:

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B) , (C) , and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

R.C. 2307.93(A)(3)(a).

In evaluating whether Appellee has established a clear conflict between H.B. 292 and the Constitution, the Appellants are entitled to "every presumption in favor of" the statute's constitutionality. *Dickman*, 164 Ohio St. at 147. Because Appellee has not satisfied this elevated burden, the Court should not accept the appellate court's reasoning. As this Court has cautioned, the judiciary cannot "nullif[y]" statutes unless the General Assembly has engaged in "a gross abuse of [its] discretion in undoubted violation of some state . . . constitutional provision." *Williams v. Scudder* (1921), 102 Ohio St. 305, 131 N.E. 481, paragraph four of the syllabus. There is no gross abuse in H.B. 292; this Court should reverse.

B. The General Assembly did not grossly abuse its power to legislate for the public good by passing H.B. 292 because it sought to reform a system that "severe[ly] burden[s]" litigants and all Ohio taxpayers.[2]

The presumption that statutes are constitutional takes on added weight here because the General Assembly exhaustively analyzed Ohio's asbestos litigation problem when it considered H.B. 292. When the General Assembly began hearing testimony about the crisis in 2003, there were more than 39,000 cases on the state's dockets. Today, there are even more. One estimate places the potential number of asbestos plaintiffs in Ohio at nearly 200,000. R.C. 2307.91, uncodified law at § 3(A)(3)(a). Even with only 39,000 cases, the General Assembly calculated it would take three years, with every trial judge in the state working on asbestos cases full time, to clear the dockets. Id. at § 3(A)(3)(d).

The General Assembly recognized that the bloated asbestos docket does more than monopolize scarce judicial resources. The number and character of asbestos cases

[2] R.C. 2307.91, uncodified law at § 3(A)(2).

also implicate the "public interest" because asbestos filings are bankrupting Ohio companies and sacrificing the needs of *sick* plaintiffs in the name of mass settlements that enrich lawyers. Id. at § 3(A)(7); (4)(c), (d).

The volume of pending asbestos cases also harms both defendants and deserving plaintiffs. These cases consume vast defense resources because the "typical claimant . . . now names sixty to seventy defendants." Id. at § 3(A)(2). A federal judge, reviewing the similar bloat of silicosis cases on her docket, explained why volume also harms deserving plaintiffs. She recognized that when lawyers flood courts with both legitimate and illegitimate cases, "it prevents people who really need to go forward with their case from being heard." *In re: Silica Prod. Liab. Litig.* (S.D. Tex. 2005), 398 F.Supp.2d 563, 585 (quoting earlier status conference in the same case). Great volume may harm deserving plaintiffs, but it does not harm plaintiffs' *lawyers.* Judge Jack elaborates: plaintiffs' lawyers filed an improbable number of cases with the "clear motivation . . . to overwhelm the Defendants and the judicial system . . . in [the] hopes of extracting mass nuisance-value settlements because the Defendants and the judicial system are financially incapable of examining the merits of each individual claim." Id. at 676.

The General Assembly recognized that the same motives were at work in Ohio's swelling asbestos dockets, noting that, "tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded." R.C. 2307.91, uncodified law at § 3(A)(2). Equally tragic, "sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick." Id.

But resource misallocation is not the only defect in asbestos proceedings the General Assembly sought to cure when it passed H.B. 292. In Ohio, as in other states,

the very integrity of the judicial process is threatened by litigation that is driven by lawyers, not doctors. Judge Jack commented on this threat when she evaluated the diagnoses of some of the same doctors who have triggered the filing of thousands of asbestos cases in Ohio. She criticized a system where "the law firms, rather than any medical professionals, established the criteria [that led to a suit being filed]." *In re: Silica*, 398 F.Supp.2d 563, 598. Not only were lawyers setting the criteria for suits involving medical diagnoses, in some cases, the lawyers only paid the doctors when the doctors rendered a positive diagnosis. Id. at 628. Another federal court, confronting the large volume of asbestos cases, noted that "[l]abor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms. . . . Certain pro-plaintiff B-readers [X-ray readers] were so biased that their readings were simply unreliable." *Owens Corning v. Credit Suisse First Boston* (D.Del. 2005), 322 B.R. 719, 723. These diagnoses were often unreliable because "in the business of mass screenings, a diagnosis, whether accurate or not, is money in the bank." *In re: Silica Prod. Liab. Litig.*, 398 F.Supp.2d at 628.

These federal judges observed the same core problems that sparked the General Assembly's concern: many asbestos lawsuits rest on diagnoses of questionable integrity. The General Assembly sought to cure this defect by passing H.B. 292. Without that cure, the old way of litigating asbestos cases could undermine the integrity of Ohio's judicial process because those diagnoses flood the courts with questionable claims and divert attention from meritorious ones. In the words of the General Assembly, H.B. 292 cures an "unfair and inefficient" asbestos litigation system by deferring the claims of those not

sick in order to preserve "defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state's employees and the well being of the Ohio economy." R.C. 2307.91, uncodified law at § 3(A)(2); 3(A)(7).

These twin problems of volume and dubious filings led the General Assembly to conclude that "the public interest require[d]" change in the asbestos litigation system. R.C. 2307.91, uncodified law at § 3(A)(7). Specifically, the legislature decided that "reasonable medical criteria are a *necessary* response to the asbestos litigation crisis." Id. at § 3(A)(5) (emphasis added). The General Assembly decided to promote the public interest in an efficient and respectable asbestos litigation system by doing two things – clarifying when a plaintiff has an accrued cause of action for asbestos injury and specifying what medical evidence entitles a plaintiff to a trial court's immediate attention. The law accomplishes both tasks by directing courts to conduct an early prima facie review of an asbestos claimant's medical evidence of injury.

This prima facie review gives courts a much-needed tool to prioritize which cases should head to trial now, and which should await further evidence of asbestos-related injury. By allowing courts to focus on cases where the prima facie evidence of asbestos injury meets a certain threshold, deserving plaintiffs have their cases heard first, defense resources are preserved for future injury actually caused by asbestos, and judicial resources are directed to cases that can be resolved now. H.B. 292 facilitates the task of prioritizing cases by clarifying existing law.

Since 1980, Ohio law has set the date for accrual of legally recognizable injury from asbestos as "the date on which the plaintiff is informed by *competent medical*

authority that the plaintiff has an injury that is related to the exposure." R.C. 2305.10(B)(5) (emphasis added). But in the intervening years, neither the General Assembly, nor the Ohio Supreme Court, defined "competent medical authority." The absence of concrete definitions meant that courts did not use this term to differentiate among the mass of asbestos filings that grew over the years. This resulted in the "extraordinary volume of nonmalignant asbestos cases" that "strain" Ohio's courts. R.C. 2307.91, uncodified law at § 3(A)(3) . The 2004 law tries to alleviate that strain by directing trial courts to evaluate each asbestos case shortly after it is filed based on the medical evidence of injury. H.B. 292 clarifies the empty phrase "competent medical authority" by requiring doctors submitting evidence of asbestos injury to have a doctor-

patient relationship with the plaintiff and to be in the business of medicine, not litigation.[3] These requirements help courts conduct early evaluations so they can prioritize cases based on medical evidence and relieve the strain on Ohio's judicial – and other – resources.

To date the General Assembly's intentions to fix the system remain unfulfilled because some trial courts have refused to apply the law. Two appellate districts have have reviewed the law's retroactive application, with opposite results. The Twelfth District issued the first opinion on December 18, 2006, reversing a trial court order that declined to apply H.B. 292. In a comprehensive analysis, the Twelfth District surveyed

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[3] A competent medical authority must satisfy the following four requirements:

- The doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.
- The doctor is treating or has treated the plaintiff and has or had a doctor-patient relationship with the person.
- As the basis for the diagnosis, the doctor has not relied on any of the following:
  - Reports or opinions based on tests conducted in violation of any law, regulation, or medical code of practice;
  - Reports or opinions based on tests performed outside the doctor-patient relationship;
  - Reports or tests that, as a condition of the test, required the plaintiff to agree to retain the legal services of the law firm sponsoring the test.
- The doctor spends not more than twenty-five per cent of his time in connection with actual or potential tort actions, and the doctor's corporation or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

See R.C. 2307.91(Z).

the purposes of H.B. 292, Ohio's retroactivity jurisprudence, and a host of objections to the law's retroactive application. After exploring each of these areas in detail, the Twelfth District concluded that H.B. 292 does not violate the Ohio Constitution when applied to pending cases. *Wilson,* 2006-Ohio-6704, at ¶¶ 12, 59. The *Wilson* court specifically addressed the definition of competent medical authority: "The changes made by H.B. 292, such as defining 'competent medical authority,' are procedural or remedial, and not substantive." Id. at 118.

In this case, the appellate court reached the opposite result, reasoning that, because H.B. 292 places limits on who qualifies as "competent medical authority," it is unconstitutional when applied to pending cases. *Ackison v. Anchor Packing Co.*, 4th Dist. No. 05CA46, 2006-Ohio-7099, at ¶ 26.

C. The Ohio Constitution only bars legislation that impairs vested rights.

The Fourth District answered the certified question in the negative because it concluded that the definition of "competent medical authority" in H.B. 292 imposed burdens on plaintiffs that did not exist at common law. *Ackison*, at ¶¶ 25-26. These additional burdens, the court reasoned, implicate the constitutional ban on retroactive laws in Section 28, Article II of the Ohio Constitution. The Fourth District read that section too expansively. Because the Retroactivity Clause bans only substantive changes to the law – not changes to *how* cases are litigated – H.B. 292 fits within the General Assembly's policy-making prerogative.

Whether a law exceeds the General Assembly's authority to set policy for the state depends on a two-step inquiry. First, did the General Assembly intend the law to

operate retrospectively, and second, is the law substantive. *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, at ¶ 6.

No one disputes that the General Assembly intended that H.B. 292 operate retroactively, because it governs pending cases. Thus, the sole question before this Court is whether the law is substantive: whether the General Assembly had the constitutional *power* to apply the law to pending cases. In *Smith*, this Court focused the substantive-law inquiry on the idea of vested rights. That inquiry is consistent with what this Court has recognized as the "seminal test for retrospective laws, cited for more than a century with approval by this court." *Bielat,* 87 Ohio St.3d 350, 360-61 (citing Justice Story's classic definition of retroactivity in *Soc. for the Propagation of the Gospel v. Wheeler* (C.C.N.H. 1814) (No. 13,156), 22 F.Cas. 756, 757). That definition has three key elements.

- A law is impermissibly retroactive if it impairs vested rights. *Bielat*, 87 Ohio St.3d 350, 360; *Smith*, 109 Ohio St.3d 285 at ¶ 6.
- A law is impermissibly retroactive if it adds new obligations or disabilities to past transactions. *Bielat,* 87 Ohio St.3d 350, 360.
- A law is *permissibly* retroactive if it has merely remedial effect. *Bielat,* 87 Ohio St.3d 350, 354; *Smith*, 109 Ohio St.3d 285 at ¶ 6.

The clarifications to the law in H.B. 292 are permissibly retroactive because they trespass no vested right and do not add new obligations to past transactions. Instead, the law has a mere remedial effect on asbestos plaintiffs. The Fourth District's holding is also incorrect because H.B. 292 fits in two *separate* categories of laws that are remedial, and therefore constitutionally retroactive.

1. Appellee has no vested right to the law that predated H.B. 292

There is no vested right in a filed action or to the rules that govern how an action proceeds. Appellee's act of filing a lawsuit does not vest her with rights to how her case

will be litigated. This Court's *Smith* decision typifies the kinds of rights that are properly labeled *vested*. There, the Court split about the strength of a final judgment. The disagreement in *Smith* was whether a *judgment* had *enough finality* to vest a right against retroactive disenfranchisement.

The *Smith* decision involved a law that altered child support obligations. The analysis focused on whether the mother had a vested right in the order of support. Both the majority and the dissent probed the vested rights question by considering whether the order constituted a final judgment. The majority attached "utmost significance" to the fact that a court "memorialized" the support payments in a *final judgment* before the effective date of the new law. Id. at ¶ 11. This, according to the majority, meant the mother had a vested right that the legislature could not sweep away retroactively.

The dissent, while agreeing that a final judgment "usually creates a vested right," noted that "child-support orders are distinguishable to the extent that courts have continuing jurisdiction to modify such support." Id. at ¶ 21 (Lundberg Stratton, J., dissenting; joined by O'Donnell and Lanzinger, JJ.). All seven members of this Court agreed that *something shy* of a final judgment does not establish a vested right.

Smith was not the first time this Court pointed to a final judgment as a moment of vesting. In *Johnson v. Adams*, this Court confronted a legislative change to the irrebuttable presumption that a man who marries a woman with full knowledge of her preexisting pregnancy consents to be the father for the purposes of support. (1985), 18 Ohio St.3d 48, 479 N.E.2d 866. The Court ruled that the Constitution precluded application of the new law (making the presumption rebuttable) to the appealed case

because "retrospectivity clearly does not allow the reversal, on appeal, of a *judgment* rendered [prior to the effective date of the act]." Id. at 50 (emphasis in original).

Ohio is not alone in assigning significance in vested rights analysis to final judgments. Federal law also recognizes final judgments as a mechanism that vests a party with a right of constitutional significance. In *McCullough v. Com. of Virginia* (1898), 172 U.S. 102, 123-124, 19 S.Ct. 134, the United States Supreme Court commented that "[i]t is not within the power of the legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." *Axel Johnson Inc. v. Arthur Andersen & Co.* (C.A.2, 1993), 6 F.3d 78, 83, 84, is similar. There, the court held that the defendant had no vested right in judgment because the time to appeal remained open, meaning the judgment was not final. In 2006, a California district court summarized federal law in this area. Upholding a law that eliminated causes of action against gun manufacturers, it observed that "e*very circuit court* to have addressed the issue has likewise concluded that *no vested property right* exists in a cause of action unless the plaintiff has obtained a *final, unreviewable judgment.*" *Ileto v. Glock, Inc.* (C.D.Cal. 2006), 421 F.Supp.2d 1274, 1299 (emphasis added) (collecting cases).

State supreme court decisions also recognize final judgments as acts that establish vested rights. For example, the Supreme Courts of Iowa and Washington have held that litigants did not enjoy vested rights to existing law because their cases had not reached final judgment. See *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.* (Iowa 1991), 473 N.W.2d 612, 619 ("plaintiff did not have a vested right to punitive

damages prior to the entry of a judgment.") (upholding statute retroactively limiting punitive damages); *Johnson v. Continental West, Inc.* (Wash. 1983), 663 P.2d 482, 486 ("These being actions sounding in tort, which were on appeal, no one can be said to have had a vested right until the cases were finally resolved on appeal and a final judgment entered."). Consistent with this principle, the Vermont Supreme Court recently struck down a retroactive law because it "undid [a] final judgment[]" of that court that "vested" rights in the prevailing party. *Burton v. Town of Salisbury* (Vt. 2001), 790 A.2d 394, 399. Final judgments are an obvious marker for vested rights.

Final judgments exemplify the significance of a vested right, but are not the only means of securing a vested right. Prior decisions of this Court reveal other instances of substantial reliance where litigants enjoy vested rights. These cases highlight the contrast with the appellate court's reasoning in this case that Appellee has a vested right to the undefined phrase "competent medical authority."

In *Vogel v. Wells*, the Court evaluated a retroactive law that eliminated the collateral source rule as applied to municipalities, thereby permitting them to introduce evidence of other compensation. (1991), 57 Ohio St.3d 91, 566 N.E.2d 154. The Court declared the law unconstitutional, noting that a beneficiary's rights to Social Security funds *vested* upon the death of the decedent. Id. at 99. By contrast, Appellee's rights in this case did not vest because she had done no more than file suit.

In *Van Fossen v. Babcock & Wilcox*, this Court struck down a law on retroactivity grounds because it changed the meaning of "intentional tort" in a way directly contradictory to this Court's holding in an earlier case. *Van Fossen,* 36 Ohio St.3d 100, 108-109 (observing that the statute changed an element of an intentional workplace tort

from "substantially certain" to "deliberate intent."), superseded by statute on other grounds (R.C. 2745.01), holding narrowed by, *Bielat v. Bielat*, 87 Ohio St.3d 350, syllabus paragraph 2 (recognizing that *Van Fossen's* definition of substantive right was too expansive). H.B. 292 – unlike the law in *Van Fossen* – does not *contradict* a prior ruling of this Court.[4] This Court has never interpreted the phrase "competent medical authority" in R.C. 2305.10(B)(5). H.B. 292 fills that void and clarifies the meaning of – among other terms – competent medical authority, because the judiciary's ability to deal fairly with asbestos litigation had been compromised by the absence of any guidance about the meaning of that term and the questionable medical authority presented to courts in the absence of any guidance.

The reforms in H.B. 292 are also unlike the law this Court confronted in *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 290 N.E.2d 181. There, the Court held that a new statute of limitations that shortened the time to bring a cause of action to a time that had already passed violated the Retroactivity Clause. H.B. 292 is not guilty of this maneuver. H.B. 292 actually *extends* the statute of limitations for an asbestos claim by tolling the statute for most cases filed and administratively dismissed for failure to comply with the prima facie requirements. R.C. 2307.94(A). H.B. 292 does not eliminate a cause of action, it merely defines how certain causes of action will be litigated.

That was the reasoning of the Twelfth District when it decided that H.B. 292 does not impair vested rights. In that Court's words, "retroactive application of . . . H.B. 292

[4] A Georgia Supreme Court case addressing an asbestos reform bill is distinguishable for the same reason. In *DaimlerChrysler Corp. v. Ferrante* (Ga.2006), 637 S.E.2d 659, the court struck down a law that undid a recent Georgia Supreme Court decision.

does not take away appellee's vested right in proceeding with her cause of action." *Wilson* at, ¶ 77. The Court continued, "H.B. 292 merely affect[s] the methods and procedure by which that cause of action is recognized . . . not the cause of action itself." Id.

A Florida appellate court recently reached the same conclusion about the retroactive application of Florida's asbestos reform law. The court held that plaintiff "did not have a vested right in her common law asbestos claim." *DaimlerChrysler Corp. v. Hurst* (Fla.App.2007), 949 So.2d 279, 287; see also, *Flowserve Corp. v. Bonilla* (Fla.App.2007), 952 So.2d 1239 (following *Hurst*).

Vested rights, for purposes of retroactivity, involve only substantial, settled expectations that predate the new law. As three Justices explained in *Smith*, a "vested right is a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without that person's consent." 109 Ohio St.3d 285, at ¶ 20 (internal quotation marks omitted). Litigants do not have a right to rely on every feature of existing law. Put another way, "A right is not regarded as vested in the constitutional sense unless it amounts to something more than a mere expectation . . . based upon an anticipated continuance of existing law." *In re Emery* (1st Dist. 1978), 59 Ohio App.2d 7, 11, 391 N.E.2d 746. Most retrospective changes to existing law do not take away vested rights.

Appellee has no vested right in the stasis of the law. No judgment secures her claim to the vague law that predated H.B. 292. Nor does H.B. 292 undo this Court's precedent or eliminate a cause of action. Appellee's mere act of filing does not stop the progress of the law. As noted in a recent federal appellate decision, a litigant has "no

settled expectation-let alone a vested right-in the . . . [law in force] when she filed her [claim] . . . . The fact that the change may have been fatal to the success of her claim does not alter the conclusion that [she] had no right to expect that filing an application would freeze the law in its then-current state." *Combs v. Comm'r of Social Security* (C.A.6, 2006), 459 F.3d 640, 654 (Gillman, J., concurring).

The focus of H.B. 292 is on prioritizing which filed asbestos cases should head to trial now and which should wait. The law accomplishes this by bringing clarity to terms such as "competent medical authority," a term whose prior ambiguity helped create the current litigation crisis. And it does so without abridging a vested right because Appellee has no vested right to the undefined phrase "competent medical authority." H.B. 292 is permissibly retroactive.

2. H.B. 292 does not add obligations to past transactions

A law may be impermissibly retroactive if it adds new obligations or disabilities to past transactions. *Bielat,* 87 Ohio St.3d 350, 360. This branch of the Article II, § 28 ban on retroactive legislation concerns vested rights in past acts, such as business activity or contracts, and has no obvious application to a tort plaintiff's cause of action. Examples of laws this Court has analyzed under this prong of the retroactivity test include changes to the law of testamentary transfers, changes to the law governing land-installment contracts, a penalty for default on a strip-mine reclamation bond, a new accounting method for calculating corporate income tax, a change in the law of corporate governance, and an increase in the tax rate for foreign insurance companies doing business in Ohio. See, respectively, *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 721 N.E.2d 28; *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 503 N.E.2d 753; *Personal Serv.*

Ins. Co. v. Mamone (1986), 22 Ohio St.3d 107, 489 N.E.2d 785; *Lakengren, Inc. v. Kosydar* (1975), 44 Ohio St.2d 199, 339 N.E.2d 814; *Schaffner v. Standard Boiler & Plate Iron Co.* (1948), 150 Ohio St. 454, 83 N.E.2d 192; *Safford v. Metropolitan Life Ins. Co.* (1928), 119 Ohio St. 332, 164 N.E. 351.

H.B. 292 simply does not trigger an analysis of past transactions. Tort plaintiffs do not try to conform their conduct to existing law because their injuries arise from the unforeseen and unexpected. Torts involve fundamentally different considerations than cases involving regulations or contracts. Contracts and regulations involve planned choices about the parties' rights and obligations. Article II, Section 28 bars legislative acts that change those rights and obligations *after the fact*. An analysis of "past transactions" simply does not mesh with tort actions.

Even if analyzing H.B. 292 through the lens of "past transactions" were appropriate, that law still has no impermissible retroactive effect. H.B. 292 does not change the obligations of liable defendants to compensate plaintiffs injured by their conduct, it only changes the manner of enforcing that obligation.

3. H.B. 292 makes only remedial – and therefore permissibly retroactive – changes to preexisting law

Because H.B. 292 only changes the *way* plaintiffs enforce liability against defendants, it does not encroach the constitutional bar against retroactive legislation. The changes H.B. 292 brought to asbestos litigation do not undo rights that Appellee had to preexisting law; they are permissible because they are remedial. As this Court reiterated in *Smith*, laws that operate retroactively, but are "merely remedial," are not "*unconstitutionally* retroactive." *Smith*, 109 Ohio St.3d 285 at ¶ 6 (emphasis in original). This Court has used several formulations to tease out the meaning of "remedial," but the

two most useful are that a law is remedial, and therefore constitutional, if it 1) clarifies previous law or 2) merely changes the mechanism for enforcing rights. Put another way, laws do not infringe vested rights when they clarify existing law or modify the process of enforcing existing law.

H.B. 292 fits comfortably into these descriptions of permissibly retroactive legislation. The significant features of the law – clarifying the definition of when an asbestos claim accrues and adding a pretrial filter to ensure the most deserving cases go to trial first – are exactly the kinds of remedial legislation that are consistent with Ohio's Constitution.

a. H.B. 292 is constitutional because it clarifies a law on the books since 1980

H.B. 292 is remedial because it clarifies the meaning of a law the General Assembly enacted in 1980. The 1980 law says that an asbestos-injury action does not accrue until "competent medical authority" tells a plaintiff he has suffered an injury caused by asbestos. R.C. 2305.10(B)(5). "Competent medical authority" remained undefined until the General Assembly clarified the term in 2004. In the interval, the pliability of the term meant that some courts permitted asbestos cases to go forward without examining whether the claim had accrued. The result: too many asbestos-injury suits that should not be in court yet because they have not even accrued. The 2004 legislation corrects the problems caused by the unguided application of "competent medical authority." This clarification is not *unconstitutionally* retroactive.

The General Assembly may pass laws that "constitute[] a clarification of what the General Assembly intended [without making] a substantive change." *State v. Johnson* (1986), 23 Ohio St.3d 127, 131, 491 N.E.2d 1138; accord *State ex rel. Boyd v. Frigidaire*

(1984), 11 Ohio St.3d 243, 465 N.E.2d 83 (purpose of legislation was to "clarify the statute rather than make any substantive change"). These clarifications involve the General Assembly telling courts what it really meant when it passed an older statute. An appeals court explains: "When the Ohio General Assembly clarifies a prior Act, there is no question of retroactivity." *Nationwide Mut. Ins. Co. v. Kidwell* (1996), 117 Ohio App.3d 633, 642, 691 N.E.2d 309. This is because "the enactment of a statute . . . for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; in legal theory it simply states the law as it was all the time, and no question of retroactive application is involved." *City of Redlands v. Sorensen* (1985), 176 Cal.App.3d 202, 211 (collecting cases).

State supreme courts from coast to coast acknowledge that legislatures may clarify the meaning of existing law without violating any prohibition against retroactive lawmaking. Recently, the California Supreme Court reversed a lower court decision that refused to give retroactive effect to a new law. The Supreme Court, finding the law merely clarified existing law, disapproved of several appellate cases that had misinterpreted the clarified law. The court explained: "Even a material change in statutory language may demonstrate legislative intent only to clarify the statute's meaning. If the legislative intent is to clarify, an amendment has no retrospective effect because the true meaning of the statute remains the same." *Colmenares v. Braemar Country Club, Inc.* (Cal. 2003), 63 P.3d 220, 222 n.2 (internal citations and quotation marks omitted).

The New Jersey Supreme Court has upheld a law that clarified, retroactively, the meaning of "mental illness" and the process for civil commitment of those who might be

mentally ill. The court explained: "The amendment explains or clarifies existing law and brings it into harmony with what the Legislature originally intended." *Matter of D.C.* (N.J. 1996), 679 A.2d 634, 644 (internal quotation marks omitted).

The Louisiana Supreme Court has upheld retroactive application of a statute that changed an evidentiary rule for medical malpractice. Commenting on a law that effectively ended the rule requiring local experts in that state, the Court said, "[I]nterpretive legislation cannot properly be said to divest vested rights, because . . . such legislation does not violate the principle of non-retroactivity of laws. The interpretive legislation does not create new rules, but merely establishes the meaning that the interpreted statute had from the time of its enactment." *Ardoin v. Hartford Acc. & Indem. Co.* (La.1978), 360 So.2d 1331, 1338-1339.

More directly, at least two courts have confronted retroactive laws that defined previously undefined terms. A Michigan appeals court faced the question in *Blatt v. Lynn* (Mich. App. 1999), No. 209686, 1999 WL 33441163. The court upheld an amendment that clarified the term "serious impairment of a body function" against a challenge that the law abrogated a vested right. Before the amendment, "serious impairment of a body function" was a term "the act did not define." Id. at * 1. The amendment added clarity to the pre-amended language by defining the term as "an objectively manifested impairment of an important body function that affected his general ability to lead his normal life." Id. In addition, the amendment assigned the task of deciding whether a plaintiff suffered serious impairment to the trial judge. Id. at * 3. The court concluded that the amendment was remedial because it "clarifies the meaning of the term 'serious impairment of body function.'" and reasoned that because plaintiffs "had a mere expectancy of surviving

summary disposition," the amendment did not "create or abolish substantive rights." Id. at *3.

More recently, Ohio's Twelfth District Court of Appeals utilized the logic of clarifying legislation to uphold the retroactive application of H.B. 292. As in *Blatt*, the relevant term was undefined before the challenged law took effect. The Twelfth District noted that it was "appropriate for the General Assembly to define" the term "competent medical authority" because neither the Ohio Supreme Court nor the General Assembly had defined it until H.B. 292 took effect. *Wilson* at, ¶ 105. That is, the Twelfth District concluded that the General Assembly may define an undefined term without violating the Ohio Constitution.

The crises of volume and dubious diagnoses that now plague Ohio asbestos litigation arose because an unclear law meant courts did not have guidance about the true meaning of existing law. As a result, courts did not properly evaluate filed cases based on whether the plaintiffs had accrued causes of action. Starting in 1980, the General Assembly intended to tie accrual of an asbestos case to the time when a *competent* medical authority tells the plaintiff that he has an asbestos injury. Because that term remained undefined, plaintiffs without accrued actions – despite the General Assembly's intent in 1980 – filed suits that remained on Ohio court dockets for years. In 2004, the General Assembly clarified that it never intended plaintiffs to have accrued causes of action without receiving diagnoses from a competent medical authority. This clarification is constitutional.

Appellee had no right to the continued vagueness of the law. Before H.B. 292, she had no more than an expectation that the old standards by which courts viewed

asbestos lawsuits would remain unchanged. That expectation does not prevent the General Assembly from addressing policy concerns with how asbestos lawsuits are conducted. Because neither the General Assembly nor the Ohio Supreme Court ever defined "bodily injury" or "competent medical authority," the General Assembly was free to explain what it meant in 1980 and to cure the problems in adjudicating asbestos cases that arose because of its prior imprecision.

b. H.B. 292 is a remedial, constitutional enactment because it does no more than change the manner of prosecuting an asbestos case

Even if the appellate court was right in finding that H.B. 292 is not clarifying legislation, its conclusion that H.B. 292 contravenes the Ohio Constitution would be wrong. Laws that clarify past acts and laws that alter the manner of prosecuting a case are *independent* indicia of permissible retroactivity.

Because H.B. 292 operates by changing the *manner* of litigating asbestos cases, but does not change the *substance* of the law of asbestos liability, H.B. 292 is permissibly retroactive. Changes to rules of evidence or burdens of proof applied in a pending case are not even retroactive, let alone *unconstitutionally* retroactive. When a court applies a new rule of evidence to a pending case, the court applies the rule prospectively because the *proceeding* postdates the act, even if the underlying conduct (and the filing of the suit) predates it. The clarifications in H.B. 292 do no more than change the manner of prosecuting an asbestos claim.

The appellate court focused on the change wrought by the definition of "competent medical authority" in H.B. 292. According to the Fourth District, the definition in the statute represents a departure from prior law because, prior to the statute,

the law "did not have the same stringent requirements" involving "competent medical authority." *Ackison*, at ¶ 28.

The Fourth District read the Retroactivity Clause too broadly. That clause does not prohibit changes to *how* a case is litigated. As this Court has said, laws that "provid[e] rules of practice, courses of procedure, or methods of review" are permissibly retroactive. *In re Nevius* (1963), 174 Ohio St. 560, 564, 191 N.E.2d 166 (collecting cases and quoting *State ex rel. Slaughter v. Indus. Comm.* (1937), 132 Ohio St. 537, 9 N.E.2d 505, paragraph three of the syllabus).

H.B. 292 regulates the "method of review" that trial courts use to evaluate asbestos cases at the prima facie stage. For example, the definition of "competent medical authority" operates to specify the evidence necessary to have a case prioritized above others. This is consistent with changes to evidentiary showings the Court has upheld in past cases. In *State ex rel. Holdridge v. Indus. Comm.*, the Court let stand the retroactive application of a new standard for workers' compensation cases that removed a prima facie presumption from the prior law. (1967), 11 Ohio St.2d 175, 228 N.E.2d 621. Similarly, in *State ex rel. Romans v. Elder Beerman Stores Corp.*, the Court approved application of a new definition of "inactivity" for workers' compensation claims. 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82. In *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, this Court upheld a retroactive change in the law of juvenile court jurisdiction. In each case, the change involved *how* the court evaluated the case, not the substance of that evaluation. H.B. 292 does the same.

The guiding principle, that changes to the manner of litigating a case may be made retroactively, dates back more than 100 years in Ohio. As far back as 1874, the

Ohio Supreme Court recognized that a new rule of spousal competency governed a pending suit, because the act, even though effective after the suit was filed, "applie[d] as well to cases pending, and causes of action existing at the date of its taking effect." *Westerman v. Westerman* (1874), 25 Ohio St. 500, 507. A contemporaneous case from the Indiana Supreme Court is in accord. In 1882, that court explained that "the protection of vested rights do[es] not embrace legislation in respect to the competency of witnesses." *Wilson v. Wilson* (Ind.1882), 86 Ind. 472.

The appellate court here did not account for this principle. Instead, the Fourth District seized on the idea that, before H.B. 292, "common usage and common law" supplied the meaning of "competent medical authority." *Ackison*, at ¶ 25. This, according to the appellate court, meant that H.B. 292 could not clarify the open-ended term. But courts from the United States Supreme Court down have explained that litigants do not have vested rights in rules of procedure or evidence. "No one has a vested right in any given mode of procedure." *Crane v. Hahlo* (1922), 258 U.S. 142, 147, 42 S. Ct. 214; see also *Thompson v. Missouri* (1898), 171 U.S. 380, 388, 18 S.Ct. 922 (accused had no "vested right in the rule of evidence" excluding certain handwriting samples; legislative change permitting the evidence not unconstitutional). In the words of the Nebraska Supreme Court, "A litigant has no vested right in the mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending, after the enactment becomes effective, is properly triable under the changed method." *Lovelace v. Boatman* (Neb. 1925), 202 N.W. 418, syllabus.

Changes to procedure are remedial because the process of litigating a case does not involve the underlying substantive law. As the Supreme Court has explained, "rules

of procedure regulate secondary rather than primary conduct" so a new procedural rule enacted "after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Landgraf v. USI Film Prod.* (1994), 511 U.S. 244, 275, 114 S.Ct. 1483 (collecting cases). The California Supreme Court recently echoed this distinction when it applied a new law of standing that changed while the case was on appeal. The change was permissibly retroactive because it applied only to the "conduct of [the] proceedings," not the "legal consequences of past conduct." *Californians for Disability Rights v. Mervyn's, LLC* (Ca.2006), 138 P.3d 207, 212.

This principle takes root in all kinds of permissibly retroactive laws, from laws that add additional pre-suit procedures, to laws that change the rules of evidence, to laws that change burdens of proof or presumptions. All of these are like the changes in H.B. 292, because they are changes to the rules about how to evaluate a case, not rules about how to evaluate the underlying liability.

i. Courts have upheld retroactive pre-suit filing requirements

The Supreme Courts of Iowa and Minnesota recognized one manifestation of this principle when they upheld retroactive application – to pending cases – of statutes that *required* a mediation between certain debtors and creditors before filing suit. The statutes did not permit creditors to file traditional lawsuits until either the mediation was complete or a court excused the mediation requirement. See *First Nat'l Bank in Lenox v. Heimke* (Iowa 1987), 407 N.W.2d 344; *Production Credit Ass'n v. Spring Water Dairy Farm, Inc.* (Minn. 1987), 407 N.W.2d 88. The Iowa Supreme Court commented that the forced mediation did not impact creditors' substantive rights because it involved "only an additional procedural step." *Lenox* at 346. Likewise, the new procedural step in H.B.

292, although it interposes a hearing between filing suit and trial, is not impermissibly retroactive.

ii. Courts have upheld retroactive changes to evidentiary requirements

Other courts have applied this principle to changes about rules regulating evidence. See, e.g., *United States v. Papworth* (N.D.Tex.1957), 156 F.Supp. 842 (upholding retroactive application of change to rule of evidence). In *Dolph v. Hostetter* (Mich.App.1993), 664 N.W.2d 254, an appellate court permitted admission of a husband's communication against a murder defendant based on a statute passed after charges were filed. The court upheld this retroactive application even though the state conceded that prosecution "would not be feasible" without the marital communication. Id. at 256. The Maryland Court of Appeals, Maryland's highest court, captured the point briskly when it noted that, "no person has a vested right in . . . [a] rule of evidence." *Rawlings v. Rawlings* (Md.2001), 766 A.2d 98, 112 (upholding retroactive application of rule for finding civil contempt by changing the consequence of certain evidence) (internal quotations omitted).

Recently, two Florida appellate decisions used this rationale to uphold retroactive application of an asbestos reform bill much like H.B. 292. Like H.B. 292, the Florida law requires certain plaintiffs alleging asbestos injury to submit prima facie evidence demonstrating injury in order to "maintain" a lawsuit. The Florida court – exercising its limited certiorari power – quashed a trial court order that found the Florida statute unconstitutional when applied retroactively. The appeals court reasoned that the statute could apply retroactively because the "Act merely affects the means and methods the plaintiff must follow when filing or maintaining an asbestos cause of action."

DaimlerChrysler Corp. v. Hurst, 949 So.2d 279, 287; see also, *Flowserve Corp. v. Bonilla*, 952 So.2d 1239 (following *Hurst*).

iii. Courts have upheld retroactive changes to burdens of proof

Still other courts have applied the principle to rules that change burdens of proof. Courts have blessed laws that switch the burden of proof (see, e.g., *Thomas Betts Corp v. Panduit Corp* (N.D.Ill. 2000), 108 F.Supp.2d 976) (change in statutory burden of proof)), that reduce the burden of proof (*Ardoin v. Hartford Acc. & Indem. Co.* (La.1978), 360 So.2d 1331, 1339 (eliminating locality rule for medical malpractice)), or that *increase* the burden of proof (see, e.g., *Sudwisher v. Hoffpauir* (La. 1998), 705 So.2d 724 (approving retroactive change in burden of proof from preponderance to clear and convincing)). The Iowa Supreme Court summarizes: "a statutory elevation of the requisite burden can be applied to prior conduct." *Matter of Duhme's Estate* (Iowa 1978), 267 N.W.2d 688, 691 (raising burden of proof from preponderance to clear and convincing).

Even changes to the rules of proof that impact a litigant's chances of success are consistent with the secondary-conduct principle and therefore do not infringe vested rights. A recent en banc decision of the Sixth Circuit upheld retroactive application of an administrative rule that deleted a presumption in favor of disability based on obesity. The Court upheld that change even though it would be "outcome determinative for some claimants." *Combs v. Comm'r of Social Security* (C.A.6, 2006), 459 F.3d 640, 647 (en banc). The court also noted that the deleted presumption, despite making it harder for some claimants to prevail, "had no retroactive effect because . . . [it was] a rule of adjudication and therefore ha[d] its effect on claims at the *time of adjudication*." Id. at 649 (emphasis added). Even the fact that the changed presumption "may have been fatal

to the success" of the claim did not mean the claimant had a right to expect the law to remain unchanged. Id. at 654 (Gillman, J., concurring). Likewise, the clarifications to "competent medical authority" in H.B. 292 impact only the method of evaluating claims – a process that, even in pending cases, occurs after the effective date of the act.

iv. Courts have upheld retroactive changes to rules that narrow the scope of competent evidence

The principle that retroactive changes to rules of secondary conduct are permissible even applies to rules that *narrow* the meaning of competent evidence. This Court upheld application of a law that narrowed who qualified as a competent witness in medical malpractice cases in *Denicola v. Providence Hosp.* Like the "competent medical authority" provision of H.B. 292, the law under scrutiny in *Denicola* barred the use of evidence from a doctor who did not "devote[] three-fourths of his professional time to . . . active clinical practice." (1979) 57 Ohio St.2d 115, 116-17, 387 N.E.2d 231. Upholding retroactive application, the Court observed that, because the rule "pertains to the competency of a witness to testify . . . it is of a remedial or procedural nature." Id. The new rule, "[b]eing procedural and not substantive . . . cannot be said to have been retrospectively employed in a trial conducted almost a year after its enactment." Id. at 117.

Other decisions agree with the reasoning in *Denicola*. A Pennsylvania appellate court reached the same result when it upheld application of a law limiting those qualified to testify in a medical malpractice trial, even though the act took effect after the plaintiff filed suit. *Bethea v. Philadelphia AFL-CIO Hosp. Assoc.* (Pa.Super. 2005), 871 A.2d 223. The court reasoned that the restrictive competency requirement did not "deal with any substantive right[] of a party." Id. at 226.

Similarly, Ohio's Fifth District decided that a new rule of evidence that excluded peer review materials in malpractice suits was permissibly retroactive because it did not "impair the . . . substantive right of the plaintiff to bring a cause of action but only limited the admissibility of some evidence." *Huntsman v. Aultman Hosp.*, 160 Ohio App.3d 196, 2005-Ohio-1482, 826 N.E.2d 384, at ¶ 18. The Court concluded that the new statute "applies to matters pending on [its] effective date." Id. at ¶ 21.

The Twelfth District has approved the retroactive application of H.B. 292 itself. In reaching that result, the court approved retroactive application of the new rule of evidence implicit in the clarified definition of "competent medical authority." The Court explained that the General Assembly's decision to precisely define "competent medical authority" is "clearly a procedural, rather than [a] substantive[] act." *Wilson*, 169 Ohio App.3d 720, 2006-Ohio-6704, ¶ 105; see also *Staley v. AC&S, Inc.*, 12th Dist. No. CA2006-06-133, 2006-Ohio-7033 (following *Wilson*); *Stahlheber v. Du Quebec, Ltee*, 12th Dist. No. CA2006-06-134, 2006-Ohio-7034 (same).

H.B. 292 only changes secondary rules, rules about how courts handle asbestos cases. Because H.B. 292 does not change the rules about whether a defendant is liable for causing an asbestos-related injury, H.B. 292 does not change substantive law. H.B. 292 only changes the law in a way consistent with the restrictions of the Ohio Constitution.

D. Because H.B. 292 contains a severability provision, this Court should reverse unless it concludes that *all* requirements in R.C. 2307.91 – R.C. 2307.93 are unconstitutional

Although H.B. 292 affects only the method of litigating an asbestos case, the appellate court "conclude[d] that H.B. 292 cannot constitutionally be retroactively

applied to appellants' asbestos-related claims." *Ackison*, at ¶ 29. The court remanded so the trial court could "evaluate appellants' cause of action under Ohio common law." Id. The appellate court's judgment ordering the trial court to apply the common law means that it found that all applicable parts of R.C. 2307.91 – R.C. 2307.93 offended the Ohio Constitution. This Court must reverse that judgment if it holds that any part of those sections is constitutional. Otherwise, the appellate mandate to "apply the common law" will be in error.

The General Assembly has directed courts to sever any part of H.B. 292 that offends the Ohio Constitution, leaving the remainder in place as a partial reform of asbestos litigation. The General Assembly declared that *any* part of the act found invalid "does not affect" the other parts of the act because the invalid part is "independent and severable" from the remainder of the act. R.C. 2307.91, uncodified law at § 6. This directive is consistent with R.C. 1.50, which obligates courts to consider whether a portion of a law it has declared unconstitutional is severable from the remainder of the law.

> If any provision of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

R.C. 1.50.

This Court has explained that R.C. 1.50 permits courts to sever a section of a law declared invalid if the invalid part "is not so essentially connected with the remainder" of the law "that, if eliminated, the statute loses its intent." *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 465, 668 N.E.2d 457.

Using the command in R.C. 1.50, this Court has severed sub-section of laws, and even individual words in laws, while leaving the remainder of the law intact. See, e.g., *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 39 (severing two (of four) subsections of act); *State ex rel. Doersam v. Indus. Comm'n* (1989), 45 Ohio St.3d 115, 122, 543 N.E.2d 1169 (severing only the words "if the death is due to injury received or occupational disease first diagnosed"). As the Court explained in *Doersam*, "it is [a court's] obligation to preserve as much of the General Assembly's handiwork as is constitutionally permissible." Id. at 121. Therefore, unless this Court concludes that *all* parts of H.B. 292 applicable to this case must fall, it should not affirm the appellate court's mandate directing the trial court to disregard H.B. 292 and apply the common law.

E. Other states have recognized the need to reform asbestos litigation

A growing number of jurisdictions across the country recognize that states have the power to address the asbestos-litigation crisis by adjusting the rules that govern pending cases. In addition to the Florida statute upheld in *Hurst*, Texas, Kansas, and South Carolina have recently enacted laws that require plaintiffs alleging asbestos injury to submit detailed evidence supporting that claim. The South Carolina and Florida laws explain why these reforms are permissibly retroactive. In the words of the South Carolina legislature:

> (C) This act shall not be interpreted to create, alter, or eliminate a legal cause of action for any asbestos- and/or silica-related claimant who has been diagnosed with any asbestos- and/or silica-related disease. The act sets the procedure by which the courts in South Carolina shall manage trial settings for all asbestos- and/or silica-related claims.

S.C.Code.Ann. § 44-135-70(C).

The Florida legislature was even more explicit:

> This act shall take effect July 1, 2005. Because the act expressly preserves the right of all injured persons to recover full compensatory damages for their loss, it does not impair vested rights. In addition, because it enhances the ability of the most seriously ill to receive a prompt recovery, it is remedial in nature. Therefore, the act shall apply to any civil action asserting an asbestos claim in which trial has not commenced as of the effective date of this act.

Fla.Stat. § 774.202 (uncodified § 10 of the act).

Courts also recognize that reform is necessary and constitutional. The Mississippi Supreme Court recently decided that changes to the rules of permissive joinder, designed to give "trial courts . . . a valuable tool [to] guard[] the integrity" of Mississippi courts, applied retroactively to pending asbestos cases. *Albert v. Allied Glove Corp.* (Miss.2006), 944 So.2d 1, 2006 WL 3437801, at *2.

In May 2006, a Texas appellate court ruled that a law could retroactively *eliminate* an asbestos plaintiff's cause of action against a defendant because the "Legislature may exercise its police power to balance competing individual and societal interests and . . . enact legislation that reasonably responds to the issues and interests before it." *Robinson v. Crown Cork & Seal Co.* (Tex.App.2006), ___ S.W.3d ___, 2006 WL 1168782, at *3. The court upheld the law despite the fact that "[i]n the trial court, [the defendant] admitted liability" because "before the court entered judgment, the Legislature enacted-and made immediately effective-a law that would preclude any recovery by the [plaintiff] from [the defendant]." Id. at *1. Like Appellees in this case, the plaintiff in the Texas case argued that "her vested rights" could not be "extinguished retroactively" and that her "accrued cause of action" was a vested right. Id at *3 (emphasis deleted). The Texas court rejected this claim despite a Texas constitutional

provision that says "No . . . retroactive law . . . shall be made." Section 16, Article I, Texas Constitution.

Conclusion

Appellee has no vested right to every feature of the law in force when she filed suit. The appellate court erred when it concluded that H.B. 292 infringed a vested right by clarifying what qualifies as "competent medical authority."

Under the old system, resolving whether an asbestos claim rested on the kind of questionable diagnosis that the General Assembly and numerous federal courts have condemned had to wait until the case was many years old. Deserving plaintiffs cannot wait that long. Defendants cannot wait that long. Ohio's courts cannot wait that long. Ohio's economy cannot wait that long. H.B. 292 prioritizes cases at the outset. For those that do not pass muster now, the claim is not extinguished, it is merely delayed. This process – a remedy to a failure in the civil justice system – is compatible with Ohio's Constitution.

This court may only sustain the lower court's decision if it concludes that Appellees have proved beyond fair debate that the General Assembly violated the Ohio Constitution when it decided to reform Ohio's broken asbestos-litigation system. This court should reverse the constitutional holding below.

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APPENDIX

IN THE SUPREME COURT OF OHIO

LINDA ACKISON, Administratrix, etc.,	:	CASE NO.: 07-0219
Appellee,	:	On Appeal from the Lawrence County Court of Appeals,
v.	:	Fourth Appellate District
ANCHOR PACKING CO., et al.,	:	Court of Appeals Case No. 05 CA 46
Appellants.	:	

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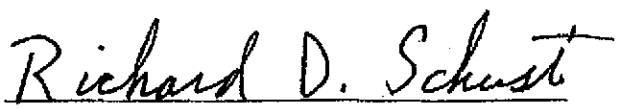
Notice of Appeal of Appellants

Appellants herby give notice of their appeal to the Supreme Court of Ohio from the judgment of the Lawrence County Court of Appeals, Fourth Appellate District, entered in Court of Appeals case No. 05 CA 46 on December 20, 2006.

This case raises a substantial constitutional question that is also one of public and great general interest.

Respectfully submitted,



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IN THE SUPREME COURT OF OHIO

LINDA ACKISON, Administratrix, etc.,	:	CASE NO.: 07-0415
Appellee,	:	On Appeal from the Lawrence County Court of Appeals,
v.	:	Fourth Appellate District
ANCHOR PACKING CO., et al.,	:	Court of Appeals Case No. 05 CA 46
Appellants.	:	

APPELLANTS' NOTICE OF CERTIFIED CONFLICT

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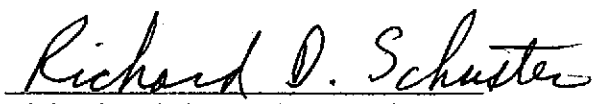
NOTICE

On January 4, 2007, appellants filed a motion in the Fourth District Court of Appeals to certify a conflict between the Fourth District's opinion in *Ackison v. Anchor Packing Co., et al.*, 4th Dist. No. 05CA46, 2006-Ohio-7099 (attached as Exhibit A) and the Twelfth District Court of Appeal's decisions in *Wilson v. AC & S, Inc.* 12th Dist. No. CA2006-03-056, 2006-Ohio-6704 (attached as Exhibit B); *Staley v. AC&S, Inc.*, 12th Dist. No. CA2006-06-133, 2006-Ohio-7033 (attached as Exhibit C); and *Stahlheber v. Du Quebec, Ltee*, 12th Dist. No. CA2006-06-134, 2006-Ohio-7034 (attached as Exhibit D).[1] On February 28, 2007, the Fourth District granted appellants' motion and certified a conflict. (A copy of the Order certifying a conflict is attached as Exhibit E). In particular, the Fourth District certified the following issue: "Can R.C. 2307.91, 2307.92 and 2307.93 be applied to cases already pending on September 2, 2004?" Appellants therefore submit this notice in compliance with Supreme Court Practice Rule IV.

Respectfully submitted,



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[1] Appellants filed a discretionary appeal in this Court in connection with the above-captioned case on February 5, 2007. That appeal was assigned Case No. 2007-0219. In addition, a notice of appellants' motion to certify a conflict was filed with this Court on February 5, 2007.

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APPENDIX

C

Ackison v. Anchor Packing Co.Ohio App. 4 Dist.,2006.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,Fourth District, Lawrence County.

LINDA ACKISON, as Administratrix of the Estate of Danny Ackison, Plaintiff-Appellant,

v.

ANCHOR PACKING CO., et al., Defendants-Appellees.

No. 05CA46.

Decided Dec. 20, 2006.

Civil Appeal from Common Pleas Court.

Richard E. Reverman and Kelly W. Thye, Cincinnati, OH, for appellant.

Robin E. Harvey and Angela M. Hayden, Cincinnati, OH, for appellees Georgia Pacific.[FN1]

FN1. The remaining counsel for appellees is too numerous to list in the caption. Instead, we included them in the appendix.

Jim Petro, Ohio Attorney General, and Holly J. Hunt, Assistant Attorney General, Columbus, OH, amicus curiae.

PER CURIAM.

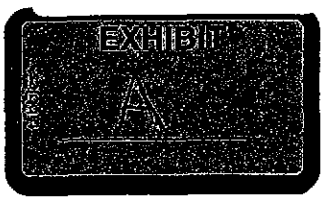
*1 {¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment in favor of Anchor Packing Company and numerous other entities, [FN2] defendants below and appellees herein.

FN2. The other defendants are: (1) Beazer East, Inc.; (2) Clark Industrial Insulation Co.; (3) Crown Cork and Seal Company, Inc.; (4) CSR Limited; (5) Foseco, Inc.; (6) Foster Wheeler Energy Corporation; (7) General Refractories Company; (8) Metropolitan Life Insurance Company; (9) Minnesota Mining and Manufacturing Company; (10) Ohio Valley Insulating Co., Inc.; (11) Owens-Illinois Corporation, Inc.; (12) Rapid-American Corp.; (13) Union Boiler Company; (14) Viacom, Inc.; (15) R.E. Kramig, Inc.; (16) McGraw Construction Company, Inc.; (17) McGraw/Kokosing, Inc.; (18) Frank W. Schaeffer, Inc.; (19) International Minerals and Chemical Corporation; (20) George P. Reintjes Company; (21) International Chemicals Company; (22) General Electric Company; (23) Georgia Pacific Corporation; (24) Uniroyal Holding, Inc.; (25) John Crane, Inc.; (26) Amchem Products, Inc.; (27) Certainteed Corp.; (28) Dana Corp.; (29) Maremont Corp.; (30) Pfizer, Inc.; (31) Quigley Co., Inc .; (32) Union Carbide Chemical and Plastics Co., Inc; (33) Garlock, Inc.; (34) A.W. Chesterton Co.; (35) Mobile Oil Corp. aka Mobil Oil Corp.; (36) Wheeler Protective Apparel, Inc.; (37) Ingersoll-Rand Company; (38) D.B. Riley, Inc.; (39) Allied Corporation; (40) Lincoln Electric Co.; (41) Wagner Electric Company; (42) Airco, Inc.; (43) Hobart Brothers Company; (44) Asarco, Inc.; (45) Cleaver Brooks Company; (46) Uniroyal, Inc.; (47) H.B. Fuller Co.; (48) Norton Company; (49) Industrial Holdings Company; (50) Bigelow Litpak Company; (51) John Doe 1 through 100.

*1 {¶ 1} Linda Ackison, as administratrix of the estate of Danny Ackison, deceased, and Linda Ackison, individually, plaintiffs below and appellants herein, raise the following assignments of error for review:

*1 FIRST ASSIGNMENT OF ERROR:

*1 "THE TRIAL COURT ERRED IN RULING THAT AN 'OTHER CANCER' AND



ASBESTOSIS DIAGNOSIS HAS TO BE DIAGNOSED BY A COMPETENT MEDICAL AUTHORITY AS R.C. 2305.10 AS [SIC] H.B. 292, R.C. 2307.92, R.C. 2307 .93, R.C. 2307.94, AND THEIR PROGENY ARE UNCONSTITUTIONAL WHEN APPLIED RETROACTIVELY."

*1 SECOND ASSIGNMENT OF ERROR:

*1 "THE TRIAL COURT ERRED IN FINDING THAT H.B. 292, R.C. 2307.92, R.C. 2307.93, R.C. 2307.94, AND ITS PROGENY REQUIRES PLAINTIFFS-APPELLANTS TO MEET A PRIMA FACIE CASE FOR BOTH AN ESOPHAGEAL CANCER AND ASBESTOSIS CLAIM."

*1 THIRD ASSIGNMENT OF ERROR:

*1 "THE TRIAL COURT ERRED IN FINDING THAT R.C. 2307.92(D) SETS FORTH CERTAIN MINIMUM REQUIREMENTS FOR BRINGING OR MAINTAINING A TORT ACTION ALLEGING AN ASBESTOS CLAIM THAT IS BASED UPON WRONGFUL DEATH AND THAT THESE REQUIREMENTS APPLY NO MATTER WHAT THE UNDERLYING DISEASE. "

*1 {¶ 3} This case centers around appellants' ability to pursue recovery for alleged asbestos-related injuries and whether recently-enacted H.B. 292 governs appellants' claims. On May 5, 2004, appellants filed a multi-plaintiff, seventy-eight page complaint against appellees alleging various asbestos-related injuries. On September 2, 2004, H.B. 292 became effective. The legislation requires a plaintiff "in any tort action who alleges an asbestos claim [to] file * * * a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in [R.C. 2307.92(B), (C), or (D)], whichever is applicable." The statute also applies to cases that are pending on the legislation's effective date. The statute requires plaintiffs with cases pending before the effective day to submit, within one hundred twenty days following the effective date, evidence sufficient to meet the R.C. 2307.92 prima facie showing requirement.

*1 {¶ 4} R.C. 2307.92 specifies three types of plaintiffs who must establish a prima-facie showing: (1) plaintiffs alleging an asbestos claim based on a nonmalignant condition; (2) plaintiffs alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker; and (3) plaintiffs alleging an asbestos claim that is based upon a wrongful death. See R.C. 2307.92(B), (C), and (D). The statute does not specifically require a prima-facie showing regarding other asbestos-related claims. The statute requires each of the foregoing types of plaintiffs to show that a " competent medical authority" has, inter alia, diagnosed an asbestos-related injury. R.C. 2307.91(Z) defines "competent medical authority" as follows:

*2 "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in [R.C. 2307.92] and who meets the following requirements:

*2 (1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

*2 (2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

*2 (3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

*2 (a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

*2 (b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

*2 (c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to

agree to retain the legal services of the law firm sponsoring the examination, test, or screening.
*2 (4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenue from providing those services.

*2 {¶ 5} In an attempt to set forth a prima facie case, appellants stated: "Danny R. Ackinson's [sic [FN3]] radiological report diagnosed ulcerated distal esophagus cancer. A B-Read report showed small opacities of profusion 0/1 in the mid and lower lung zones bilaterally and circumscribed pleural thickening. Mr. Ackinson also signed an affidavit wherein he testifies he has worked with or in the vicinity of asbestos containing products and recalls the cutting, handling and application of asbestos containing products which produced visible dust to which he was exposed and inhaled. Mr. Ackinson's death certificate states that his cause of death was congestive heart failure and aortic stenosis. The evidence of ulcerated distal esophagus cancer in Mr. Ackinson's throat is proof that asbestos was a substantial contributing factor to Mr. Ackinson's esophageal cancer diagnosis." Appellants also asserted that applying H.B. 292 to their cause of action would be unconstitutionally retroactive and that it does not specifically apply to an esophageal cancer claim.

FN3. Appellants misspelled Ackison's name throughout the foregoing paragraph as contained in "Plaintiff Danny Ackison's Motion to Prove Plaintiffs' Prima Facie Case Under R.C. 2307 and Motion for Trial Setting."

*3 {¶ 6} The trial court denied appellants' "motion to prove prima facie case under R.C. 2307 and motion for trial setting." The court determined: (1) R.C. 2305.10 requires that for an asbestos-related cause of action to accrue, a competent medical authority must inform the plaintiff that his injury is related to asbestos exposure; (2) R.C. 2307.92(D) sets forth certain minimum requirements for bringing or maintaining a tort action alleging an asbestos claim that is based upon a wrongful death and they apply no matter what plaintiff alleges is the underlying disease; (3) R.C. 2307.92(B) sets forth minimum requirements for maintaining a tort action alleging an asbestos claim based on a non-malignant condition; (4) R.C. 2307.93(A)(3)(a) provides that the provisions apply to claims that arose before the effective date of the law unless the court finds that a substantive right of the party has been impaired and that it violates Section 28, Article II of the Ohio Constitution; (5) appellant failed to meet the criteria for maintaining a wrongful death claim under R.C. 2307.92(D)-she failed to present evidence that the decedent's death would not have occurred without asbestos exposure; (7) appellant failed to meet the criteria for maintaining an injury claim for a non-malignant condition under R.C. 2307.92(B)-she failed to present evidence that the decedent was diagnosed by a competent medical authority with at least a Class 2 respiratory impairment and asbestosis or diffuse pleural thickening and that the asbestosis or diffuse pleural thickening is a substantial contributing factor to the decedent's physical impairment; (8) R.C. 2307.92 does not set forth specific criteria for maintaining an asbestos claim for esophageal cancer, but in order for a cause of action to accrue based upon bodily injury caused by asbestos exposure, a plaintiff must have been informed by competent medical authority that he has an asbestos related injury under R.C. 2305.10; appellant did not present such evidence and a cause of action for esophageal cancer has yet to accrue; and (9) the statute does not impair appellant's substantive rights; instead, the statutes define previously undefined terms. Thus, the court administratively dismissed appellants' claims.

*3 {¶ 7} This appeal followed.

I

*3 {¶ 8} In their first assignment of error, appellants assert that the trial court erred by failing to find the asbestos-related claim legislation

unconstitutional because the legislation

*3 {¶ 9} retroactively changes the standard for bringing a claim. Appellants further contend that the trial court improperly concluded that a "competent medical authority," as H.B. 292 defines that term, must diagnose the asbestos-related claims for the claims to accrue under R.C. 2305.10.

*3 {¶ 10} Appellees contend that the legislation is not unconstitutionally retroactive. Rather, they argue that the statutes are remedial and merely define and clarify terms used in earlier legislative enactments. Appellees further assert that R.C. 2307.93(A)(3)(a), the "savings clause," prevents the legislation from being declared unconstitutionally retroactive. The "savings clause" provides that the legislation does not apply to a pending case if its application would unconstitutionally impair a claimant's vested rights in a particular case.

*4 {¶ 11} Initially, we state our agreement with appellees that the legislation itself is not unconstitutionally retroactive. R.C. 2307.93(A)(3)(a) provides:
*4 For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of [R.C. 2307.92) are to be applied unless the court that has jurisdiction over the case finds both of the following:
*4 (i) A substantive right of the party has been impaired.
*4 (ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

*4 Thus, because the legislation itself prohibits its application if it would result in unconstitutional retroactivity, the legislation could not be declared unconstitutionally retroactive.

*4 The legislature has left it open for courts to decide, on a case-by-case basis, whether its application to cases prior to the legislation's effective date would be unconstitutionally retroactive. Therefore, we limit our review to whether applying the legislation to appellant's case would be unconstitutionally retroactive.
*4 " 'Retroactive laws and retrospective application of laws have received the near universal distrust of civilizations.' *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 104, 522 N.E.2d 489; see, also, *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (noting that 'the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic'). In recognition of the 'possibility of the unjustness of retroactive legislation,' *Van Fossen,* 36 Ohio St.3d at 104, 522 N.E.2d 489, Section 28, Article II of the Ohio Constitution provides that the General Assembly 'shall have no power to pass retroactive laws.' "

*4 *State v. Walls,* 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 9.

*4 {¶ 12} The Ohio Supreme Court has interpreted Section 28, Article II of the Ohio Constitution to mean that the Ohio General Assembly may not pass retroactive, substantive laws. See *Smith v. Smith,* 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, at ¶ 6; *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 352-353, 721 N.E.2d 28; *State ex rel. Slaughter v. Indus. Comm.* (1937), 132 Ohio St. 537, 542, 9 N.E.2d 505 (stating that the prohibition against retroactive laws "has reference only to laws which create and define substantive rights, and has no reference to remedial legislation"). Generally, a substantive statute is one that "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat,* 87 Ohio St.3d at 354. In contrast, retroactive, remedial laws do not violate Section 28, Article II of the Ohio Constitution. *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; *Van Fossen,* 36 Ohio St.3d at 107. " [R]emedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570, citing *Van Fossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, 107, 522 N.E.2d 489.

*5 {¶ 13} Thus, to determine whether a law is unconstitutionally retroactive, a court must employ

a two-part analysis: (1) a court must evaluate whether the General Assembly intended the statute to apply retroactively; and (2) the court must determine whether the statute is remedial or substantive.

*5 {¶ 14} In *Walls,* the court explained the first part of the analysis:
*5 "Because R.C. 1.48 establishes a presumption that statutes operate prospectively only, '[t]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply.' *Van Fossen,* paragraph one of the syllabus. If there is no ' " ' clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.' " ' *Id.* at 106, quoting *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 503 N.E .2d 753. If we can find, however, a ' clearly expressed legislative intent' that a statute apply retroactively, we proceed to the second step, which entails an analysis of whether the challenged statute is substantive or remedial. *Cook,* 83 Ohio St.3d at 410; see, also, *Van Fossen,* paragraph two of the syllabus."

*5 *Walls,* at ¶ 10. Thus, a court's inquiry into whether a statute may be constitutionally applied retroactively continues only after an initial finding that the General Assembly expressly intended that the statute be applied retroactively. *Van Fossen,* paragraph two of the syllabus.

*5 {¶ 15} In the case at bar, the General Assembly did express its intent for the legislation to apply retroactively. R.C. 2307.93 states that R.C. Chapter 2307 applies to cases pending as of the effective date of the legislation. Thus, we must consider whether the legislation is substantive or remedial.

*5 {¶ 16} "[A] statute is substantive when it does any of the following: impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations or liabilities as to a past transaction; creates a new right out of an act which gave no right and imposed no obligation when it occurred; creates a new right; gives rise to or takes away the right to sue or defend actions at law." *Van Fossen,* 36 Ohio St.3d at 107 (citations omitted); see, also, *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570. "In common usage, 'substantive' means 'creating and defining rights and duties' or 'having substance: involving matters of major or practical importance to all concerned[.]' MerriamWebster's Collegiate Dictionary (11 Ed.2003) 1245. A substantive law is the 'part of the law that creates, defines, and regulates the rights, duties, and powers of parties.' Black's Law Dictionary (7 Ed.1999) 1443." *Gen. Elec. Lighting v. Koncelik,* Franklin App. Nos. 05AP-310 and 05AP-323, 2006-Ohio-1655, at ¶ 21 .

*6 {¶ 17} Conversely, "[r] emedial laws are those affecting only the remedy provided. These include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Van Fossen,* 36 Ohio St.3d at 107 (footnotes omitted). "[L]aws which relate to procedures are ordinarily remedial in nature, including rules of practice, courses of procedure and methods of review." *Van Fossen,* 36 Ohio St.3d at 108 (citations omitted). Remedial laws are "those laws affecting merely 'the methods and procedure[s] by which rights are recognized, protected and enforced, not * * * the rights themselves.' " *Bielat,* 87 Ohio St.3d at 354, quoting *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205, 39 N.E .2d 148; see, also, *State v. Walls,* 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 15. Remedial laws affect only the remedy provided, and include laws that " 'merely substitute a new or more appropriate remedy for the enforcement of an existing right.' " *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (2001), 91 Ohio St.3d 308, 316, 744 N.E.2d 751, quoting *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; see, also, *State ex rel. Romans v. Elder Beerman Stores Corp.,* 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82, at ¶ 15 (stating that remedial provisions are just what the name denotes-those that affect only the remedy provided). " 'A statute undertaking to provide a rule of practice, a course of procedure or a method of review, is in its very nature and essence a remedial statute.' " *Lewis v. Connor* (1985), 21 Ohio St.3d 1, 3, 487 N.E.2d 285, quoting *Miami v.*

Dayton (1915), 92 Ohio St. 215, 219, 110 N.E. 726. "Rather than addressing substantive rights, ' remedial statutes involve procedural rights or change the procedure for effecting a remedy. They do not, however, create substantive rights that had no prior existence in law or contract.' *Dale Baker Oldsmobile v. Fiat Motors of N. Am.,* (1986), 794 F.2d 213, 217." *Euclid v. Sattler* (2001), 142 Ohio App.3d 538, 540, 756 N.E.2d 201; see, also, *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258, 259, 744 N.E.2d 708 ("Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, and generally come in the form of 'rules of practice, courses of procedure, or methods of review.' ").

*6 {¶ 18} In *Van Fossen,* the Ohio Supreme Court determined that R.C. 4121.80(G) was unconstitutionally retroactive. The statute provided a definition of the term "substantially certain": " ' Substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death." Previously, the Ohio Supreme Court had defined substantial certainty as follows: " 'Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain * * * to occur * * *.' " *Id.* at 108-109, quoting *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 95, 472 N.E.2d 1046. The *Van Fossen* court stated that applying the new statute " would remove appellees' potentially viable, court-enunciated cause of action by imposing a new, more difficult statutory restriction upon appellees' ability to bring the instant action." *Id.* at 109. The court concluded that the statute "removes an employee's potential cause of action against his employer by imposing a new, more difficult standard for the 'intent' requirement of a workers' compensation intentional tort than that established [under common law]." *Id.,* paragraph four of the syllabus. The court concluded that this was a "new standard [that] constitute[d] a limitation, or denial of, a substantive right ." *Id.*

*7 {¶ 19} In *Kunkler,* the court determined that R.C. 4121.80(G)(1) was an unconstitutional, substantive, retroactive law. The court rejected the argument that "the new statute merely reiterates the common-law definition of an intentional tort * * *." *Id.* at 138. The court explained: "if the statute works no change in the common-law definition of intentional tort, the exercise in determining whether the statute applies to this case would be pointless." *Id.* "Since the new statute purports to create rights, duties and obligations, it is (to that extent) substantive law." *Id.*

*7 {¶ 20} In *Cook,* the court determined that the sexual offender registration requirements of R.C. Chapter 2950 were not unconstitutionally retroactive. The court noted that "under the former provisions, habitual sex offenders were already required to register with their county sheriff. Only the frequency and duration of the registration requirements have changed. * * * * Further, the number of classifications has increased from one * * * to three * * *." *Id.* at 411 (citations omitted). The court concluded that "the registration and address verification provisions of R.C. Chapter 2950 are de minimis procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950." *Cook,* 83 Ohio St.3d at 412.

*7 {¶ 21} In *Bielat,* the court concluded that R.C. 1709.09(A) and 1709.11(D) constituted "remedial, curative statutes that merely provide a framework by which parties to certain investment accounts can more readily enforce their intent to designate a pay-on-death beneficiary." *Id.* at 354. "[T]he relevant provisions of R.C. Chapter 1709 remedially recognize, protect, and enforce the contractual rights of parties to certain securities investment accounts to designate a pay-on-death beneficiary. Before the Act, Ohio courts did not consistently recognize and enforce similar rights." *Id.* at 354-55. The new legislation "cure[d] a conflict between the pay-on-death registrations permitted in the Act and the formal requirements of our Statute of Wills." *Id.* at 356.

*7 {¶ 22} In *Kilbane,* the court held that the settlement provisions in former R.C. 4123.65 were a course of procedure as part of the process for enforcing a right to receive workers compensation and, thus, was remedial legislation. The legislature

had amended R.C. 4123.65 to remove the provision for Industrial Commission hearings on applications for settlement approval in State Fund claims.

*7 {¶ 23} Two Ohio common pleas court cases have concluded that H.B. 292 constitutes unconstitutional retroactive legislation when applied to cases pending before the legislation's effective date. In *In Re Special Docket No. 73958,* January 6, 2006, three Cuyahoga County Common Pleas Court judges determined that retroactively applying H.B. 292 violates Section 28, Article II of the Ohio Constitution because it requires "a plaintiff who filed his suit prior to the effective date of the statute to meet an evidentiary threshold that extends above and beyond the common law standard-the standard that existed at the time [the] plaintiff filed his claim. " The court noted that Ohio common law required " a plaintiff seeking redress for asbestos-related injuries * * * to show that asbestos had caused an alteration of the lining of the lung without any requirement that he meet certain medical criteria before filing his claim," (citing *In re Cuyahoga County Asbestos Cases* (1998), 127 Ohio App.3d 358, 364, 713 N.E.2d 20),[FN4] and that H.B. 292 imposed new requirements regarding the quality of medical evidence to establish a prima facie asbestos-related claim. The court stated that the legislation "can retroactively eliminate the claims of those plaintiffs whose right to bring suit not only vested, but also was exercised." Because the court found application of the act unconstitutional, it applied R.C. 2307.93(A)(3)(b) which states that "in the event a court finds the retroactive application of the act unconstitutional, 'the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.' " If the plaintiff does not meet the prior standard, the court should administratively dismiss the claims. See R.C. 2307.93(A)(3)(c).

FN4. The *Asbestos Cases* court explained the common law standard as follows:
"[I]n Ohio the asbestos-related pleural thickening or pleural plaque, which is an alteration to the lining of the lung, constitutes physical harm, and as such satisfies the injury requirement for a cause of action for negligent failure to warn or for a strict products liability claim, even if no other harm is caused by asbestos. *Verbryke v. Owens-Corning Fiberglas Corp.* (1992), 84 Ohio App.3d 388, 616 N.E.2d 1162. The *Verbryke* court noted that 'even if Robert Verbryke's disease is asymptomatic it does not necessarily mean he is unharmed in the sense of the traditional negligence action.' *Verbryke,* supra, at 395, 616 N.E.2d at 1167."
Id. at 364.

*8 {¶ 24} In *Thorton v. A-Best Products,* Cuyahoga C.P. Nos. CV-99-395724, CV-99-386916, CV-01-450637, CV-95-293526, CV-95-293588-072, CV-95-296215, CV-03-499468, CV-95-293312-002, CV-00-420647, CV-02-482141, the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive. The court determined that H.B. 292 is substantive, as opposed to remedial, legislation: "[T]he Act's imposition of new, higher medical standards for asbestos-related claims is a substantive alteration of existing Ohio law which will have the effect of retroactively eliminating the claims of plaintiffs whose rights to bring suit previously vested." While the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive, it did not declare the legislation itself unconstitutional. The court found that the legislation cannot be unconstitutionally retroactive because R.C. 2307.93(A)(3)(a) precludes its application if to do so would violate Section 28, Article II of the Ohio Constitution.

*8 {¶ 1} The court rejected the defendants' argument that the Act did not create a new standard for asbestos-related claims-similar to the argument appellees raise in the case sub judice:
*8 "Under R.C. 2305.10, Defendants argue it was the law of Ohio that an asbestos personal injury claim does not accrue until the plaintiff has developed an asbestos-related bodily injury and has been told by 'competent medical authority' that his injury was caused by his exposure to asbestos.

However, in 1982 the legislature did not define the terms 'competent medical authority' and 'injury' in R.C. 2305.10. Defendants argue that the Act does not change the requirements for the accrual of an asbestos-related injury. Rather, the Act establishes minimum medical requirements and prima facie provisions to provide definitions and substantive standards for the provisions included by the legislature in R.C. 2305.10."

*8 In rejecting the defendants' argument, the court noted that H.B. 292 requires the diagnosis of a " competent medical authority" and provides a specific definition of that phrase. "In contrast, R.C. 2305.10 does not define 'competent medical authority.' In the absence of a statutory definition, that meaning is supplied by common usage and common law." The court noted that no definition exists in the case law and thus, H.B. 292 requires medical experts "to 'jump additional hurdles' before they are permitted to walk into court."

*8 {¶ 26} In the case at bar, applying R.C. Chapter 2307 to appellants' cause of action would remove their potentially viable, common law cause of action by imposing a new, more difficult statutory standard upon their ability to maintain the asbestos-related claims. The statute requires a plaintiff filing certain asbestos-related claims to present "competent medical authority" to establish a prima facie case. The statute specifically defines " competent medical authority" and places limits on who qualifies as "competent medical authority." Previously, no Ohio court had placed such restrictions on what constituted competent medical authority. Instead, courts generally accepted medical authority that complied with the Rules of Evidence. This represents a change in the law, not simply a change in procedure or in the remedy provided. Therefore, the change is substantive and applying R.C. Chapter 2307 to appellants' asbestos-related claims would be unconstitutional. The legislation creates a new standard for maintaining an asbestos claim that was pending before the legislation's effective date and prohibits appellants from maintaining this cause of action unless they comply with the new statutory requirements. Because these requirements represent a substantive change in the law, they are not mere remedial requirements. Instead, they are substantive changes and may not be constitutionally applied retroactively. However, because the legislation contains a savings provision, the legislation itself is not unconstitutional. Thus, we conclude that applying H.B. 292 to appellants asbestos-related claims would be an unconstitutionally retroactive application.

*9 {¶ 27} We disagree with appellees' assertion that the General Assembly, by enacting H.B. 292, simply "clarified" the law regarding asbestos-related litigation and R.C. 2305.10. In *Nationwide Mut. Ins. Co. v. Kidwell* (1996), 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309, we observed that the General Assembly has the authority to clarify its prior acts. See *Martin v. Martin* (1993), 66 Ohio St.3d 110, 609 N.E.2d 537, fn. 2; *Ohio Hosp. Assn. v. Ohio Dept. of Human Serv.* (1991), 62 Ohio St.3d 97, 579 N.E.2d 695, fn. 4; *State v. Johnson* (1986), 23 Ohio St.3d 127, 131, 491 N.E.2d 1138; *Hearing v. Wylie* (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921. We explained:
*9 "When the Ohio General Assembly clarifies a prior Act, there is no question of retroactivity. If, however, the clarification substantially alters substantive rights, any attempt to make the clarification apply retroactively violates Section 28, Article II, Ohio Constitution. In *Hearing [v. Wylie* (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921], the court wrote as follows:
*9 'Appellee has argued that the change made by the General Assembly in Section 4123.01, Revised Code, was not an amendment but was merely a clarification of what the General Assembly had always considered the law to be. There is, therefore, according to appellee, no question of retroactiveness so far as the application of the amendment to this action is concerned.
*9 With this contention we cannot agree. The General Assembly was aware of the decisions of this court interpreting the word, "injury ." Those interpretations defined substantive rights given to the injured workmen to be compensated for their injuries. Those substantive rights were substantially altered by the General Assembly when it amended the definition of "injury." To attempt to make that substantive change applicable to actions pending at

the time of the change is clearly an attempt to make the amendment apply retroactively and is thus violative of Section 28, Article II, Constitution of Ohio.' (Emphasis added.) *Id.*, 173 Ohio St. at 224, 19 O.O.2d at 43-44, 180 N.E.2d at 923."

*9 *Nationwide Mut. Ins. Co. v. Kidwell* (1996), 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309.

*9 {¶ 28} In the case sub judice, H.B. 292 does not simply "clarify" prior legislation. Rather, H.B. 292 represents entirely new legislation that changes the legal requirements for filing an asbestos-related claim. Before the legislation, a plaintiff was not required to set forth a prima-facie case. To the extent the legislation attempts to change the definition of "competent medical authority" in R.C. 2305.10, it is unconstitutional retroactive legislation when applied to cases pending before the effective date. Before the legislation's effective date, " competent medical authority" did not have the same stringent requirements that the legislation imposes. Instead, whether a plaintiff presented "competent medical authority" generally was determined by examining the rules of evidence. By purporting to change the definition of "competent medical authority" as used in R.C. 2305.10,[FN5] the legislation effects a substantive change in the meaning of that phrase.

> FN5. We also question whether H.B. 292's definition of "competent medical authority" applies to R.C. 2305.10. The definition itself states that "competent medical authority" means a medical doctor who is providing a diagnosis for purposes of establishing a prima facie case under R.C. 2307.92; it does not state that it means a medical doctor who is providing a diagnosis for purposes of determining whether a claim accrued under R.C. 2305.10.

*10 {¶ 20} Consequently, we conclude that H.B. 292 cannot constitutionally be retroactively applied to appellants' asbestos-related claims. We therefore remand the case to the trial court so that it can evaluate appellants' cause of action under Ohio common law.

*10 {¶ 30} Accordingly, we hereby sustain appellants' first assignment of error, reverse the trial court's judgment and remand the matter for further proceedings. Our disposition of appellants' first assignment of error renders their remaining assignments of error moot and we will not address them. See App.R. 12(A)(1)(c).

*10 JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

*10 It is ordered that the judgment be reversed and the matter remanded for further proceedings consistent with this opinion. Appellant shall recover of appellees costs herein taxed.

*10 The Court finds there were reasonable grounds for this appeal.

*10 It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

*10 A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

HARSHA, P.J.: Concurs in Judgment Only.
ABELE, J. & McFARLAND, J.: Concur in Judgment & Opinion.

APPENDIX

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Ohio App. 4 Dist.,2006.
Ackison v. Anchor Packing Co.
Slip Copy, 2006 WL 3861073 (Ohio App. 4 Dist.), 2006 -Ohio- 7099

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--- N.E.2d ----, 2006 WL 3703350 (Ohio App. 12 Dist.), 2006 -Ohio- 6704
(Cite as: --- N.E.2d ----)

C

Wilson v. AC&S, Inc.Ohio App. 12 Dist.,2006.
Court of Appeals of Ohio,Twelfth District, Butler County.
WILSON, Appellee,
v.
AC&S, INC., et al., Appellants.
No. CA2006-03-056.
No. CA2006-03-056.
Decided Dec. 18, 2006.

Background: Wife, individually and as personal representative of husband's estate, brought asbestos personal injury and wrongful death claims against companies engaged in mining, processing, manufacturing, or selling, or distributing asbestos or asbestos-containing products or machinery, alleging husband's exposure to asbestos or asbestos-containing products or machinery in his work at steel plant had caused his lung disease and other ailments. The Court of Common Pleas, Butler County, No. CV2001-12-3029, ruled that statutes addressing asbestos liability claims could be applied retroactively to wife's action. Wife appealed.

Holding: The Court of Appeals, Young, J., held that statutes addressing prima facie showing of asbestos liability were remedial, and thus, retroactive application of statutes did not violate state constitutional provision generally prohibiting retroactive laws.

Reversed and remanded.

[1] Constitutional Law 92 ⇐45

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k45 k. Judicial Authority and Duty in General. Most Cited Cases
The decision as to whether or not a statute is constitutional presents a question of law.

[2] Appeal and Error 30 ⇐893(1)

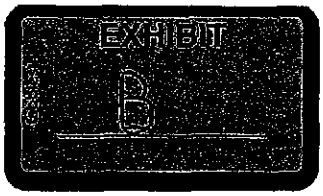
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Questions of law are reviewed de novo, independently, and without deference to the trial court's decision.

[3] Constitutional Law 92 ⇐48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
Ohio statutes enjoy a strong presumption of constitutionality.

[4] Constitutional Law 92 ⇐48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases



Constitutional Law 92 ⚿48(3)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(3) k. Doubtful Cases; Construction to Avoid Doubt. Most Cited Cases
An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.

[5] Constitutional Law 92 ⚿48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.

[6] Constitutional Law 92 ⚿48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
The presumption of validity of a legislative enactment cannot be overcome unless it appears that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.

[7] Constitutional Law 92 ⚿92

92 Constitutional Law
92VI Vested Rights
92k92 k. Constitutional Guaranties in General. Most Cited Cases

Constitutional Law 92 ⚿186

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k186 k. Constitutional Prohibitions in General. Most Cited Cases
The Ohio Constitution generally prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments. Const. Art. 2, § 28.

[8] Constitutional Law 92 ⚿188

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k187 Nature of Retrospective Laws
92k188 k. In General. Most Cited Cases
The Retroactivity Clause of the Ohio Constitution nullifies those new laws that reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective. Const. Art. 2, § 28.

[9] Constitutional Law 92 ⚿186

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k186 k. Constitutional Prohibitions in General. Most Cited Cases

Constitutional Law 92 ⚿188

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k187 Nature of Retrospective Laws
92k188 k. In General. Most Cited Cases
Retroactivity of laws itself is not always forbidden by the Ohio Constitution, and although the language of the Ohio Constitution provides that the General Assembly "shall have no power to pass retroactive laws," there is a crucial distinction between statutes that merely apply retroactively or retrospectively,

and those that do so in a manner that offends the Ohio Constitution. Const. Art. 2, § 28.

[10] Constitutional Law 92 ⚿188

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k187 Nature of Retrospective Laws
92k188 k. In General. Most Cited Cases
A "retroactive law," within meaning of Ohio constitutional provision generally prohibiting retroactive laws, is a law made to affect acts or facts occurring, or rights accruing, before it came into force. Const. Art. 2, § 28.

[11] Constitutional Law 92 ⚿188

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k187 Nature of Retrospective Laws
92k188 k. In General. Most Cited Cases
The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively, and if so, the court moves on to the question of whether the statute is substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial, rendering it constitutionally retroactive. Const. Art. 2, § 28.

[12] Constitutional Law 92 ⚿190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ⚿2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
General Assembly expressly intended that statutes, requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition, would be applied retroactively, as element for determining whether statutes were unconstitutionally retroactive. Const. Art. 2, § 28; R.C. §§ 2307.91, 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

General Assembly expressly intended that statutes, requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition, would be applied retroactively, as element for determining whether statutes were unconstitutionally retroactive. Const. Art. 2, § 28; R.C. §§ 2307.91, 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[13] Constitutional Law 92 ⚿190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases
A retroactive statute is "substantive," and therefore unconstitutionally retroactive, if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction. Const. Art. 2, § 28.

[14] Constitutional Law 92 ⚿186

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k186 k. Constitutional Prohibitions in General. Most Cited Cases
One of the primary purposes of the Retroactivity Clause in the Ohio Constitution, which generally prohibits retroactive laws, is to prevent the legislature from invading or interfering with the vested rights of individuals. Const. Art. 2, § 28.

[15] Constitutional Law 92 ⚿190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights

and Obligations. Most Cited Cases
A "vested right," which is protected by Retroactivity Clause of Ohio Constitution, which clause generally prohibits retroactive laws, may be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right. Const. Art. 2, § 28.

[16] Constitutional Law 92 ⇐190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases
"Vested right," which is protected by Retroactivity Clause of Ohio Constitution, which clause generally prohibits retroactive laws, is one which it is proper for the state to recognize and protect, and which an individual cannot be deprived of arbitrarily without injustice, or without his or her consent. Const. Art. 2, § 28.

[17] Constitutional Law 92 ⇐190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases
A right cannot be considered a "vested right," as would be protected by Retroactivity Clause of Ohio Constitution, which clause generally prohibits retroactive laws, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of existing laws. Const. Art. 2, § 28.

[18] Constitutional Law 92 ⇐105

92 Constitutional Law
92VI Vested Rights
92k105 k. Rights of Action and Defenses. Most Cited Cases
After a cause of action has accrued, it cannot be taken away or diminished by legislative action.

[19] Constitutional Law 92 ⇐92

92 Constitutional Law
92VI Vested Rights
92k92 k. Constitutional Guaranties in General. Most Cited Cases

Constitutional Law 92 ⇐277(1)

92 Constitutional Law
92XII Due Process of Law
92k277 Property and Rights Therein Protected
92k277(1) k. In General. Most Cited Cases
There is no property right or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority.

[20] Constitutional Law 92 ⇐190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases
When the Ohio Supreme Court interprets a key word or phrase in a statute, those interpretations define substantive rights given to persons who are affected by the statute, and if those substantive rights are substantially altered by the General Assembly when it amends the definition of that key word or phrase, then the amendment cannot be made to apply retroactively to any action pending at the time of the change, since such a retroactive application of a substantive provision would violate the Retroactivity Clause of the Ohio Constitution. Const. Art. 2, § 28.

[21] Constitutional Law 92 ⇐190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ⇐2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Statute defining "substantial contributing factor," for purposes of making prima facie showing, in asbestos liability case, that exposure to asbestos was substantial contributing factor to the exposed person's medical condition, did not substantially alter Ohio Supreme Court's interpretation of " substantial factor," which interpretation adopted the definition of "substantial factor" in the Restatement (Second) of Torts, and thus, retroactive application of the statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(1), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

Statute defining "substantial contributing factor," for purposes of making prima facie showing, in asbestos liability case, that exposure to asbestos was substantial contributing factor to the exposed person's medical condition, did not substantially alter Ohio Supreme Court's interpretation of " substantial factor," which interpretation adopted the definition of "substantial factor" in the Restatement (Second) of Torts, and thus, retroactive application of the statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(1), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

[22] Constitutional Law 92 ⚿191

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k191 k. Laws Relating to Remedies. Most Cited Cases

Products Liability 313A ⚿2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statute defining "competent medical authority," for purposes of making prima facie showing, in asbestos liability case, that a competent medical authority determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred, was remedial or procedural rather than substantive, and thus, retroactive application of statute, to actions pending on date the statute became effective, did not violate Ohio Constitution's general prohibition of retroactive laws; before enactment of statute, neither General Assembly nor Ohio Supreme Court had defined "competent medical authority." Const. Art. 2, § 28; R.C. §§ 2305.10, 2307.91(Z), (FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

Statute defining "competent medical authority," for purposes of making prima facie showing, in asbestos liability case, that a competent medical authority determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred, was remedial or procedural rather than substantive, and thus, retroactive application of statute, to actions pending on date the statute became effective, did not violate Ohio Constitution's general prohibition of retroactive laws; before enactment of statute, neither General Assembly nor Ohio Supreme Court had defined "competent medical authority." Const. Art. 2, § 28; R.C. §§ 2305.10, 2307.91(Z), (FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[23] Constitutional Law 92 ⚿190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ⚿2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statute imposing "but for" requirement, to establish prima facie case of asbestos liability, that a competent medical authority determined with a reasonable degree of medical certainty that without

the asbestos exposure the physical impairment of the exposed person would not have occurred, was consistent with state's long-standing definition of " proximate cause" and with Ohio Supreme Court's interpretation of "substantial factor," which interpretation adopted the definition of "substantial factor" in Restatement (Second) of Torts, which definition incorporated "cause," and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

Statute imposing "but for" requirement, to establish prima facie case of asbestos liability, that a competent medical authority determined with a reasonable degree of medical certainty that without the asbestos exposure the physical impairment of the exposed person would not have occurred, was consistent with state's long-standing definition of " proximate cause" and with Ohio Supreme Court's interpretation of "substantial factor," which interpretation adopted the definition of "substantial factor" in Restatement (Second) of Torts, which definition incorporated "cause," and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

[24] Negligence 272 ⇐379

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases

Negligence 272 ⇐384

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k384 k. Continuous Sequence; Chain of Events. Most Cited Cases
The "proximate cause" of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred.

[25] Constitutional Law 92 ⇐190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ⇐2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statute requiring prima facie showing, in asbestos liability case brought by smoker or in wrongful death case based on asbestos exposure, either of substantial occupational exposure to asbestos or of exposure equal to "25 fiber per cc years," did not displace any statute or Ohio Supreme Court case law, and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(GG), 2307.92(C)(1)(c), (D)(1)(c), 2307.93(A)(1, 2, 3).

Statute requiring prima facie showing, in asbestos liability case brought by smoker or in wrongful death case based on asbestos exposure, either of substantial occupational exposure to asbestos or of exposure equal to "25 fiber per cc years," did not displace any statute or Ohio Supreme Court case law, and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(GG), 2307.92(C)(1)(c), (D)(1)(c), 2307.93(A)(1, 2, 3).

[26] Constitutional Law 92 ⇐191

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k191 k. Laws Relating to Remedies. Most Cited Cases
A retroactive statute is "remedial," and therefore does not violate general constitutional prohibition of retroactive laws, if it is one that affects only the remedy provided; this includes laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. Const. Art. 2, § 28.

[27] Constitutional Law 92 ⚿191

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k191 k. Laws Relating to Remedies. Most Cited Cases
A "remedial" statute, which can be applied retroactively without violating general constitutional prohibition of retroactive laws, is one that merely affects the methods and procedure by which rights are recognized, protected and enforced, not the rights themselves. Const. Art. 2, § 28.

[28] Constitutional Law 92 ⚿191

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k191 k. Laws Relating to Remedies. Most Cited Cases

Products Liability 313A ⚿2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition were "remedial" rather than substantive, and thus, retroactive application of the statutes to actions pending on date the statutes became effective, as was expressly intended by General Assembly, did not violate Ohio Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such ambiguities had resulted in extraordinary volume of cases that had strained state's courts and had threatened to overwhelm the judicial system. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition were "remedial" rather than substantive, and thus, retroactive application of the statutes to actions pending on date the statutes became effective, as was expressly intended by General Assembly, did not violate Ohio Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such ambiguities had resulted in extraordinary volume of cases that had strained state's courts and had threatened to overwhelm the judicial system. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[29] Constitutional Law 92 ⚿193

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k192 Curative Acts
92k193 k. In General. Most Cited Cases

Products Liability 313A ⚿2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing

factor to the medical condition were curative, and thus, retroactive application of the statutes to actions pending on date the statutes became effective did not violate Ohio Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such clarifications were meant to address problem of overwhelming volume of asbestos liability cases filed by plaintiffs who were not sick, which cases compromised the ability of plaintiffs who were sick to receive compensation. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition were curative, and thus, retroactive application of the statutes to actions pending on date the statutes became effective did not violate Ohio Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such clarifications were meant to address problem of overwhelming volume of asbestos liability cases filed by plaintiffs who were not sick, which cases compromised the ability of plaintiffs who were sick to receive compensation. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[30] Constitutional Law 92 ⇐193

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k192 Curative Acts
92k193 k. In General. Most Cited Cases
Retroactive curative laws do not violate the general constitutional prohibition of retroactive laws. Const. Art. 2, § 28.

[31] Constitutional Law 92 ⇐70.3(4)

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k70 Encroachment on Legislature
92k70.3 Inquiry Into Motive, Policy, Wisdom, or Justice of Legislation
92k70.3(4) k. Wisdom. Most Cited Cases
It is not a court's function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation.

[32] Constitutional Law 92 ⇐70.3(3)

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k70 Encroachment on Legislature
92k70.3 Inquiry Into Motive, Policy, Wisdom, or Justice of Legislation
92k70.3(3) k. Policy. Most Cited Cases
The Ohio General Assembly, and not the Supreme Court, is the proper body to resolve public policy issues.

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS Case No. CV2001-12-3029

Price Waicukauski & Riley, L.L.C., William N. Riley, and Christopher Moeller, for appellee.
Motley, Rice, L.L.C., John J. McConnell, and Vincent L. Greene, for appellee.
Vorys, Sater, Seymour & Pease, L.L.P., Richard D. Schuster, and Nina I Webb-Lawton; Rosemary D. Welsh, for appellants 3M Company, Oglebay Norton Company, Certainteed Corporation, and Union Carbide.
Oldham & Dowling and Reginald S. Kramer, for appellant CBS Corporation.
Baker & Hostetler L.L.P., Robin E. Harvey, and Angela M. Hayden, for appellants Uniroyal, Inc., and Georgia-Pacific.
Gallagher Sharp, Kevin C. Alexanderson, John A. Valenti, and Colleen Mountcastle, for appellant Ingersoll-Rand Corporation.
Buckley King, L.P.A., and Jeffrey W. Ruple, for

appellant Cleaver-Brooks.
Sutter, O'Connell & Farchione Co., L.P.A., Matthew C. O'Connell, and Douglas R. Simek, for appellants Riley Stoker Corporation and Garlock Sealing Technologies, L.L.C.
McCarthy, Lebit, Crystal & Liffman, Co., L.P.A., and David A. Schaefer, for appellant Rapid American Corporation.
Jim Petro, Attorney General, and Holly J. Hunt, Assistant Attorney General, for amicus curiae Ohio Attorney General Jim Petro.
Bunda, Stutz & DeWitt, and Robert Bunda, for amicus curiae Owens-Illinois, Inc.Price Waicukauski & Riley, L.L.C., William N. Riley, and Christopher Moeller, for appellee.Motley, Rice, L.L.C., John J. McConnell, and Vincent L. Greene, for appellee.Vorys, Sater, Seymour & Pease, L.L.P., Richard D. Schuster, and Nina I Webb-Lawton; Rosemary D. Welsh, for appellants 3M Company, Oglebay Norton Company, Certainteed Corporation, and Union Carbide.Oldham & Dowling and Reginald S. Kramer, for appellant CBS Corporation.Baker & Hostetler L.L.P., Robin E. Harvey, and Angela M. Hayden, for appellants Uniroyal, Inc., and Georgia-Pacific.Gallagher Sharp, Kevin C. Alexanderson, John A. Valenti, and Colleen Mountcastle, for appellant Ingersoll-Rand Corporation.Buckley King, L.P.A., and Jeffrey W. Ruple, for appellant Cleaver-Brooks.Sutter, O'Connell & Farchione Co., L.P.A., Matthew C. O'Connell, and Douglas R. Simek, for appellants Riley Stoker Corporation and Garlock Sealing Technologies, L.L.C.McCarthy, Lebit, Crystal & Liffman, Co., L.P.A., and David A. Schaefer, for appellant Rapid American Corporation.Jim Petro, Attorney General, and Holly J. Hunt, Assistant Attorney General, for amicus curiae Ohio Attorney General Jim Petro.Bunda, Stutz & DeWitt, and Robert Bunda, for amicus curiae Owens-Illinois, Inc.WILLIAM W. YOUNG, Judge.

*1 {¶ 1} This matter is before us on an appeal [FN1] by numerous appellants who are challenging a decision of the Butler County Court of Common Pleas' finding that the asbestos claim of plaintiff-appellee, Barbara Wilson, individually and as personal representative of the estate of Chester Wilson, is governed by the law as it existed prior to the effective date of 2004 Am.Sub.H.B. No. 292 (" H.B. 292").

*1 {¶ 2} From 1964 to his retirement in April 2000, Chester Wilson was employed by A.K. Steel Corporation, formerly known as Armco Steel Corporation, located in Butler County, Ohio. Mr. Wilson worked in various jobs around the plant, including the position of furnace tender. On August 4, 2000, Mr. Wilson, who was a two-or-three-pack-a-day smoker, was diagnosed with lung cancer.

*1 {¶ 3} On December 14, 2001, Mr. Wilson filed a complaint against a number of companies (hereinafter "appellants" [FN2]) that have been engaged in the mining, processing, manufacturing, or sale, and distribution of asbestos or asbestos-containing products or machinery. Mr. Wilson alleged that he had been exposed to asbestos or asbestos-containing products or machinery in his occupation and that appellants were responsible for his lung disease and related physical ailments from which he suffered.

*1 {¶ 4} On April 15, 2003, Mr. Wilson died of lung cancer. Thereafter, Mr. Wilson's wife, Barbara Wilson, was substituted as the party in interest for the deceased Mr. Wilson.

*1 {¶ 5} On September 2, 2004, H.B. 292 went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B) through (D) and 2307.93(A)(1).

*1 {¶ 6} In March 2005, appellee filed a motion, with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. Appellants filed a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow her case to proceed and requesting that appellee's case be administratively dismissed.

*1 {¶ 7} On August 30, 2005, the trial court held a hearing on the parties' various assertions regarding appellee's asbestos claim. At the hearing, appellee acknowledged that her evidence was insufficient to establish the prima facie showing required under H.B. 292. Nevertheless, appellee argued that H.B. 292 should not apply to her asbestos claim because applying the new law to her claim would amount to an unconstitutional retroactive application of the law.

*1 {¶ 8} On February 24, 2006, the trial court issued an order holding that the retroactive application of H.B. 292 was substantive rather than merely remedial in its effect and therefore violates Section 28, Article II of the Ohio Constitution. Consequently, the trial court announced its intention to "adjudicate substantive issues in asbestos cases filed before September 2, 2004 according to the law as it existed prior to [H.B. 292]'s enactment, and [to] administratively dismiss, without prejudice, any claim that fails to meet the requisite evidentiary threshold." The trial court journalized its order on March 7, 2006.

*2 {¶ 9} Appellants now appeal from the trial court's March 7, 2006 order [FN3] and assign the following as error:

*2 {¶ 10} Assignment of Error No. 1:

*2 {¶ 11} "The trial court erred in interpreting R.C. 2307.92 and concluding that the statute would violate the Ohio Constitution."

*2 {¶ 12} Appellants argue that the trial court erred in concluding that retrospectively applying certain provisions in H.B. 292 to this case would violate the ban on retroactive legislation in Section 28, Article II of the Ohio Constitution. We agree with this argument.

I

*2 {¶ 13} **OVERVIEW OF OHIO'S PERSONAL INJURY ASBESTOS LITIGATION SYSTEM-PAST and PRESENT**

A

*2 {¶ 14} *Ohio's Personal Injury Asbestos Litigation System-Pre-H.B. 292*

*2 {¶ 15} In 1980, the General Assembly amended R.C. 2305.10 to state when a cause of action for an asbestos-related personal injury arises or accrues under Ohio law. 138 Ohio Laws, Part II, 3412. R.C. 2305.10(B)(5) now states:

*2 {¶ 16} "[A] cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first."

*2 {¶ 17} Prior to September 2, 2004, the General Assembly had never defined the terms "bodily injury caused by exposure to asbestos" or " competent medical authority."

B

*2 {¶ 18} *Ohio's Asbestos Litigation Crisis*

*2 {¶ 19} Asbestos claims have created a vastly increased amount of litigation in the state and federal courts in this country, which the United States Supreme Court has characterized as "an elephantine mass" of cases. H.B. 292, Section 3(A); *Ortiz v. Fibreboard Corp.* (1999), 527 U.S. 815, 821, 119 S.Ct. 2295, 144 L.Ed.2d 715.

*2 {¶ 20} The extraordinary volume of nonmalignant asbestos cases continues to strain federal and state courts. H.B. 292, Section 3(A). Over 600,000 people in the United States have filed asbestos claims for asbestos-related personal injuries through the end of 2000, and it is estimated that there are currently more than 200,000 active asbestos cases in courts nationwide.

*2 {¶ 21} One report suggests "that at best, only

one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date." Id. Another study estimates that $54 billion have already been spent on asbestos litigation. Id. Estimates of the total costs of all asbestos claims range from $200 to 265 billion. Id.

*2 {¶ 22} Before 1998, Ohio, Mississippi, New York, West Virginia, and Texas accounted for nine per cent of all filings of asbestos claims. However, between 1998 and 2000, these same five states handled 66 percent of all asbestos filings. As a result, Ohio has now become a haven for asbestos claims and is one of the top five state-court venues for asbestos filings. Id.

*3 {¶ 23} There are at least 35,000 asbestos personal-injury cases pending in Ohio state courts. Id. If the 233 Ohio state-court general jurisdictional judges started trying these asbestos cases today, each would have to try over 150 cases before retiring the current docket. H.B. 292, Section 3(A). That figure conservatively computes to at least 150 trial weeks, or more than three years per judge to retire the current docket. Id.

*3 {¶ 24} "The current docket, however, continues to increase at an exponential rate." Id. For example, in 1999 there were approximately 12,800 pending asbestos cases in Cuyahoga County. Id. However, by the end of October 2003, there were over 39,000 pending asbestos cases. Id. Approximately 200 new asbestos cases are filed in Cuyahoga County every month. Id.

*3 {¶ 25} Asbestos personal-injury litigation has already contributed to the bankruptcy of more than 70 companies nationwide, including nearly all manufacturers of asbestos textile and insulation products. Id. "At least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick." Id.

*3 {¶ 26} The General Assembly has recognized " that the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment." Id. Indeed, 89 percent of asbestos claims come from people who do not have cancer, and 66 to 90 percent of these noncancer claimants are not sick. Id. Furthermore, according to one study, 94 percent of the 52,900 asbestos claims filed in the year 2000 involved claimants who are not sick. Id.

*3 {¶ 27} Tragically, plaintiffs with asbestos claims are receiving less than 43 cents on every dollar awarded, and 65 per cent of the compensation paid, thus far, has gone to claimants who are not sick. Id.

C

*3 {¶ 28} *Amended Substitute House Bill 292*

*3 {¶ 29} H.B. 292 was signed into law on June 3, 2004, and took effect on September 2, 2004. The key portions of the law are codified in R.C. 2307.91 to 2307.98. The basic purpose of the law is to resolve this state's asbestos-litigation crisis.

1

*3 {¶ 30} *Legislative Intent in Enacting H.B. 292*

*3 {¶ 31} Section 3(B) of H.B. 292 states:

*3 {¶ 32} "In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer

physical impairment in the future."

2

*4 {¶ 33} *R.C. 2307.92: Prima Facie Showing of Minimum Medical Requirements*

*4 {¶ 34} R.C. 2307.92 establishes the minimum medical requirements that a plaintiff with an asbestos claim must meet in order to maintain the action and requires the plaintiff to make a prima facie showing of those minimum requirements. The provisions of R.C. 2307.92 categorize asbestos claimants into three distinct categories: (1) claimants who are advancing an asbestos claim based on "a non-malignant condition," R.C. 2307.92(B); (2) claimants who are advancing an asbestos claim based upon "lung cancer of an exposed person who is a smoker," R.C. 2307.92(C)(1); and (3) claimants who are advancing an asbestos claim that is based upon "a wrongful death * * * of an exposed person[.]" R.C. 2307.92(D)(1).

*4 {¶ 35} The case sub judice involves a claimant, i.e., appellant, who is acting as the personal representative of her late husband, who was a smoker. Appellant claims that her late husband's lung cancer was caused by his exposure to asbestos. Appellant is also bringing a wrongful-death claim. Therefore, appellant's claims would be governed by R.C. 2307.92(C)(1) and (D)(1), assuming that the relevant provisions of H.B. 292 can be applied retroactively to this case.

*4 {¶ 36} R.C. 2307.92(C)(1) prohibits any person from bringing or maintaining a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima facie showing, in the manner described in R.C. 2307.93(A), that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. The prima facie showing must include all of the following minimum requirements:

*4 {¶ 37} "(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

*4 {¶ 38} "(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. * * *

*4 {¶ 39} "(c) Either of the following:

*4 {¶ 40} "(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

*4 {¶ 41} "(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability * * *."

*4 {¶ 42} R.C. 2307.92(D)(1) requires a similar prima facie showing to be made by a claimant who is bringing or maintaining an asbestos claim that is based upon a wrongful death.

3

*4 {¶ 43} *R.C. 2307.93: Filing of Prima Facie Evidence*

*4 {¶ 44} R.C. 2307.93(A)(1) requires the plaintiff in an asbestos action to file, within 30 days after filing the complaint or other initial pleading, " a written report and supporting test results constituting prima-facie [sic] evidence of the exposed person's physical impairment that meets the minimum requirements specified in [R.C. 2307.92(B), (C), or (D)], whichever is applicable." The defendant in the case has 120 days from the date the specified type of prima facie evidence is proffered to challenge the adequacy of that evidence. R.C. 2307.93(A)(1).

*5 {¶ 45} If the defendant in an asbestos action challenges the adequacy of the prima facie evidence of the exposed person's physical impairment as provided in R.C. 2307.93(A)(1), the trial court,

using the standard for resolving a motion for summary judgment, must determine whether the proffered prima facie evidence meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D). R.C. 2307.93(B).

*5 {¶ 46} If the trial court finds that the plaintiff failed to make the requisite prima facie showing, the court must administratively dismiss the plaintiff's claim without prejudice. R.C. 2307.93(C). Any plaintiff whose case has been administratively dismissed may move to reinstate his or her case if the plaintiff makes a prima facie showing that meets the requirements of R.C. 2307.92(B), (C), or (D). R.C. 2307.93(C).

*5 {¶ 47} R.C. 2307.93(A)(2) provides that with respect to any asbestos claim that is pending on the effective date of the statute, the plaintiff must file the written report and supporting test results described in R.C. 2307.93(A)(1) within 120 days following the effective date of the statute. The trial court, upon plaintiff's motion and for good cause shown, may extend the 120-day period in which the written report and supporting test results must be filed.

4

*5 {¶ 48} *The "Savings Clause" in R.C. 2307.93(A)(3)(b)*

*5 {¶ 49} R.C. 2307.93(A)(3) contains a "savings clause," which provides that for any cause of action arising before the effective date of this section, the provisions set forth in R.C. 2307.92(B), (C), and (D) are to be applied unless the court finds that "[a] substantive right of a party to the case has been impaired" *and* that "that impairment is otherwise in violation of Section 28 of Article II of the Ohio Constitution." If the court makes both of those findings, it must apply the law that is in effect prior to the effective date of R.C. 2307.93. See R.C. 2307.93(A)(3)(b).

*5 {¶ 50} If the court finds that the plaintiff has failed to provide sufficient evidence to support his or her cause of action under R.C. 2307.93(A)(3)(b), the court must administratively dismiss the plaintiff's claim without prejudice, and with the court retaining jurisdiction over the case. R.C. 2307.93(A)(3)(c). Any plaintiff whose case has been administratively dismissed may move to reinstate the case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action under the law that was in effect when the plaintiff's cause of action arose. Id.

5

*5 {¶ 51} *H.B. 292's Definition of Key Phrases*

*5 {¶ 52} H.B. 292 defines at least one phrase not previously defined by either the General Assembly or the Ohio Supreme Court, namely, "competent medical authority."

*5 {¶ 53} R.C. 2307.91(Z) defines "competent medical authority" as meaning a medical doctor who is providing a diagnosis for purposes of constituting prima facie evidence of an exposed person's physical impairment that meets the requirements specified in R.C. 2307.92. The medical doctor must also be a "board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist," R.C. 2307.91(Z)(1), who "is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person." R.C. 2307.91(Z)(2).

*6 {¶ 54} Furthermore, as the basis for the diagnosis, the medical doctor must not have relied, in whole or in part, on the reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition (1) in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted; (2) that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process; or (3) that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or

screening. R.C. 2307.91(Z)(3)(a) through (c).

*6 {¶ 55} Additionally, the medical doctor must not spend more than 25 percent of his or her professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group must not earn more than 20 percent of its revenues from providing those services. R.C. 2307.91(Z)(4).

*6 {¶ 56} "[B]odily injury caused by exposure to asbestos" is defined, for purposes of R.C. 2305.10 and R.C. 2307.92 to 2307.95, as "physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor." "Substantial contributing factor," in turn, is defined to mean that "[e]xposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim[,]" *and* that "[a] competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred." R.C. 2307.91(FF)(1) and (2).

*6 {¶ 57} Finally, R.C. 2307.91(G)(G) defines " substantial occupational exposure to asbestos" as meaning "employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person * * * (1) [h]andled raw asbestos fibers; (2) [f]abricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process; (3) [a]ltered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers; or (4) [w]orked in close proximity to other workers engaged in any of the activities described in [R.C. 2307.91(GG)(1), (2), or (3)] in a manner that exposed the person on a regular basis to asbestos fibers."

II

*6 {¶ 58} **RETROACTIVE APPLICATION OF R.C. 2307.91, 2307.92, and 2307.93**

*6 {¶ 59} Appellants assert that the trial court erred in finding that the retroactive application of several provisions of H.B. 292 to appellee's asbestos claim violates the Ohio Constitution. We agree with appellants' argument.

A

*7 {¶ 60} *Standard of Review; Presumption of Constitutionality*

*7 [1][2] {¶ 61} The decision as to whether or not a statute is constitutional presents a question of law. *Andreyko v. Cincinnati,* 153 Ohio App.3d 108, 791 N.E.2d 1025, 2003-Ohio-2759, ¶ 11. "Questions of law are reviewed de novo, independently, and without deference to the trial court's decision." (Footnote omitted.) Id.

*7 [3][4][5][6] {¶ 62} "[Ohio] statutes enjoy a strong presumption of constitutionality. 'An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.' *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, * * * paragraph one of the syllabus. 'A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.' Id. at 147, 128 N.E.2d 59 * * *. ' That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.' *Xenia v. Schmidt* (1920), 101 Ohio St. 437, 130 N.E. 24, * * * paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600 * * *; *Dickman,* 164 Ohio St. at 147 * * *." *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570.

B

*7 {¶ 63} *Test for Unconstitutional Retroactivity*

*7 {¶ 64} The test for determining whether a statute may be applied retroactively was summarized in *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 721 N.E.2d 28:

*7 [7][8] {¶ 65} "Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments. *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99 * * *. The retroactivity clause nullifies those new laws that ' reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].' *Miller v. Hixson* (1901), 64 Ohio St. 39, 51 * * *.

*7 [9][10] {¶ 66} " * * * [R]etroactivity itself is not always forbidden by Ohio Law. Though the language of Section 28, Article II of the Ohio Constitution provides that the General Assembly ' shall have no power to pass retroactive laws,' Ohio courts have long recognized that there is a crucial distinction between statutes that merely apply retroactively (or 'retrospectively') and those that do so in a manner that offends our Constitution. See, e.g., *Rairden v. Holden* (1864), 15 Ohio St. 207, 210-211; *State v. Cook,* 83 Ohio St.3d [404,] 410, 700 N.E.2d 570, * * *. [T]he words ' retroactive' and 'retrospective' have been used interchangeably in the constitutional analysis for more than a century. Id. Both terms describe a law that is 'made to affect acts or facts occurring, or rights accruing, before it came into force.' Black's Law Dictionary (6 Ed.1990) 1317.

*8 [11] {¶ 67} "The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively. R.C. 1.48; * * * *Cook,* 83 Ohio St.3d at 410 * * *, citing *Van Fosse* [*v. Babcock & Wilson Co.* (1988)], 36 Ohio St.3d 100 * * *, at paragraph one of the syllabus. If so, the court moves on to the question of whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial[, rendering it constitutionally retroactive]." (Emphasis sic.) *Bielat,* 87 Ohio St.3d at 352-353, 721 N.E.2d 28.

C

*8 {¶ 68} *Legislature's Express Intention of Retroactive Application*

*8 [12] {¶ 69} As to the first prong of the *Van Fossen, Cook,* and *Bielat* test for determining whether a statute can be constitutionally applied retroactively, we note that the trial court and all parties to this action agree that the General Assembly expressly intended for the provisions in R.C. 2307.91 to 2307.93 to apply retroactively. For example, R.C. 2307.93(A)(2) and (3)(a) require a plaintiff with an asbestos claim pending on the effective date of that section to comply with the requirements of filing a prima facie case set forth in R.C. 2307.92. Thus, it is clear that the General Assembly expressly intended for the provisions in R.C. 2307.91 through 2307.93 to apply retroactively. The remaining question that we must address is whether those provisions are "remedial" or "substantive."

D

*8 {¶ 70} *Substantive Retroactive Statutes*

*8 [13] {¶ 71} "[A] retroactive statute is substantive-and therefore *unconstitutionally* retroactive-if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat,* 87 Ohio St.3d at 354, 721 N.E.2d 28, citing *Cook,* 83 Ohio St.3d at 410-411, 700 N.E.2d 570.

1

*8 {¶ 72} *Vested Rights*

*8 [14][15] {¶ 73} One of the primary purposes of the retroactivity clause in Section 28, Article II of the Ohio Constitution is to prevent the legislature from invading or interfering with the "vested rights"

of individuals. See *Bielat,* 87 Ohio St.3d at 357, 721 N.E.2d 28. "A 'vested right' may be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right." *Washington Cty. Taxpayers Assn. v. Peppel* (1992), 78 Ohio App.3d 146, 155, 604 N.E.2d 181.

*8 [16][17] {¶ 74} "A vested right is one which it is proper for the state to recognize and protect, and which an individual cannot be deprived of arbitrarily without injustice[,]" *State v. Muqdady* (2000), 110 Ohio Misc.2d 51, 55, 744 N.E.2d 278, or without his or her consent. *Scamman v. Scamman* (1950), 56 Ohio Law Abs. 272, 90 N.E.2d 617, 619 . A right cannot be considered "vested" unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of existing laws. *Roberts v. Treasurer* (2001), 147 Ohio App.3d 403, 411, 770 N.E.2d 1085; see, also, *In re Emery* (1978), 59 Ohio App.2d 7, 11, 391 N.E.2d 746.

*9 {¶ 75} Appellee argues that retroactive application of the provisions of H.B. 292 will unconstitutionally impair Mr. Wilson's "vested right in his cause of action." We disagree with this argument.

*9 [18] {¶ 76} Initially, we agree with appellee's assertion that after a cause of action has accrued, it cannot be taken away or diminished by legislative action. *State ex rel Slaughter v. Indus. Comm.* (1937), 132 Ohio St. 537, 540-541, 9 N.E.2d 505; *Pickering v. Peskind* (1930), 43 Ohio App. 401, 407-408, 183 N.E. 301. See, also, *Faller v. Mass. Bonding & Ins. Co.* (1929), 7 Ohio Law Abs. 586, 168 N.E. 394, 395-396 ("When a new limitation is made to apply to existing rights or causes of action, a reasonable time must be allowed before it takes effect, in which such rights may be asserted, or in which suit may be brought on such causes of action").

*9 {¶ 77} However, retroactive application of the provisions in H.B. 292 does not take away appellee's vested right in proceeding with her cause of action for bodily injury caused by exposure to asbestos. Appellee still has the right to proceed with that cause of action and to recover for an injury caused by her husband's exposure to asbestos. The relevant provisions of H.B. 292 merely affect the methods and procedure by which that cause of action is recognized, protected, and enforced, not the cause of action itself. *Bielat,* 87 Ohio St.3d at 354, 721 N.E.2d 28.

*9 {¶ 78} For example, R.C. 2307.91(Z) defines the term "competent medical authority" and lists the requirements that have to be met to allow a court to determine that a medical doctor is competent to provide a diagnosis for purposes of constituting prima facie evidence of an exposed person's physical impairment that meets the requirements specified in R.C. 2307.92. Appellee cites the new definition of this term to demonstrate that her vested right in her accrued cause of action has been unconstitutionally impaired.

*9 {¶ 79} However, because this statute "pertains to the competency of a witness to testify * * * it is of a remedial or procedural [rather than substantive] nature." *Denicola v. Providence Hosp.* (1979), 57 Ohio St.2d 115, 117, 387 N.E.2d 231. Since the provision is procedural or remedial rather than substantive, it does not offend the Ohio Constitution. See *Bielat,* 87 Ohio St.3d at 354, 721 N.E.2d 28.

*9 {¶ 80} Both the trial court and appellee have argued in these proceedings that H.B. 292 should not be applied to cases that were pending on the date the statute became effective, because the new statute requires plaintiffs who bring an asbestos claim "to meet an evidentiary threshold that extends above and beyond the common law standard-the standard that existed at the time [Mr. Wilson] filed his claim." As an example of the common law standard, the trial court cited *In re Cuyahoga County Asbestos Cases* (1998), 127 Ohio App.3d 358, 713 N.E.2d 20, which held that a plaintiff seeking redress for asbestos-related injuries had a compensable claim where he could show that asbestos had caused an alteration of the lining of the lung. Id. at 364, 713 N.E.2d 20. We find this reasoning unpersuasive.

*10 [19] {¶ 81} While a vested right may be

created by the common law, see *Weil,* 139 Ohio St. 198, 39 N.E.2d 148, it is well settled that "there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority." *Leis v. Cleveland R. Co.* (1920), 101 Ohio St. 162, 128 N.E. 73, syllabus.

***10** {¶ 82} Furthermore, as the Ohio Attorney General has pointed out in his amicus curiae brief, " [i]t is difficult to maintain * * * that someone has a vested right to a standard that is not the law of the entire State, and is certainly not binding on other appellate districts across the State."

***10** {¶ 83} Additionally, a right cannot be considered "vested" unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of existing laws. *Roberts,* 147 Ohio App.3d at 411, 770 N.E.2d 1085. In this case, it appears that appellee had nothing more than a mere expectation of future benefit founded upon an anticipated continuance of the law. Id.

***10** {¶ 84} In light of the foregoing, we conclude that appellee has failed to demonstrate that the retroactive application of H.B. 292 will deprive or diminish any vested right held by her or her late husband.

2

***10** {¶ 85} *Accrued Substantive Rights*

***10** {¶ 86} The term "accrued substantive rights" has often been used synonymously with the term " vested rights." See, e.g., *Bielat,* 87 Ohio St.3d at 357, 721 N.E.2d 28. The term "accrued" in its usual or customary meaning is defined as " 'to come into existence as an enforceable claim: vest as a right.' " *State ex rel. Estate of McKenney v. Indus. Comm.,* 110 Ohio St.3d 54, 55, 850 N.E.2d 694, 2006-Ohio-3562, ¶ 8, quoting Webster's Third New International Dictionary (1986) 13. The term " substantive right" has been defined as "a right that can be protected or enforced by law." Black's Law Dictionary (8th Ed.2004) 1349.

***10** {¶ 87} Appellee asserts that R.C. 2307.91(FF) 's definition of "substantial contributing factor" represents a "dramatic departure" from the definition of "substantial factor" in the Ohio Supreme Court's decision in *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, and that R.C. 2307.91(GG)'s definition of "substantial occupational exposure to asbestos" reimposes the "frequency, regularity, and proximity" test of *Lohrmann* that the Ohio Supreme Court rejected in *Horton.* Therefore, appellee contends, these provisions of H.B. 292 should not be applied retroactively to cases that were filed before the effective date of that statute because their retroactive application would impair the substantive rights of persons with asbestos claims. We disagree with this argument.

***10** [20] {¶ 88} As appellants themselves acknowledge, the General Assembly is not free to make retroactive changes to the settled meaning of a law. When the Ohio Supreme Court interprets a key word or phrase in a statute, those interpretations define substantive rights given to persons who are affected by the statute. *Hearing v. Wylie* (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921, overruled on other grounds by *Village v. Gen. Motors Corp.* (1984), 15 Ohio St.3d 129, 472 N.E.2d 1079. If those substantive rights are substantially altered by the General Assembly when it amends the definition of that key word or phrase, then the amendment cannot be made to apply retroactively to any action pending at the time of the change, since such a retroactive application of a substantive provision would violate Section 28, Article II of the Ohio Constitution. See *Hearing v. Wylie.*[FN4]

***11** [21] {¶ 89} Appellee argues that the definitions of "substantial contributing factor" and " substantial occupational exposure to asbestos" in R.C. 2307.91(FF) and (GG), respectively, constitute an attempt by the Ohio General Assembly to make an impermissible retroactive change to the settled law in this state regarding the meaning of those phrases. We disagree with this argument.

***11** {¶ 90} In *Horton,* the Ohio Supreme Court was asked to "set forth the appropriate summary judgment standard for causation in asbestos cases."

Id. at 682, 653 N.E.2d 1196. The *Horton* court stated as follows:

*11 {¶ 91} "For each defendant in a multidefendant asbestos case, the plaintiff has the burden of proving exposure to the defendant's product and that the product was a substantial factor in causing the plaintiff's injury." Id., paragraph one of the syllabus.

*11 {¶ 92} In defining the phrase "substantial factor," the court in *Horton* adopted the definition of that phrase contained in Restatement of the Law 2d, Torts (1965), Section 431, Comment *a* :

*11 {¶ 93} " 'The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in a popular sense, in which there always lurks the idea of responsibility, rather than the so-called " philosophical sense," which includes every one of the great number of events without which any happening would not have occurred.' " *Horton,* 73 Ohio St.3d at 686, 653 N.E.2d 1196.

*11 {¶ 94} *Horton* rejected the standard for proving "substantial causation" set forth in *Lohrmann v. Pittsburgh Corning Corp.* (C.A.4, 1986), 782 F.2d 1156, which had held that "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." Id. at 1162-1163.

*11 {¶ 95} R.C. 2307.91(FF) defines "substantial contributing factor" to mean both of the following: " (1) that exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim, and (2) that a competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred." Contrary to what appellee argues, we conclude that R.C. 2307.91(FF) 's definition of "substantial contributing factor" comports with the definition of "substantial factor" found in *Horton.*

*11 {¶ 96} In support of her position, appellee focuses on the phrase "a cause" in Comment *a* of Section 431 of the Restatement and asserts that the " predominant cause" requirement in R.C. 2307.91(FF)(1) conflicts with the rule adopted by *Horton.* However, appellee is ignoring the language in Comment *a* that states that the word "cause" is being used " 'in its popular sense, in which there always lurks the idea of responsibility, rather than the so-called 'philosophical sense,' which includes every one of the great number of events without which any happening would not have occurred.' " *Horton,* 73 Ohio St.3d at 686, 653 N.E.2d 1196, quoting Comment *a* of Section 431 of the Restatement of the Law 2d, Torts (1965).

*12 {¶ 97} Furthermore, Comment c to Section 431 states:

*12 {¶ 98} "A number of considerations which in themselves or in combination with one another are important in determining whether the actor's conduct is a substantial factor in bringing about harm to another are stated in [section] 433."

*12 {¶ 99} Section 433 of the Restatement of the Law 2d, Torts (1965) states:

*12 {¶ 100} "The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing harm to another:

*12 {¶ 101} "(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it[.]"

*12 {¶ 102} The "Comment on Clause (a)" of Section 433 states, in relevant part:

*12 {¶ 103} "d. There are frequently a number of events each of which is not only a necessary antecedent to the other's harm, but is also recognizable as having an appreciable effect in bringing it about. Of these the actor's conduct is

only one. Some other event which is a contributing factor in producing the harm may have such a *predominant* effect in bringing it about as to make the effect of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor." (Emphasis added.)

*12 {¶ 104} When all of the foregoing is considered, it is apparent that the "predominant cause" element in R.C. 2307.91(FF) is consistent with Section 431, Comment *a* of the Restatement of the Law 2d, Torts, adopted in *Horton*. See *Horton*, 73 Ohio St.3d at 686, 653 N.E.2d 1196.

*12 [22] {¶ 105} We also reject appellee's argument that R.C. 2307.91(FF) is in conflict with *Horton* because it contains a requirement that a " competent medical authority" determine with a reasonable degree of medical certainty that without the asbestos exposures, the physical impairment of the exposed person would not have occurred. R.C. 2307.91(FF)(2). R.C. 2305.10 has always used the term "competent medical authority." Prior to H.B. 292, neither the General Assembly nor the Ohio Supreme Court had defined the phrase, and, therefore, it was appropriate for the General Assembly to define that phrase. Additionally, defining the term "competent medical authority" is clearly a procedural, rather than a substantive, act. See *Denicola*, 57 Ohio St.2d at 117, 387 N.E.2d 231 .

*12 [23][24] {¶ 106} Furthermore, including a " but for" component in the definition of "substantial contributing factor" contained in R.C. 2307.91(FF)(2) (i.e., the competent medical authority must determine with a reasonable degree of medical certainty that the physical impairment would not have occurred without or "but for" the asbestos exposures) is consistent with this state's long-standing definition of "proximate cause," to wit: "Briefly stated, the proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred." *Aiken v. Industrial Comm.* (1944), 143 Ohio St. 113, 117, 28 O.O. 50, 53 N.E.2d 1018 . We also find the "but for" requirement consistent with Section 431, Comment *a* of the Restatement of the Law 2d, Torts, adopted in *Horton*, 73 Ohio St.3d at 686, 653 N.E.2d 1196, which uses the word "cause" in its " 'popular sense, in which there always lurks the idea of responsibility, rather than the so-called "philosophical" sense, which includes every one of the great number of events without which any happening would not have occurred.' "

*13 {¶ 107} We also agree with the following arguments presented by Owens-Illinois, Inc., in its amicus curiae brief, regarding these issues:

*13 {¶ 108} "R.C. 2307.91(FF) and 2307.92(B-D) [do not] conflict with *Horton v. Harwick Chemical Corp.*, as [appellee] contend[s]. These sections address a different issue than the one addressed in *Horton*. In *Horton*, the Ohio Supreme Court rejected the 'frequency, regularity, and proximity' test of *Lohrmann* for determining 'whether a particular product was a substantial factor in producing the plaintiff's injury.' *Horton*, 73 Ohio St.3d at 683, 653 N.E.2d at 1200 (emphasis added). As the Court made clear, it was addressing the standard for proving the liability of '*each defendant* in a multidefendant asbestos case' and the causative role of 'exposure to *the defendant's product*-as opposed to the causative role of asbestos generally-at the proof (summary judgment) stage. Id. at 686, 653 N.E.2d at 1202 (emphasis added). The Court declined to require a plaintiff to 'prove that he was exposed to a *specific product* on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that *the product* was a substantial factor in causing his injury.' Id. (emphasis added).

*13 {¶ 109} "R.C. 2307.92, by contrast, does not concern proof or whether exposure to an individual defendant's individual product caused an injury. Instead, it concerns only the threshold, prima facie showing of collective exposure to asbestos, and whether that collective exposure was sufficient to cause the injury. The prima facie showing serves only to identify whether the case genuinely involves asbestos-related injury, and not the further and more difficult question whether a particular product or particular defendant is responsible. [Footnote Omitted.] Since *Horton* did not address this issue at

all, this section of HB 292 cannot conflict with *Horton.*

*13 {¶ 110} "There is a section of HB 292 that contravenes *Horton,* but it is expressly made only prospective, raising no retroactivity issues. R.C. 2307.96, which governs the standard for proving ' that the conduct of [a] particular defendant was a substantial factor in causing the injury,' was expressly intended to reject *Horton* and to adopt the 'frequency, regularity, and proximity' test of *Lohrmann. See* H.B. 292, Section 5 * * * (discussing the reasons the legislature disagreed with the Court about the value of the *Lohrmann* test). The General Assembly was careful to make this section *prospective* only. *See* R.C. 2307.96(C) ('This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are *brought on or after the effective date of this section.*') (emphasis added). [Footnote omitted.]

*13 {¶ 111} " * * *

*13 [25] {¶ 112} "Finally, HB 292's requirement (in smoker/lung cancer and wrongful death cases only) of a prima facie showing either of 'substantial occupational exposure' to asbestos or of exposure equal to 25 fiber per cc years (R.C. 2307.92(C)(1)(c), 2307.92(D)(1)(c)), does not ' reimpose' the *Lohrmann* test that the Ohio Supreme Court had rejected in *Horton.* This is true for the same reasons discussed above: First, the ' substantial occupational exposure' provisions were not intended to 'reimpose' the *Lohrmann* test. The General Assemble knew how to adopt *Lohrmann,* and when it did so, it respected the boundaries of its power and did so prospectively. Second, these provisions again address the prima facie case (whether the claimant had sufficient collective exposure to asbestos generally to state a colorable claim of asbestos-related injury), and not the issue of proof regarding an individual product or defendant, which was the issue in *Horton.*

*14 {¶ 113} "Rather than addressing the question at issue in *Horton* (how a plaintiff may prove that a particular defendant, out of all the parties to whose products the plaintiff was exposed, is liable for its role in causing an injury), the 'substantial occupational exposure' provisions are one of two alternative means by which a plaintiff may satisfy a prima facie asbestos exposure threshold in lung cancer and wrongful death cases. Since 1980 it has been the law in Ohio by statute that an asbestos claim requires 'injury caused by exposure to asbestos.' R.C. 2305.10. HB 292 merely defines two alternative ways to [make a prima facie] show[ing of] exposure, displacing no statute or Supreme Court case law: either by a direct showing under a quantitative standard (25 fiber per cc years) or by a showing of 'substantial occupational exposure' (five years' work in a job in which the worker either handled raw asbestos, or fabricated asbestos-containing products, or worked with asbestos-containing products, or worked close to others who did these thing). This legislative clarification and specification of 'exposure' is not unconstitutionally retroactive."

*14 {¶ 114} In light of the foregoing, we conclude that applying R.C. 2307.91(FF) and (GG) to actions filed before the effective date of H.B. 292 does not violate Section 28, Article II of the Ohio Constitution.

3

*14 {¶ 115} *Imposition of New or Additional Burdens, Duties, etc.*

*14 {¶ 116} As to the issue of whether retroactive application of the relevant provisions of H.B. 292 would impose "new or additional burdens, duties, obligations, or liabilities as to a past transaction," we first note that appellants contend that this branch of the test for unconstitutional retroactivity " concerns vested rights in past acts, such as business activity or contracts, and has no obvious application to tort actions."

*14 {¶ 117} However, it appears that this branch of the test for unconstitutional retroactivity has a wider application than business activity or contracts. For instance, in *Bielat,* the court stated, " The retroactivity clause nullifies those new laws that 'reach back and create new burdens, new

duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].' " *Bielat,* 87 Ohio St.3d at 352-353, 721 N.E.2d 28, quoting *Miller,* 64 Ohio St. at 51, 59 N.E. 749.

*14 {¶ 118} Nevertheless, we conclude that the retroactive application of the relevant provisions of H.B. 292 does not impose any "new or additional burdens, duties, obligations, or liabilities" on persons seeking to bring an asbestos claim. The changes made by H.B. 292, such as defining " competent medical authority," are procedural or remedial, and not substantive. Therefore, the retroactive application of H.B. 292 does not offend the Ohio Constitution. See *Bielat,* 87 Ohio St.3d at 354, 721 N.E.2d 28.

E

*14 {¶ 119} *Remedial Retroactive Statutes*

*14 [26][27] {¶ 120} A retroactive statute is remedial-and therefore *constitutionally* retroactive-if it is one that affects "only the remedy provided, and include[s] laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Cook,* 83 Ohio St.3d at 411, 700 N.E.2d 570, citing *Van Fossen,* 36 Ohio St.3d at 107, 522 N.E.2d 489. A remedial statute is one that merely affects " 'the methods and procedure by which *rights are recognized, protected and enforced, not * * * the rights themselves.*' (Emphasis added.)" *Bielat,* 87 Ohio St.3d at 354, 721 N.E.2d 28, quoting *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205, 39 N.E.2d 148. "A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even when it is applied retroactively." *Cook,* 83 Ohio St.3d at 411, 700 N.E.2d 570.

1

*15 {¶ 121} *Remedial Provisions of H.B. 292*

*15 [28] {¶ 122} We conclude that the provisions in H.B. 292 at issue in this case, i.e., R.C. 2307.91 through 2307.93, constitute remedial provisions that merely affect "the methods and procedure by which rights are recognized, protected and enforced, not * * * the rights themselves." *Weil,* 139 Ohio St. at 205, 39 N.E.2d 148. These provisions "merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Cook,* 83 Ohio St.3d at 411, 700 N.E.2d 570.

*15 {¶ 123} The relevant provisions of H.B. 292 remedially changed the law in this state by clarifying the meaning of ambiguous phrases like " bodily injury caused by exposure to asbestos" and " competent medical authority." The ambiguity in these phrases resulted in an extraordinary volume of cases that strain the courts in this state and threatens to overwhelm our judicial system. See Section 3(A)(3) of H.B. 292. The extraordinary volume of cases has led to circumstances in which the plaintiffs in asbestos actions are receiving less than 43 cents on every dollar awarded, and 65 percent of the compensation paid, thus far, has gone to claimants who are not sick. Id. at Section 3(A)(2), Thus, the remedial legislation in the relevant provisions of H.B. 292 serves to avoid a multiplicity of suits and the accumulation of costs and promotes "the interests of all parties." *Bielat,* 87 Ohio St.3d at 354, 721 N.E.2d 28, quoting *Rairden v. Holden,* 15 Ohio St. at 211.

2

*15 {¶ 124} *Curative Statutes*

*15 [29][30] {¶ 125} Our conclusion that the provisions in R.C. 2307.91 through 2307.93 are remedial "is strengthened by our state's recognition of the validity of retrospective *curative* laws." (Emphasis sic.) *Bielat,* 87 Ohio St.3d at 355, 721 N.E.2d 28. "[T]he language that immediately follows the prohibition of retroactive laws contained in Section 28, Article II of our Constitution expressly permits the legislature to pass statutes that ' "authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers, by *curing omissions, defects, and errors in instruments and proceedings, arising out of their*

want of conformity with the laws of this state." ' (Emphasis added.) *Burgett v. Norris* (1874), 25 Ohio St. 308, 316, quoting Section 28[, Article II of the Ohio Constitution]. *Burgett* recognized that curative acts are a valid form of retrospective, remedial legislation when it held that '[i]n the exercise of its plenary powers, the legislature * * * could cure and render valid, by remedial retrospective statutes, that which it could have authorized in the first instance.' Id. at 317." *Bielat,* 87 Ohio St.3d at 355-356, 721 N.E.2d 28.

***15** {¶ 126} By enacting the disputed provisions of H.B. 292, the General Assembly was curing and rendering valid, by a remedial retrospective statute, that which it could have authorized in the first instance. See *Bielat,* 87 Ohio St.3d at 354-355, 721 N.E.2d 28, citing *Burgett.* Specifically, the relevant provisions of H.B. 292 clarify the meaning of such potentially ambiguous phrases as "competent medical authority" and "bodily injury caused by exposure to asbestos."

***16** {¶ 127} As we have indicated, the ambiguity of those phrases has produced an extraordinary volume of cases that strains our courts and that threatens to overwhelm the judicial system in this state. Because of the overwhelming number of asbestos cases that have been filed by persons who may have been exposed to asbestos but who are not sick, the ability of defendants to compensate those plaintiffs who have been exposed to asbestos and who *are* sick has been seriously compromised. See Section 3(A)(2) and(5) of H.B. 292.

***16** {¶ 128} To resolve this problem, the General Assembly saw fit to enact more precise definitions of ambiguous terms like "competent medical authority" and "bodily injury caused by exposure to asbestos" to ensure that only those parties who actually have been harmed by exposure to asbestos receive compensation for their injuries. Thus, as the Ohio Constitution and *Burgett* expressly permit, the relevant provisions of H.B. 292 cure an omission, defect, or error in the proceedings involving asbestos personal injury litigation in this state. See *Bielat,* 87 Ohio St.3d at 356, 721 N.E.2d 28.

F

***16** {¶ 129} *Appellee's Concluding Arguments*

***16** {¶ 130} Finally, appellee raises the following argument in her conclusion:

***16** {¶ 131} "H.B. 292 takes away the remedy for the enforcement of the vested right of certain asbestos plaintiffs, including [decedent] Chester Wilson [who is now represented by appellee], and only promotes the interests of the [appellants]. After passage of H.B. 292, asbestos plaintiffs who cannot meet the new requirements set forth in H.B. 292 have no remaining remedy in a cause of action that arose and vested well before the enactment of the statute." We find this argument unpersuasive.

***16** {¶ 132} As the Ohio Supreme Court has recently stated:

***16** [31][32] {¶ 133} " ' "It is not a court's function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation." ' *Klein v. Leis,* 99 Ohio St.3d 537, 2003-Ohio-4779 * * *, ¶ 14, quoting *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 48 * * *. 'The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.' *Johnson v. Microsoft Corp.,* 106 Ohio St.3d 278, 2005-Ohio-4985 * * *, ¶ 14." *State ex rel. Triplett v. Ross,* 111 Ohio St.3d 231, 2006-Ohio-4705, ¶ 55.

***16** {¶ 134} In light of the foregoing, appellants' assignment of error is sustained.

III

***16** {¶ 135} The trial court's judgment is reversed, and this cause is remanded for further proceedings consistent with this opinion and in accordance with the law of this state.

***16** Judgment reversed and cause remanded.

POWELL, P.J., and BRESSLER, J., concur.
Powell, P.J., and Bressler, J., concur.

FN1. This matter is sua sponte removed from the accelerated calendar.

FN2. The defendants-appellants in this case are 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide, CBS Corporation, Ingersoll-Rand Corporation, Uniroyal, Inc., Georgia-Pacific Corporation, Cleaver-Brooks, Riley Stoker Corporation, Garlock Sealing Technologies, LLC, and Rapid American Corporation. The companies named as defendants in Mr. Wilson's original complaint included these plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference, we shall refer to all of these defendants as " appellants," even though several of them have been dismissed from this action and are not parties to this appeal.

FN3. This court initially dismissed appellants' appeal on the grounds that the order appealed from was not a final appealable order. However, upon appellants' application for reconsideration, we reinstated appellants' appeal on the grounds that the entry appealed from is a provisional remedy as contemplated pursuant to R.C. 2307.93(A)(3), and that because the decision appealed from directly interprets R.C. 2307.93(A)(3), it is a final order pursuant to R.C. 2505.02.

FN4. *Hearing v. Wylie* states: "The General Assembly was aware of the decisions of this court interpreting the word 'injury.' Those interpretations defined substantive rights given to injured workmen to be compensated for their injuries. Those substantive rights were substantially altered by the General Assembly when it amended the definition of 'injury.' To attempt to make that substantive change applicable to actions pending at the time of the change is clearly an attempt to make the amendment apply retroactively and is thus violative of Section 28, Article II, Constitution of Ohio. " *Hearing*, 173 Ohio St. at 224, 180 N.E.2d 921.

Ohio App. 12 Dist.,2006.
Wilson v. AC&S, Inc.
--- N.E.2d ----, 2006 WL 3703350 (Ohio App. 12 Dist.), 2006 -Ohio- 6704

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C

Staley v. AC & S, Inc.Ohio App. 12 Dist.,2006.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio,Twelfth District, Butler County.
George A. STALEY, Plaintiff-Appellee,
v.
AC & S, INC., et al, Defendants-Appellants.
No. CA2006-06-133.

Decided Dec. 28, 2006.

Civil Appeal from Butler County Court of Common Pleas, Case No. CV2001-12-2971.

Price Waicukauski & Riley, LLC, William N. Riley, Christopher Moeller, Indianapolis, IN, Motley, Rice, LLC, John J. McConnell, Vincent L. Greene, IV, Providence, RI, for plaintiff-appellee.
Vorys, Sater, Seymour and Pease LLP, Richard D. Schuster, Nina I. Webb-Lawton, Columbus, OH, Rosemary D. Welsh, Cincinnati, OH, for defendants-appellants, 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide.
Oldham & Dowling, Reginald S. Kramer, Akron, OH, for defendant-appellant, CBS Corporation.
Baker & Hostetler, LLP, Robin E. Harvey, Angela M. Hayden, Cincinnati, OH, for defendants-appellants, Uniroyal, Inc. and Georgia-Pacific Corporation.
Buckley King, L.P.A., Jeffrey W. Ruple, East Cleveland, OH, for defendant-appellant, Cleaver-Brooks, Inc.
Baker & Hostetler LLP, Randall L. Solomon, Edward D. Papp, Diane L. Feigi, Cleveland, OH, for defendant-appellant, Maremont Corporation.
Evanchan & Palmisano, Nicholas L. Evanchan, Ralph J. Palmisano, John Sherrod, Twin Oaks Estate, Akron, OH, for defendant-appellant, Foster Wheeler Energy Corporation.
McCarthy, Lebit, Crystal & Liffman, Co., L.P.A., David A. Schaefer, West Cleveland, OH, for defendant-appellant, Rapid American Corporation.
State of Ohio Office of Attorney General, Constitutional Offices Section, Jim Petro, Holly J. Hunt, Columbus, OH, for amicus curiae, Ohio Attorney General Jim Petro.
POWELL, P.J.

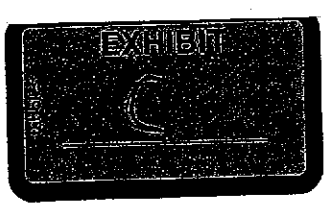
*1 {¶ 1} This matter is before us on an appeal [FN1] by numerous defendants-appellants [FN2] who are appealing an order of the Butler County Court of Common Pleas that: (1) found that the "medical criteria provisions" of Amended Substitute House Bill 292 cannot be applied prospectively to the asbestos claim of plaintiff-appellee, George A. Staley, but (2) administratively dismissed plaintiff-appellee's claim, anyway, pursuant to R.C. 2307.93(C).

FN1. This matter is sua sponte removed from the accelerated calendar.

FN2. The defendants-appellants in this case are: 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide, CBS Corporation, Uniroyal, Inc., Georgia-Pacific Corporation, Cleaver-Brooks, Inc., Maremont Corporation, Foster Wheeler Energy Corporation, and Rapid American Corporation.

*1 {¶ 2} From 1946 to his retirement in 1984, appellee was employed by A.K. Steel Corporation (f.k.a. Armco Steel Corporation), located in Butler County, Ohio. Appellee worked as a laborer in various jobs and locations around the plant. On November 16, 1999, appellee was diagnosed with asbestos-related disease.

*1 {¶ 3} On December 14, 2001, appellee filed a complaint against a number of companies (hereinafter "appellants" [FN3]) that have been



engaged in the mining, processing or manufacturing, or sale and distribution of asbestos or asbestos-containing products or machinery. Appellee alleged that he had been exposed to asbestos or asbestos-containing products or machinery in his occupation, and that appellants were jointly and severally liable for his " asbestos-related lung injury, disease, illness and disability and other related physical conditions."

> FN3. The companies named as defendants in Staley's original complaint included the companies listed in fn. 2, plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference, we shall refer to all of these defendants as "appellants" even though several of them have been dismissed from this action and are not parties to this appeal.

*1 {¶ 4} On September 2, 2004, Amended Substitute House Bill 292 (hereinafter "H.B. 292") went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D) and 2307.93(A)(1).

*1 {¶ 5} In December 2005, appellee filed a motion, with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. In March 2006, appellants filed a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow his case to proceed, and requesting that appellee's case be administratively dismissed pursuant to R.C. 2307.93(C).

*1 {¶ 6} In April 2006, the trial court held a hearing on the parties' various assertions regarding appellee's asbestos claim. At the hearing, appellee acknowledged that his evidence was insufficient to make the prima facie showing required under H.B. 292. Nevertheless, appellee argued that H.B. 292 should not apply to his asbestos claim since applying the new law to his case would constitute an unconstitutional retroactive application of the law.

*1 {¶ 7} On June 1, 2006, the trial court issued an "Amended Order of Administrative Dismissal" with respect to appellee's asbestos claim. The trial court began its analysis by adopting its recent decision in *Wilson v. AC & S, Inc.* (Mar. 7, 2006), Butler Cty. C.P. No. CV2001-12-3029, and finding "that the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case." However, the trial court then found that "the prima facie proceeding required by R.C. 2307.92 is procedural and may be applied retrospectively." As a result of these findings, the trial court announced its intention to "review the prima facie materials [filed] in this case according to the law as it existed prior to H.B. 292's effective date of September 2, 2004."

*2 {¶ 8} The trial court concluded that the prima facie evidence presented by appellee-by appellee's own admission-failed "to meet the criteria for maintaining an asbestos-related bodily injury claim that existed prior to September 2, 2004." Consequently, the trial court administratively dismissed appellee's case, without prejudice, pursuant to R.C. 2307.93(C).

*2 {¶ 9} Appellants now appeal from the trial court's June 1, 2006 order, raising the following assignment of error:

*2 {¶ 10} "THE TRIAL COURT ERRED IN ITS INTERPRETATION THAT R .C. 2307.92 VIOLATES THE OHIO CONSTITUTION."

*2 {¶ 11} Appellants argue that the trial court erred in determining that it could not apply the procedural requirements outlined in R.C. 2307.92 without violating the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution. We agree with this argument.

*2 {¶ 12} The trial court, citing its recent decision in *Wilson,* Butler Cty. C.P. No. CV2001-12-3029,

found "that the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case." The trial court did not define what it meant when it used the phrase "medical criteria provisions of H.B. 292," but presumably, the court was referring to the "minimum medical requirements" listed throughout R.C. 2307.92, and the definitions of certain key terms in R.C. 2307.91, like "competent medical authority." See, e.g., R.C. 2307.91(Z) (defining " competent medical authority").

*2 {¶ 13} However, in *Wilson v. AC & S, Inc.*, Butler App. No. CA2006-03-056, 2006-Ohio6704, this court reversed the trial court's decision. In *Wilson,* this court held that R.C. 2307.91, 2307.92, and 2307.93 were procedural or remedial provisions rather than substantive ones, and, therefore, their retroactive application to cases filed before the effective date of those provisions (i.e., September 2, 2004), did not violate the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution.

*2 {¶ 14} In light of our decision in *Wilson,* the trial court erred when it found that "the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case[,]" and when it decided to "review the prima facie materials [filed] in this case according to the law as it existed prior to H.B. 292's effective date of September 2, 2004."

*2 {¶ 15} The trial court's decision to administratively dismiss appellee's case pursuant to R.C. 2307.93(C) was correct. Appellee conceded during these proceedings that he did not make the prima facie showing required under R.C. 2307.92 and 2307.93. For the reasons stated in our decision in *Wilson,* those provisions apply to appellee's case. Because appellee could not make the requisite prima facie showing, the trial court was obligated to dismiss appellee's asbestos claim without prejudice pursuant to R.C. 2307.93(C).

*2 {¶ 16} However, if appellee seeks to reinstate his case pursuant to R.C. 2307.93(C), then he must make the prima facie showing that meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D), whichever is applicable. See R.C. 2307.93(C) ("Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code"). Appellee may *not* rely on the law as it existed prior to September 2, 2004, as the trial court indicated in its decision.

*3 {¶ 17} Appellants' assignment of error is sustained.

*3 {¶ 18} The trial court's June 1, 2006 order is affirmed in part and reversed in part, and this cause is remanded to the trial court with instructions to issue a new order consistent with this opinion and in accordance with the law of this state.

YOUNG and BRESSLER, JJ., concur.
Ohio App. 12 Dist.,2006.
Staley v. AC&S, Inc.
Slip Copy, 2006 WL 3833883 (Ohio App. 12 Dist.), 2006 -Ohio- 7033

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Slip Copy, 2006 WL 3833888 (Ohio App. 12 Dist.), 2006 -Ohio- 7034
(Cite as: Slip Copy)

Stahlheber v. Du Quebec, LTEEOhio App. 12 Dist.,2006.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio,Twelfth District, Butler County.
Deborah STAHLHEBER, Administratrix of the Estate of Cecil Sizemore, Deceased,
Plaintiff-Appellee,
v.
Lac D'Amiante DU QUEBEC, LTEE, et al.,
Defendants-Appellants.
No. CA2006-06-134.

Decided Dec. 28, 2006.

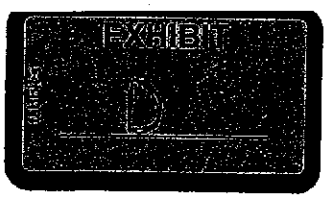
Civil Appeal from Butler County Court of Common Pleas, Case No. CV2003-05-1292.

Young, Reverman & Mazzei Co., L.P.A., Richard E. Reverman, Cincinnati, OH, and Motley Rice LLC, Vincent L. Greene IV, Providence, RI, for plaintiff-appellee.
Vorys, Sater, Seymour and Pease LLP, Richard D. Schuster, Nina I. Webb-Lawton, Columbus, OH, and Vorys, Sater, Seymour and Pease LLP, Rosemary D. Welsh, Cincinnati, OH, for defendants-appellants, American Standard, Inc., Oglebay Norton Company, Certainteed Corporation, 3M Company, and Union Carbide Corporation.
Baker & Hostetler LLP, Robin E. Harvey, Angela M. Hayden, Cincinnati, OH, for defendants-appellants, Uniroyal, Inc. and Georgia-Pacific Corp.
Baker & Hostetler LLP, Randall L. Soloman, Edward L. Papp, Diane Feigi, Cleveland, OH, for defendant-appellant, Maremont Corporation.
Evanchan & Palmisano, Nicholas L. Evanchan, Ralph J. Palmisano, John Sherrod, Akron, OH, for defendant-appellant, Foster Wheeler Energy Corporation.
Ulmer & Berne LLP, Bruce P. Mandel, James N. Kline, Kurt S. Siegfried, Robert E. Zulandt III, Cleveland, OH, for defendant-appellant, Ohio Valley Insulating Company, Inc.
McCarthy, Lebit, Crystal & Liffman Co., L.P.A., David A. Schaefer, Cleveland, OH, for defendant-appellant, Rapid American Corporation.
Jim Petro, Ohio Attorney General, Holly J. Hunt, Constitutional Offices Section, Columbus, OH, for amicus curiae, Ohio Attorney General Jim Petro.
BRESSLER, J.
*1 {¶ 1} This matter is before us on an appeal [FN1] by numerous defendants-appellants [FN2] who are challenging an order of the Butler County Court of Common Pleas finding that certain provisions in Amended Substitute House Bill 292 could not be applied prospectively to the asbestos claim of plaintiff-appellee, Deborah Stahlheber, Administratrix of the Estate of Cecil Sizemore, but administratively dismissing appellee's claim, anyway, pursuant to R.C. 2307.93(C).

FN1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

FN2. The defendants-appellants in this case are: American Standard, Inc., 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide, Uniroyal, Inc., Georgia-Pacific Corporation, Maremont Corporation, Foster Wheeler Energy Corporation, Ohio Valley Insulating Company, Inc., and Rapid American Corporation.

*1 {¶ 2} From 1952 to 1979, Cecil Sizemore worked as a truck driver and forklift operator at the Nicolet Industry Plant in Hamilton, Ohio. Sizemore was exposed to asbestos during the period in which



he worked at the plant. Sizemore died on May 14, 2001.

*1 {¶ 3} On May 13, 2003, appellee, Sizemore's daughter, acting as the administratrix of the Estate of Cecil Sizemore (hereinafter "decedent"), filed a complaint against a number of companies (hereinafter "appellants" [FN3]) that have been engaged in the mining, processing or manufacturing, or sale and distribution of asbestos or asbestos-containing products or machinery. Appellee alleged that decedent had been exposed to asbestos or asbestos-containing products or machinery in his occupation, and that appellants were jointly and severally liable for decedent's " asbestos-related lung injury, disease, illness and disability and other related physical conditions."

FN3. The companies named as defendants in Staley's original complaint included the companies listed in fn. 2, plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference, we shall refer to all of these defendants as "appellants" even though several of them have been dismissed from this action and are not parties to this appeal.

*1 {¶ 4} On September 2, 2004, Amended Substitute House Bill 292 (hereinafter "H.B. 292") went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D).

*1 {¶ 5} Appellee advanced two claims in her action against appellants: (1) that decedent had contracted asbestosis [FN4] as a result of his exposure to asbestos in his workplace; and (2) that appellants were also liable under a theory of wrongful death.

FN4. " 'Asbestosis' means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers." R.C. 2307.91(D).

*1 {¶ 6} In March 2006, appellee filed a motion with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. Appellants responded with a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow her case to proceed, and requesting that appellee's case be administratively dismissed pursuant to R.C. 2307.93(C).

*1 {¶ 7} On April 24, 2005, the trial court held a hearing on the parties' various arguments regarding appellee's asbestos-related claims. Appellee conceded at the hearing that based on decedent's death certificate, which had been filed in the case, " there is no evidence * * *, at the moment, that [decedent's] death was caused as a result of an [asbestos-related] disease." Appellee requested the trial court to administratively dismiss both her asbestosis and wrongful death claims until she had an opportunity to gather additional evidence in support of them. Appellee also asked the trial court to find that the retroactive application of H.B. 292 to her case would be unconstitutional, as the trial court had found in previous cases. See *Wilson v. AC & S, Inc.* (Mar. 7, 2006), Butler Cty. C.P. No. CV2001-12-3029.

*2 {¶ 8} On June 1, 2006, the trial court issued an "Amended Order of Administrative Dismissal" with respect to appellee's asbestos claim. Initially, the trial court found that pursuant to R .C. 2307.93(A)(3)(a), applying R.C. 2307.92 to appellee's case "would impair [her] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." Consequently, the trial court announced its intention to review the prima facie materials that had been filed in the case according to the law as it existed prior to September 2, 2004.

*2 {¶ 9} However, the trial court concluded that the prima facie evidence presented by appellee failed "to meet the criteria for maintaining an

asbestos-related bodily injury claim that existed prior to September 2, 2004." Consequently, the trial court administratively dismissed appellee's case without prejudice pursuant to R.C. 2307.93(C).

*2 {¶ 10} Appellants now appeal from the trial court's June 1, 2006 order, raising the following assignment of error:

*2 {¶ 11} "THE TRIAL COURT ERRED IN ITS INTERPRETATION THAT R .C. 2307.92 VIOLATES THE OHIO CONSTITUTION."

*2 {¶ 12} Appellants argue that the trial court erred in determining that it could not apply certain provisions of H.B. 292, including R.C. 2307.92, without violating the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution. We agree with this argument.

*2 {¶ 13} Initially, appellee contends that the order from which appellants are appealing is not a final appealable order. We disagree with this contention.

*2 {¶ 14} R.C. 2505.02, which governs "final orders," states in pertinent part:

*2 {¶ 15} "(A) As used in this section:

*2 {¶ 16} " * * *

*2 {¶ 17} "(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to * * * a prima facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

*2 {¶ 18} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

*2 {¶ 19} " * * *

*2 {¶ 20} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

*2 {¶ 21} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

*2 {¶ 22} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. "

*2 {¶ 23} In this case, the proceedings in the trial court constituted a "provisional remedy" under R.C. 2505.02(A)(3) since they involved a proceeding for "a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code." Additionally, the order being appealed is one "that grants or denies a provisional remedy[,]" in that the trial court (1) found that appellee had not made a sufficient prima facie showing under R.C. 2307.92, and (2) made a finding under R.C. 2307.93(A)(3). See R.C. 2505.02(A)(3) and (B)(4).

*3 {¶ 24} The order appealed from is also one that "determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy." R.C. 2505.02(B)(4)(a). Specifically, the trial court found that pursuant to R.C. 2307.93(A)(3)(a), applying R.C. 2307.92 to appellee's case "would impair [appellee's] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." As a result, the trial court concluded that the law in effect prior to the effective date of H.B. 292, i.e., September 2, 2004, must be applied to this action. Consequently, the order appealed from meets both of the requirements listed in R.C. 2505.02(B)(4)(a).

*3 {¶ 25} Finally, in light of all of the facts and circumstances of these proceedings, appellants " would not be afforded a meaningful or effective remedy" by having to wait to file an appeal " following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). Therefore, we conclude that the order from which the instant appeal was taken was

final and appealable. This court has reached the same conclusion in similar, recent cases. See, e.g., *Wilson v. AC & S, Inc.* (Dec. 18, 2006), Butler App. No. CA2006-03-056, 2006-Ohio-6704, at fn. 3.

*3 {¶ 26} As to the issues raised in appellants' assignment of error, we first note that in *Wilson,* this court held that R.C. 2307.91, 2307.92, and 2307.93 are procedural or remedial provisions rather than substantive ones, and, therefore, their retroactive application to cases filed before the effective date of those provisions, i.e., September 2, 2004, did not violate the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution.

*3 {¶ 27} In light of our decision in *Wilson,* the trial court erred when it found, pursuant to R.C. 2307.93(A)(3)(a), that applying R.C. 2307.92 to appellee's case "would impair [her] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." The trial court also erred when it "review[ed] the prima facie materials that had been filed in the case according to the law as it existed prior to September 2, 2004."

*3 {¶ 28} The trial court's decision to administratively dismiss appellee's case pursuant to R.C. 2307.93(C), on the other hand, was correct. Since appellee did not make the requisite prima facie showing, the trial court was obligated to dismiss both of appellee's asbestos claims (for asbestosis and wrongful death) without prejudice pursuant to R.C. 2307.93(C).

*3 {¶ 29} If appellee seeks to reinstate her case pursuant to R.C. 2307.93(C), then she must make the prima facie showing that meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D), whichever is applicable; however, she may *not* rely on the law as it existed prior to September 2, 2004, contrary to what the trial court had indicated in its decision. See R.C. 2307.93(C) ("Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code").

*4 {¶ 30} Appellants' assignment of error is sustained.

*4 {¶ 31} The trial court's June 1, 2006 order is affirmed in part and reversed in part, and this cause is remanded to the trial court with instructions to issue a new order consistent with this opinion and in accordance with the law of this state.

POWELL, P.J., and YOUNG, J., concur.
Ohio App. 12 Dist.,2006.
Stahlheber v. Du Quebec, LTEE
Slip Copy, 2006 WL 3833888 (Ohio App. 12 Dist.), 2006 -Ohio- 7034

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

LINDA ACKISON, as Administratrix of the Estate of Danny Ackison, :

Plaintiff-Appellant, : Case No. 05CA46

vs. :

ANCHOR PACKING CO., et al., : ENTRY ON MOTION TO CERTIFY CONFLICT

Defendants-Appellees. :

Appellees[1] filed a Motion to Certify Conflict, pursuant to App.R. 25, asserting that this court's Decision and Judgment Entry in Ackison v. Anchor Packing Co., Lawrence App. No. 05CA46, 2006-Ohio-7099, conflicts with the Twelfth District's decisions in Wilson v. AC & S, Inc., Butler App. No. CA2006-03-056, 2006-Ohio-6704, Staley v. AC & S, Inc., Butler App. No. CA2006-06-133, 2006-Ohio-7033, and Stahlheber v. Du Quebec, LTEE, Butler App. No. CA2006-06-134, 2006-Ohio-7034.

Section 3(B)(4), Article IV of the Ohio Constitution permits an appellate court to certify an issue to the Ohio Supreme Court for review and final determination when "the judges of a court of appeals find that a judgment upon which they have agreed is in Conflict with a judgment pronounced upon the same question by any other court of appeals of the state."

In Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596 613 N.E.2d 1032, 1034, the Ohio Supreme Court clarified the requirements that an appellate court must find before certifying

[1] See our prior opinion for the full list of appellees.

a judgment as being in Conflict.

> "First, the certifying court must find that its judgment is in Conflict with the judgment of a court of appeals of another district and the asserted Conflict must be 'upon the same question.' Second, the alleged Conflict must be on a rule of law--not facts. Third, the journal entry or opinion must clearly set forth that rule of law which the certifying court contends is in Conflict with the judgment on the same question by other district courts of appeals."

In Wilson, the Twelfth District concluded that R.C. 2307.91 to 2307.93 did not constitute unconstitutional retroactive legislation. Staley and Stahlheber followed the holding in Wilson. In Ackison, we held that the statutes, as applied to Ackison's claims, constituted unconstitutional retroactive legislation. Our holding conflicts with the Twelfth District's decisions. Therefore, we grant appellees' motion to certify conflict. We certify the following issue to the Ohio Supreme Court: "Can R.C. 2307.91, 2307.92, and 2307.93 be applied to cases already pending on September 2, 2004?"

McFarland, P.J. & Harsha, J.: Concur

MOTION GRANTED.

For the Court

BY: _____
Peter B. Abele, Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

LINDA ACKISON, as Administratrix of the Estate of Danny Ackison, :

Plaintiff-Appellant, : Case No. 05CA46

vs. :

ANCHOR PACKING CO., et al., : DECISION AND JUDGMENT ENTRY

Defendants-Appellees. :

APPEARANCES:

COUNSEL FOR APPELLANT: Richard E. Reverman and Kelly W. Thye, 1014 Vine Street, Suite 2400, Cincinnati, Ohio 45202

COUNSEL FOR APPELLEES GEORGIA PACIFIC[1]: Robin E. Harvey and Angela M. Hayden, 312 Walnut Street, Suite 3200, Cincinnati, Ohio 45202-4074

AMICUS CURIAE: Jim Petro, Ohio Attorney General, and Holly J. Hunt, Assistant Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

PER CURIAM.

This is an appeal from a Lawrence County Common Pleas Court judgment in favor of Anchor Packing Company and numerous other entities,[2] defendants below and appellees herein.

[1] The remaining counsel for appellees is too numerous to list in the caption. Instead, we included them in the appendix.

[2] The other defendants are: (1) Beazer East, Inc.; (2) Clark Industrial Insulation Co.; (3) Crown Cork and Seal Company, Inc.; (4) CSR Limited; (5) Foseco, Inc.; (6) Foster Wheeler Energy Corporation; (7) General Refractories Company; (8) Metropolitan Life Insurance Company; (9) Minnesota Mining and Manufacturing

Linda Ackison, as administratrix of the estate of Danny Ackison, deceased, and Linda Ackison, individually, plaintiffs below and appellants herein, raise the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN RULING THAT AN 'OTHER CANCER' AND ASBESTOSIS DIAGNOSIS HAS TO BE DIAGNOSED BY A COMPETENT MEDICAL AUTHORITY AS R.C. 2305.10 AS [SIC] H.B. 292, R.C. 2307.92, R.C. 2307.93, R.C. 2307.94, AND THEIR PROGENY ARE UNCONSTITUTIONAL WHEN APPLIED RETROACTIVELY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FINDING THAT H.B. 292, R.C. 2307.92, R.C. 2307.93, R.C. 2307.94, AND ITS PROGENY REQUIRES PLAINTIFFS-APPELLANTS TO MEET A PRIMA FACIE CASE FOR BOTH AN ESOPHAGEAL CANCER AND ASBESTOSIS CLAIM."

Company; (10) Ohio Valley Insulating Co., Inc.; (11) Owens-Illinois Corporation, Inc.; (12) Rapid-American Corp.; (13) Union Boiler Company; (14) Viacom, Inc.; (15) R.E. Kramig, Inc.; (16) McGraw Construction Company, Inc.; (17) McGraw/Kokosing, Inc.; (18) Frank W. Schaeffer, Inc.; (19) International Minerals and Chemical Corporation; (20) George P. Reintjes Company; (21) International Chemicals Company; (22) General Electric Company; (23) Georgia Pacific Corporation; (24) Uniroyal Holding, Inc.; (25) John Crane, Inc.; (26) Amchem Products, Inc.; (27) Certainteed Corp.; (28) Dana Corp.; (29) Maremont Corp.; (30) Pfizer, Inc.; (31) Quigley Co., Inc.; (32) Union Carbide Chemical and Plastics Co., Inc; (33) Garlock, Inc.; (34) A.W. Chesterton Co.; (35) Mobile Oil Corp. aka Mobil Oil Corp.; (36) Wheeler Protective Apparel, Inc.; (37) Ingersoll-Rand Company; (38) D.B. Riley, Inc.; (39) Allied Corporation; (40) Lincoln Electric Co.; (41) Wagner Electric Company; (42) Airco, Inc.; (43) Hobart Brothers Company; (44) Asarco, Inc.; (45) Cleaver Brooks Company; (46) Uniroyal, Inc.; (47) H.B. Fuller Co.; (48) Norton Company; (49) Industrial Holdings Company; (50) Bigelow Litpak Company; (51) John Doe 1 through 100.

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FINDING THAT R.C. 2307.92(D) SETS FORTH CERTAIN MINIMUM REQUIREMENTS FOR BRINGING OR MAINTAINING A TORT ACTION ALLEGING AN ASBESTOS CLAIM THAT IS BASED UPON WRONGFUL DEATH AND THAT THESE REQUIREMENTS APPLY NO MATTER WHAT THE UNDERLYING DISEASE."

This case centers around appellants' ability to pursue recovery for alleged asbestos-related injuries and whether recently-enacted H.B. 292 governs appellants' claims. On May 5, 2004, appellants filed a multi-plaintiff, seventy-eight page complaint against appellees alleging various asbestos-related injuries. On September 2, 2004, H.B. 292 became effective. The legislation requires a plaintiff "in any tort action who alleges an asbestos claim [to] file * * * a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in [R.C. 2307.92(B), (C), or (D)], whichever is applicable." The statute also applies to cases that are pending on the legislation's effective date. The statute requires plaintiffs with cases pending before the effective day to submit, within one hundred twenty days following the effective date, evidence sufficient to meet the R.C. 2307.92 prima facie showing requirement.

R.C. 2307.92 specifies three types of plaintiffs who must establish a prima-facie showing: (1) plaintiffs alleging an asbestos claim based on a nonmalignant condition; (2) plaintiffs alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker; and (3) plaintiffs alleging an asbestos

claim that is based upon a wrongful death. See R.C. 2307.92(B), (C), and (D). The statute does not specifically require a prima-facie showing regarding other asbestos-related claims. The statute requires each of the foregoing types of plaintiffs to show that a "competent medical authority" has, inter alia, diagnosed an asbestos-related injury. R.C. 2307.91(Z) defines "competent medical authority" as follows:

> "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in [R.C. 2307.92] and who meets the following requirements:
>
> (1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.
>
> (2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.
>
> (3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:
>
> (a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;
>
> (b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;
>
> (c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.
>
> (4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential

> tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenue from providing those services.

In an attempt to set forth a prima facie case, appellants stated: "Danny R. Ackinson's [sic[3]] radiological report diagnosed ulcerated distal esophagus cancer. A B-Read report showed small opacities of profusion 0/1 in the mid and lower lung zones bilaterally and circumscribed pleural thickening. Mr. Ackinson also signed an affidavit wherein he testifies he has worked with or in the vicinity of asbestos containing products and recalls the cutting, handling and application of asbestos containing products which produced visible dust to which he was exposed and inhaled. Mr. Ackinson's death certificate states that his cause of death was congestive heart failure and aortic stenosis. The evidence of ulcerated distal esophagus cancer in Mr. Ackinson's throat is proof that asbestos was a substantial contributing factor to Mr. Ackinson's esophageal cancer diagnosis." Appellants also asserted that applying H.B. 292 to their cause of action would be unconstitutionally retroactive and that it does not specifically apply to an esophageal cancer claim.

The trial court denied appellants' "motion to prove prima facie case under R.C. 2307 and motion for trial setting." The court determined: (1) R.C. 2305.10 requires that for an asbestos-

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[3] Appellants misspelled Ackison's name throughout the foregoing paragraph as contained in "Plaintiff Danny Ackison's Motion to Prove Plaintiffs' Prima Facie Case Under R.C. 2307 and Motion for Trial Setting."

related cause of action to accrue, a competent medical authority must inform the plaintiff that his injury is related to asbestos exposure; (2) R.C. 2307.92(D) sets forth certain minimum requirements for bringing or maintaining a tort action alleging an asbestos claim that is based upon a wrongful death and they apply no matter what plaintiff alleges is the underlying disease; (3) R.C. 2307.92(B) sets forth minimum requirements for maintaining a tort action alleging an asbestos claim based on a non-malignant condition; (4) R.C. 2307.93(A)(3)(a) provides that the provisions apply to claims that arose before the effective date of the law unless the court finds that a substantive right of the party has been impaired and that it violates Section 28, Article II of the Ohio Constitution; (5) appellant failed to meet the criteria for maintaining a wrongful death claim under R.C. 2307.92(D)-she failed to present evidence that the decedent's death would not have occurred without asbestos exposure; (7) appellant failed to meet the criteria for maintaining an injury claim for a non-malignant condition under R.C. 2307.92(B)-she failed to present evidence that the decedent was diagnosed by a competent medical authority with at least a Class 2 respiratory impairment and asbestosis or diffuse pleural thickening and that the asbestosis or diffuse pleural thickening is a substantial contributing factor to the decedent's physical impairment; (8) R.C. 2307.92 does not set forth specific criteria for maintaining an asbestos claim for esophageal cancer, but in order for a cause of action to accrue based upon bodily injury caused by asbestos exposure, a plaintiff must have been informed by competent

medical authority that he has an asbestos related injury under R.C. 2305.10; appellant did not present such evidence and a cause of action for esophageal cancer has yet to accrue; and (9) the statute does not impair appellant's substantive rights; instead, the statutes define previously undefined terms. Thus, the court administratively dismissed appellants' claims.

This appeal followed.

I

In their first assignment of error, appellants assert that the trial court erred by failing to find the asbestos-related claim legislation unconstitutional because the legislation retroactively changes the standard for bringing a claim. Appellants further contend that the trial court improperly concluded that a "competent medical authority," as H.B. 292 defines that term, must diagnose the asbestos-related claims for the claims to accrue under R.C. 2305.10.

Appellees contend that the legislation is not unconstitutionally retroactive. Rather, they argue that the statutes are remedial and merely define and clarify terms used in earlier legislative enactments. Appellees further assert that R.C. 2307.93(A)(3)(a), the "savings clause," prevents the legislation from being declared unconstitutionally retroactive. The "savings clause" provides that the legislation does not apply to a pending case if its application would unconstitutionally impair a claimant's vested rights in a particular case.

Initially, we state our agreement with appellees that the legislation itself is not unconstitutionally retroactive. R.C.

2307.93(A)(3)(a) provides:

> For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of [R.C. 2307.92) are to be applied unless the court that has jurisdiction over the case finds both of the following:
> (i) A substantive right of the party has been impaired.
> (ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

Thus, because the legislation itself prohibits its application if it would result in unconstitutional retroactivity, the legislation could not be declared unconstitutionally retroactive. The legislature has left it open for courts to decide, on a case-by-case basis, whether its application to cases prior to the legislation's effective date would be unconstitutionally retroactive. Therefore, we limit our review to whether applying the legislation to appellant's case would be unconstitutionally retroactive.

> "'Retroactive laws and retrospective application of laws have received the near universal distrust of civilizations.' Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100, 104, 522 N.E.2d 489; see, also, Landgraf v. USI Film Products (1994), 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (noting that 'the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic'). In recognition of the 'possibility of the unjustness of retroactive legislation,' Van Fossen, 36 Ohio St.3d at 104, 522 N.E.2d 489, Section 28, Article II of the Ohio Constitution provides that the General Assembly 'shall have no power to pass retroactive laws.'"

State v. Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶9.

The Ohio Supreme Court has interpreted Section 28, Article II of the Ohio Constitution to mean that the Ohio General

Assembly may not pass retroactive, substantive laws. See Smith v. Smith, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, at ¶6; Bielat v. Bielat (2000), 87 Ohio St.3d 350, 352-353, 721 N.E.2d 28; State ex rel. Slaughter v. Indus. Comm. (1937), 132 Ohio St. 537, 542, 9 N.E.2d 505 (stating that the prohibition against retroactive laws "has reference only to laws which create and define substantive rights, and has no reference to remedial legislation"). Generally, a substantive statute is one that "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." Bielat, 87 Ohio St.3d at 354. In contrast, retroactive, remedial laws do not violate Section 28, Article II of the Ohio Constitution. State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; Van Fossen, 36 Ohio St.3d at 107. "[R]emedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570, citing Van Fossen v. Babcock & Wilson Co. (1988), 36 Ohio St.3d 100, 107, 522 N.E.2d 489.

Thus, to determine whether a law is unconstitutionally retroactive, a court must employ a two-part analysis: (1) a court must evaluate whether the General Assembly intended the statute to apply retroactively; and (2) the court must determine whether the statute is remedial or substantive.

In Walls, the court explained the first part of the analysis:

> "Because R.C. 1.48 establishes a presumption that statutes operate prospectively only, '[t]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply.' Van Fossen, paragraph one of the syllabus. If there is no '"' clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.'"' Id. at 106, quoting Kiser v. Coleman (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753. If we can find, however, a 'clearly expressed legislative intent' that a statute apply retroactively, we proceed to the second step, which entails an analysis of whether the challenged statute is substantive or remedial. Cook, 83 Ohio St.3d at 410; see, also, Van Fossen, paragraph two of the syllabus."

Walls, at ¶10. Thus, a court's inquiry into whether a statute may be constitutionally applied retroactively continues only after an initial finding that the General Assembly expressly intended that the statute be applied retroactively. Van Fossen, paragraph two of the syllabus.

In the case at bar, the General Assembly did express its intent for the legislation to apply retroactively. R.C. 2307.93 states that R.C. Chapter 2307 applies to cases pending as of the effective date of the legislation. Thus, we must consider whether the legislation is substantive or remedial.

"[A] statute is substantive when it does any of the following: impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations or liabilities as to a past transaction; creates a new right out of an act which gave no right and imposed no obligation when it occurred; creates a new right; gives rise to or takes away the right to sue or defend actions at law." Van Fossen, 36 Ohio St.3d at 107 (citations omitted); see, also,

State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570. "In common usage, 'substantive' means 'creating and defining rights' and duties' or 'having substance: involving matters of major or practical importance to all concerned[.]' Merriam-Webster's Collegiate Dictionary (11 Ed.2003) 1245. A substantive law is the 'part of the law that creates, defines, and regulates the rights, duties, and powers of parties.' Black's Law Dictionary (7 Ed.1999) 1443." Gen. Elec. Lighting v. Koncelik, Franklin App. Nos. 05AP-310 and 05AP-323, 2006-Ohio-1655, at ¶21.

Conversely, "[r]emedial laws are those affecting only the remedy provided. These include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." Van Fossen, 36 Ohio St.3d at 107 (footnotes omitted). "[L]aws which relate to procedures are ordinarily remedial in nature, including rules of practice, courses of procedure and methods of review." Van Fossen, 36 Ohio St.3d at 108 (citations omitted). Remedial laws are "those laws affecting merely 'the methods and procedure[s] by which rights are recognized, protected and enforced, not * * * the rights themselves.'" Bielat, 87 Ohio St.3d at 354, quoting Weil v. Taxicabs of Cincinnati, Inc. (1942), 139 Ohio St. 198, 205, 39 N.E.2d 148; see, also, State v. Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶15. Remedial laws affect only the remedy provided, and include laws that "'merely substitute a new or more appropriate remedy for the enforcement of an existing right.'" Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision (2001), 91 Ohio St.3d 308, 316, 744 N.E.2d 751, quoting

State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; see, also, State ex rel. Romans v. Elder Beerman Stores Corp., 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82, at ¶15 (stating that remedial provisions are just what the name denotes-those that affect only the remedy provided). "'A statute undertaking to provide a rule of practice, a course of procedure or a method of review, is in its very nature and essence a remedial statute.'" Lewis v. Connor (1985), 21 Ohio St.3d 1, 3, 487 N.E.2d 285, quoting Miami v. Dayton (1915), 92 Ohio St. 215, 219, 110 N.E. 726. "Rather than addressing substantive rights, 'remedial statutes involve procedural rights or change the procedure for effecting a remedy. They do not, however, create substantive rights that had no prior existence in law or contract.' Dale Baker Oldsmobile v. Fiat Motors of N. Am., (1986), 794 F.2d 213, 217." Euclid v. Sattler (2001), 142 Ohio App.3d 538, 540, 756 N.E.2d 201; see, also, State ex rel. Kilbane v. Indus. Comm. (2001), 91 Ohio St.3d 258, 259, 744 N.E.2d 708 ("Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, and generally come in the form of 'rules of practice, courses of procedure, or methods of review.'").

In Van Fossen, the Ohio Supreme Court determined that R.C. 4121.80(G) was unconstitutionally retroactive. The statute provided a definition of the term "substantially certain": "'Substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death." Previously, the Ohio Supreme Court had

defined substantial certainty as follows: "'Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain * * * to occur * * *.'" Id. at 108-109, quoting Jones v. VIP Development Co. (1984), 15 Ohio St.3d 90, 95, 472 N.E.2d 1046. The Van Fossen court stated that applying the new statute "would remove appellees' potentially viable, court-enunciated cause of action by imposing a new, more difficult statutory restriction upon appellees' ability to bring the instant action." Id. at 109. The court concluded that the statute "removes an employee's potential cause of action against his employer by imposing a new, more difficult standard for the 'intent' requirement of a workers' compensation intentional tort than that established [under common law]." Id., paragraph four of the syllabus. The court concluded that this was a "new standard [that] constitute[d] a limitation, or denial of, a substantive right." Id.

In Kunkler, the court determined that R.C. 4121.80(G)(1) was an unconstitutional, substantive, retroactive law. The court rejected the argument that "the new statute merely reiterates the common-law definition of an intentional tort * * *." Id. at 138. The court explained: "if the statute works no change in the common-law definition of intentional tort, the exercise in determining whether the statute applies to this case would be pointless." Id. "Since the new statute purports to create rights, duties and obligations, it is (to that extent) substantive law." Id.

In Cook, the court determined that the sexual offender registration requirements of R.C. Chapter 2950 were not unconstitutionally retroactive. The court noted that "under the former provisions, habitual sex offenders were already required to register with their county sheriff. Only the frequency and duration of the registration requirements have changed. * * * * Further, the number of classifications has increased from one * * * to three * * * ." Id. at 411 (citations omitted). The court concluded that "the registration and address verification provisions of R.C. Chapter 2950 are de minimis procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950." Cook, 83 Ohio St.3d at 412.

In Bielat, the court concluded that R.C. 1709.09(A) and 1709.11(D) constituted "remedial, curative statutes that merely provide a framework by which parties to certain investment accounts can more readily enforce their intent to designate a pay-on-death beneficiary." Id. at 354. "[T]he relevant provisions of R.C. Chapter 1709 remedially recognize, protect, and enforce the contractual rights of parties to certain securities investment accounts to designate a pay-on-death beneficiary. Before the Act, Ohio courts did not consistently recognize and enforce similar rights." Id. at 354-55. The new legislation "cure[d] a conflict between the pay-on-death registrations permitted in the Act and the formal requirements of our Statute of Wills." Id. at 356.

In Kilbane, the court held that the settlement provisions in former R.C. 4123.65 were a course of procedure as part of the

process for enforcing a right to receive workers compensation and, thus, was remedial legislation. The legislature had amended R.C. 4123.65 to remove the provision for Industrial Commission hearings on applications for settlement approval in State Fund claims.

Two Ohio common pleas court cases have concluded that H.B. 292 constitutes unconstitutional retroactive legislation when applied to cases pending before the legislation's effective date. In In Re Special Docket No. 73958, January 6, 2006, three Cuyahoga County Common Pleas Court judges determined that retroactively applying H.B. 292 violates Section 28, Article II of the Ohio Constitution because it requires "a plaintiff who filed his suit prior to the effective date of the statute to meet an evidentiary threshold that extends above and beyond the common law standard-the standard that existed at the time [the] plaintiff filed his claim." The court noted that Ohio common law required "a plaintiff seeking redress for asbestos-related injuries * * * to show that asbestos had caused an alteration of the lining of the lung without any requirement that he meet certain medical criteria before filing his claim," (citing In re Cuyahoga County Asbestos Cases (1998), 127 Ohio App.3d 358, 364, 713 N.E.2d 20),[4] and that H.B. 292 imposed new requirements

[4] The Asbestos Cases court explained the common law standard as follows:

> "[I]n Ohio the asbestos-related pleural thickening or pleural plaque, which is an alteration to the lining of the lung, constitutes physical harm, and as such satisfies the injury requirement for a cause of action for negligent failure to warn or for a strict products liability claim, even if no other harm is caused by

regarding the quality of medical evidence to establish a prima facie asbestos-related claim. The court stated that the legislation "can retroactively eliminate the claims of those plaintiffs whose right to bring suit not only vested, but also was exercised." Because the court found application of the act unconstitutional, it applied R.C. 2307.93(A)(3)(b) which states that "in the event a court finds the retroactive application of the act unconstitutional, 'the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.'" If the plaintiff does not meet the prior standard, the court should administratively dismiss the claims. See R.C. 2307.93(A)(3)(c).

In Thorton v. A-Best Products, Cuyahoga C.P. Nos. CV-99-395724, CV-99-386916, CV-01-450637, CV-95-293526, CV-95-293588-072, CV-95-296215, CV-03-499468, CV-95-293312-002, CV-00-420647, CV-02-482141, the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive. The court determined that H.B. 292 is substantive, as opposed to remedial, legislation: "[T]he Act's imposition of new, higher medical standards for asbestos-related claims is a substantive

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asbestos. Verbryke v. Owens-Corning Fiberglas Corp. (1992), 84 Ohio App.3d 388, 616 N.E.2d 1162. The Verbryke court noted that 'even if Robert Verbryke's disease is asymptomatic it does not necessarily mean he is unharmed in the sense of the traditional negligence action.' Verbryke, supra, at 395, 616 N.E.2d at 1167." Id. at 364.

alteration of existing Ohio law which will have the effect of retroactively eliminating the claims of plaintiffs whose rights to bring suit previously vested." While the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive, it did not declare the legislation itself unconstitutional. The court found that the legislation cannot be unconstitutionally retroactive because R.C. 2307.93(A)(3)(a) precludes its application if to do so would violate Section 28, Article II of the Ohio Constitution.

The court rejected the defendants' argument that the Act did not create a new standard for asbestos-related claims-similar to the argument appellees raise in the case sub judice:

> "Under R.C. 2305.10, Defendants argue it was the law of Ohio that an asbestos personal injury claim does not accrue until the plaintiff has developed an asbestos-related bodily injury and has been told by 'competent medical authority' that his injury was caused by his exposure to asbestos. However, in 1982 the legislature did not define the terms 'competent medical authority' and 'injury' in R.C. 2305.10. Defendants argue that the Act does not change the requirements for the accrual of an asbestos-related injury. Rather, the Act establishes minimum medical requirements and prima facie provisions to provide definitions and substantive standards for the provisions included by the legislature in R.C. 2305.10."

In rejecting the defendants' argument, the court noted that H.B. 292 requires the diagnosis of a "competent medical authority" and provides a specific definition of that phrase. "In contrast, R.C. 2305.10 does not define 'competent medical authority.' In the absence of a statutory definition, that meaning is supplied by common usage and common law." The court noted that no definition exists in the case law and thus, H.B. 292 requires

medical experts "to 'jump additional hurdles' before they are permitted to walk into court."

In the case at bar, applying R.C. Chapter 2307 to appellants' cause of action would remove their potentially viable, common law cause of action by imposing a new, more difficult statutory standard upon their ability to maintain the asbestos-related claims. The statute requires a plaintiff filing certain asbestos-related claims to present "competent medical authority" to establish a prima facie case. The statute specifically defines "competent medical authority" and places limits on who qualifies as "competent medical authority." Previously, no Ohio court had placed such restrictions on what constituted competent medical authority. Instead, courts generally accepted medical authority that complied with the Rules of Evidence. This represents a change in the law, not simply a change in procedure or in the remedy provided. Therefore, the change is substantive and applying R.C. Chapter 2307 to appellants' asbestos-related claims would be unconstitutional. The legislation creates a new standard for maintaining an asbestos claim that was pending before the legislation's effective date and prohibits appellants from maintaining this cause of action unless they comply with the new statutory requirements. Because these requirements represent a substantive change in the law, they are not mere remedial requirements. Instead, they are substantive changes and may not be constitutionally applied retroactively. However, because the legislation contains a savings provision, the legislation itself

is not unconstitutional. Thus, we conclude that applying H.B. 292 to appellants asbestos-related claims would be an unconstitutionally retroactive application.

We disagree with appellees' assertion that the General Assembly, by enacting H.B. 292, simply "clarified" the law regarding asbestos-related litigation and R.C. 2305.10. In Nationwide Mut. Ins. Co. v. Kidwell (1996), 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309, we observed that the General Assembly has the authority to clarify its prior acts. See Martin v. Martin (1993), 66 Ohio St.3d 110, 609 N.E.2d 537, fn. 2; Ohio Hosp. Assn. v. Ohio Dept. of Human Serv. (1991), 62 Ohio St.3d 97, 579 N.E.2d 695, fn. 4; State v. Johnson (1986), 23 Ohio St.3d 127, 131, 491 N.E.2d 1138; Hearing v. Wylie (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921. We explained:

> "When the Ohio General Assembly clarifies a prior Act, there is no question of retroactivity. If, however, the clarification substantially alters substantive rights, any attempt to make the clarification apply retroactively violates Section 28, Article II, Ohio Constitution. In Hearing [v. Wylie (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921], the court wrote as follows:
>
> 'Appellee has argued that the change made by the General Assembly in Section 4123.01, Revised Code, was not an amendment but was merely a clarification of what the General Assembly had always considered the law to be. There is, therefore, according to appellee, no question of retroactiveness so far as the application of the amendment to this action is concerned.
>
> With this contention we cannot agree. The General Assembly was aware of the decisions of this court interpreting the word, "injury." Those interpretations defined substantive rights given to the injured workmen to be compensated for their injuries. Those substantive rights were substantially altered by the General Assembly when it amended the definition of "injury." To attempt to make that substantive change applicable to actions pending at the time of the change is clearly an attempt to make the amendment apply

> retroactively and is thus violative of Section 28, Article II, Constitution of Ohio.' (Emphasis added.) Id., 173 Ohio St. at 224, 19 O.O.2d at 43-44, 180 N.E.2d at 923."

Nationwide Mut. Ins. Co. v. Kidwell (1996), 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309.

In the case sub judice, H.B. 292 does not simply "clarify" prior legislation. Rather, H.B. 292 represents entirely new legislation that changes the legal requirements for filing an asbestos-related claim. Before the legislation, a plaintiff was not required to set forth a prima-facie case. To the extent the legislation attempts to change the definition of "competent medical authority" in R.C. 2305.10, it is unconstitutional retroactive legislation when applied to cases pending before the effective date. Before the legislation's effective date, "competent medical authority" did not have the same stringent requirements that the legislation imposes. Instead, whether a plaintiff presented "competent medical authority" generally was determined by examining the rules of evidence. By purporting to change the definition of "competent medical authority" as used in R.C. 2305.10,[5] the legislation effects a substantive change in the meaning of that phrase.

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[5] We also question whether H.B. 292's definition of "competent medical authority" applies to R.C. 2305.10. The definition itself states that "competent medical authority" means a medical doctor who is providing a diagnosis for purposes of establishing a prima facie case under R.C. 2307.92; it does not state that it means a medical doctor who is providing a diagnosis for purposes of determining whether a claim accrued under R.C. 2305.10.

Consequently, we conclude that H.B. 292 cannot constitutionally be retroactively applied to appellants' asbestos-related claims. We therefore remand the case to the trial court so that it can evaluate appellants' cause of action under Ohio common law.

Accordingly, we hereby sustain appellants' first assignment of error, reverse the trial court's judgment and remand the matter for further proceedings. Our disposition of appellants' first assignment of error renders their remaining assignments of error moot and we will not address them. See App.R. 12(A)(1)(c).

JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and the matter remanded for further proceedings consistent with this opinion. Appellant shall recover of appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, P.J.: Concurs in Judgment Only
Abele, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
William H. Harsha
Presiding Judge

BY: _____
Peter B. Abele, Judge

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

APPENDIX

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COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

04PI371

LINDA ACKISON, As Administratrix of the Estate of Danny Ackison Plaintiffs v. ANCHOR PACKING CO, et al., Defendants	)	CASE NO. 04 PI 371 JUDGE McCOWN

ENTRY DENYING PLAINTIFF'S MOTION TO PROVE PRIMA FACIE CASE

This matter came on for hearing on November 10, 2005 on Plaintiff's Motion to Prove Prima Facie Case Under ORC 2307 and Motion for Trial Setting. Defendants have filed a Memorandum in Opposition to Plaintiff's Motion and Plaintiff has filed an additional Memorandum in Support of their Motion.

Based upon the motions and memoranda of the parties, the exhibits submitted, argument of the parties, and the applicable law, the Court concludes as follows:

1. Ohio Revised Code Section 2305.10 requires that for a cause of action to accrue for bodily injury caused by exposure to asbestos the plaintiff must be informed by competent medical authority that the plaintiff has an injury that is related to the exposure;

2. Ohio Revised Code Section 2307.92(D) sets forth certain minimum requirements for bringing or maintaining a tort action alleging an asbestos claim that is based upon a wrongful death. The requirements apply no matter what plaintiffs allege is the underlying disease;

3. Ohio Revised Code Section 2307.92(B) sets forth certain minimum requirements for bringing or maintaining a tort action alleging an asbestos claim based on a non-malignant condition;

4. Ohio Revised Code Section 2307.93(A)(3)(a) provides that the provisions set forth in 2307.92 are to be applied to causes of action that arose before the effective date of the law unless the court finds that a substantive right of the party has been impaired and that impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution;

5. Plaintiff Linda Ackison raises several claims with regard to her husband's asbestos exposure and subsequent death: wrongful death; injury claim related to esophageal cancer; injury claim related to pleural thickening. Each of these claims must be examined under R.C. 2307.92 and R.C. 2305.10;

6. Plaintiff fails to meet the criteria for maintaining a wrongful death claim under R.C. 2307.92(D). Specifically Plaintiff failed to present evidence that Mr. Ackison's death would not have occurred without asbestos exposure;

7. Plaintiff fails to meet the criteria for maintaining an injury claim for a non-malignant condition under R.C. 2307.92(B). Specifically Plaintiff failed to present evidence that Mr. Ackison was diagnosed by a competent medical authority with at least a Class 2 respiratory impairment and asbestosis or diffuse pleural thickening and that the asbestosis or diffuse pleural thickening is a substantial contributing factor to Mr. Ackison's physical impairment. Evidence presented by the Defendants shows that Mr. Ackison was not impaired and cannot proceed with a claim for a non-malignant condition.;

8. Ohio Revised Code Section 2307.92 does not set forth specific criteria for maintaining an asbestos claim for esophageal cancer. However, in order for a cause of action to accrue based upon bodily injury caused by exposure to asbestos, a plaintiff has

to have been informed by competent medical authority that he or she has an asbestos-related injury. R.C. 2305.10. Plaintiff has failed to present any evidence that a competent medical authority informed Plaintiff that exposure to asbestos is related to the development of Mr. Ackison's esophageal cancer. Therefore, a cause of action for asbestos related esophageal cancer has not accrued;

9. Application of R.C. 2307.92 to Plaintiff's case does not impair Plaintiff's substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution. R.C. 2307.91 and 2307.92 simply define previously undefined terms in the existing law of Ohio which is not violative of the Plaintiff's constitutional rights;

10. Plaintiff's case is herby administratively dismissed, without prejudice, pursuant to 2307.93(C). COST TO PLAINTIFFS

IT IS SO ORDERED.

Judge Frank J. McCown

Prepared by:

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

LINDA ACKISON, as Administratrix of the Estate of Danny Ackison,	:	
Plaintiff-Appellant,	:	Case No. 05CA46
vs.	:	
ANCHOR PACKING CO., et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Richard E. Reverman and Kelly W. Thye, 1014 Vine Street, Suite 2400, Cincinnati, Ohio 45202
COUNSEL FOR APPELLEES GEORGIA PACIFIC[1]:	Robin E. Harvey and Angela M. Hayden, 312 Walnut Street, Suite 3200, Cincinnati, Ohio 45202-4074
AMICUS CURIAE:	Jim Petro, Ohio Attorney General, and Holly J. Hunt, Assistant Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:12-20-06

PER CURIAM.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment in favor of Anchor Packing Company and numerous

[1] The remaining counsel for appellees is too numerous to list in the caption. Instead, we included them in the appendix.

other entities,[2] defendants below and appellees herein.

{¶ 2} Linda Ackison, as administratrix of the estate of Danny Ackison, deceased, and Linda Ackison, individually, plaintiffs below and appellants herein, raise the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN RULING THAT AN 'OTHER CANCER' AND ASBESTOSIS DIAGNOSIS HAS TO BE DIAGNOSED BY A COMPETENT MEDICAL AUTHORITY AS R.C. 2305.10 AS [SIC] H.B. 292, R.C. 2307.92, R.C. 2307.93, R.C. 2307.94, AND THEIR PROGENY ARE UNCONSTITUTIONAL WHEN APPLIED RETROACTIVELY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FINDING THAT H.B. 292, R.C. 2307.92, R.C. 2307.93, R.C.

[2] The other defendants are: (1) Beazer East, Inc.; (2) Clark Industrial Insulation Co.; (3) Crown Cork and Seal Company, Inc.; (4) CSR Limited; (5) Foseco, Inc.; (6) Foster Wheeler Energy Corporation; (7) General Refractories Company; (8) Metropolitan Life Insurance Company; (9) Minnesota Mining and Manufacturing Company; (10) Ohio Valley Insulating Co., Inc.; (11) Owens-Illinois Corporation, Inc.; (12) Rapid-American Corp.; (13) Union Boiler Company; (14) Viacom, Inc.; (15) R.E. Kramig, Inc.; (16) McGraw Construction Company, Inc.; (17) McGraw/Kokosing, Inc.; (18) Frank W. Schaeffer, Inc.; (19) International Minerals and Chemical Corporation; (20) George P. Reintjes Company; (21) International Chemicals Company; (22) General Electric Company; (23) Georgia Pacific Corporation; (24) Uniroyal Holding, Inc.; (25) John Crane, Inc.; (26) Amchem Products, Inc.; (27) Certainteed Corp.; (28) Dana Corp.; (29) Maremont Corp.; (30) Pfizer, Inc.; (31) Quigley Co., Inc.; (32) Union Carbide Chemical and Plastics Co., Inc; (33) Garlock, Inc.; (34) A.W. Chesterton Co.; (35) Mobile Oil Corp. aka Mobil Oil Corp.; (36) Wheeler Protective Apparel, Inc.; (37) Ingersoll-Rand Company; (38) D.B. Riley, Inc.; (39) Allied Corporation; (40) Lincoln Electric Co.; (41) Wagner Electric Company; (42) Airco, Inc.; (43) Hobart Brothers Company; (44) Asarco, Inc.; (45) Cleaver Brooks Company; (46) Uniroyal, Inc.; (47) H.B. Fuller Co.; (48) Norton Company; (49) Industrial Holdings Company; (50) Bigelow Litpak Company; (51) John Doe 1 through 100.

2307.94, AND ITS PROGENY REQUIRES PLAINTIFFS-APPELLANTS TO MEET A PRIMA FACIE CASE FOR BOTH AN ESOPHAGEAL CANCER AND ASBESTOSIS CLAIM."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FINDING THAT R.C. 2307.92(D) SETS FORTH CERTAIN MINIMUM REQUIREMENTS FOR BRINGING OR MAINTAINING A TORT ACTION ALLEGING AN ASBESTOS CLAIM THAT IS BASED UPON WRONGFUL DEATH AND THAT THESE REQUIREMENTS APPLY NO MATTER WHAT THE UNDERLYING DISEASE."

{¶ 3} This case centers around appellants' ability to pursue recovery for alleged asbestos-related injuries and whether recently-enacted H.B. 292 governs appellants' claims. On May 5, 2004, appellants filed a multi-plaintiff, seventy-eight page complaint against appellees alleging various asbestos-related injuries. On September 2, 2004, H.B. 292 became effective. The legislation requires a plaintiff "in any tort action who alleges an asbestos claim [to] file * * * a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in [R.C. 2307.92(B), (C), or (D)], whichever is applicable." The statute also applies to cases that are pending on the legislation's effective date. The statute requires plaintiffs with cases pending before the effective day to submit, within one hundred twenty days following the effective date, evidence sufficient to meet the R.C. 2307.92 prima facie showing requirement.

{¶ 4} R.C. 2307.92 specifies three types of plaintiffs who

must establish a prima-facie showing: (1) plaintiffs alleging an asbestos claim based on a nonmalignant condition; (2) plaintiffs alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker; and (3) plaintiffs alleging an asbestos claim that is based upon a wrongful death. See R.C. 2307.92(B), (C), and (D). The statute does not specifically require a prima-facie showing regarding other asbestos-related claims. The statute requires each of the foregoing types of plaintiffs to show that a "competent medical authority" has, inter alia, diagnosed an asbestos-related injury. R.C. 2307.91(Z) defines "competent medical authority" as follows:

> "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in [R.C. 2307.92] and who meets the following requirements:
>
> (1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.
>
> (2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.
>
> (3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:
>
> (a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;
>
> (b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;
>
> (c) The reports or opinions of any doctor, clinic,

> laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.
>
> (4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenue from providing those services.

{¶ 5} In an attempt to set forth a prima facie case, appellants stated: "Danny R. Ackinson's [sic[3]] radiological report diagnosed ulcerated distal esophagus cancer. A B-Read report showed small opacities of profusion 0/1 in the mid and lower lung zones bilaterally and circumscribed pleural thickening. Mr. Ackinson also signed an affidavit wherein he testifies he has worked with or in the vicinity of asbestos containing products and recalls the cutting, handling and application of asbestos containing products which produced visible dust to which he was exposed and inhaled. Mr. Ackinson's death certificate states that his cause of death was congestive heart failure and aortic stenosis. The evidence of ulcerated distal esophagus cancer in Mr. Ackinson's throat is proof that

[3] Appellants misspelled Ackison's name throughout the foregoing paragraph as contained in "Plaintiff Danny Ackison's Motion to Prove Plaintiffs' Prima Facie Case Under R.C. 2307 and Motion for Trial Setting."

asbestos was a substantial contributing factor to Mr. Ackinson's esophageal cancer diagnosis." Appellants also asserted that applying H.B. 292 to their cause of action would be unconstitutionally retroactive and that it does not specifically apply to an esophageal cancer claim.

{¶ 6} The trial court denied appellants' "motion to prove prima facie case under R.C. 2307 and motion for trial setting." The court determined: (1) R.C. 2305.10 requires that for an asbestos-related cause of action to accrue, a competent medical authority must inform the plaintiff that his injury is related to asbestos exposure; (2) R.C. 2307.92(D) sets forth certain minimum requirements for bringing or maintaining a tort action alleging an asbestos claim that is based upon a wrongful death and they apply no matter what plaintiff alleges is the underlying disease; (3) R.C. 2307.92(B) sets forth minimum requirements for maintaining a tort action alleging an asbestos claim based on a non-malignant condition; (4) R.C. 2307.93(A)(3)(a) provides that the provisions apply to claims that arose before the effective date of the law unless the court finds that a substantive right of the party has been impaired and that it violates Section 28, Article II of the Ohio Constitution; (5) appellant failed to meet the criteria for maintaining a wrongful death claim under R.C. 2307.92(D)-she failed to present evidence that the decedent's death would not have occurred without asbestos exposure; (7) appellant failed to meet the criteria for maintaining an injury claim for a non-malignant condition under R.C. 2307.92(B)-she

failed to present evidence that the decedent was diagnosed by a competent medical authority with at least a Class 2 respiratory impairment and asbestosis or diffuse pleural thickening and that the asbestosis or diffuse pleural thickening is a substantial contributing factor to the decedent's physical impairment; (8) R.C. 2307.92 does not set forth specific criteria for maintaining an asbestos claim for esophageal cancer, but in order for a cause of action to accrue based upon bodily injury caused by asbestos exposure, a plaintiff must have been informed by competent medical authority that he has an asbestos related injury under R.C. 2305.10; appellant did not present such evidence and a cause of action for esophageal cancer has yet to accrue; and (9) the statute does not impair appellant's substantive rights; instead, the statutes define previously undefined terms. Thus, the court administratively dismissed appellants' claims.

{¶ 7} This appeal followed.

I

{¶ 8} In their first assignment of error, appellants assert that the trial court erred by failing to find the asbestos-related claim legislation unconstitutional because the legislation

{¶ 9} retroactively changes the standard for bringing a claim. Appellants further contend that the trial court improperly concluded that a "competent medical authority," as H.B. 292 defines that term, must diagnose the asbestos-related claims for the claims to accrue under R.C. 2305.10.

{¶ 10} Appellees contend that the legislation is not unconstitutionally retroactive. Rather, they argue that the statutes are remedial and merely define and clarify terms used in earlier legislative enactments. Appellees further assert that R.C. 2307.93(A)(3)(a), the "savings clause," prevents the legislation from being declared unconstitutionally retroactive. The "savings clause" provides that the legislation does not apply to a pending case if its application would unconstitutionally impair a claimant's vested rights in a particular case.

{¶ 11} Initially, we state our agreement with appellees that the legislation itself is not unconstitutionally retroactive. R.C. 2307.93(A)(3)(a) provides:

> For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of [R.C. 2307.92) are to be applied unless the court that has jurisdiction over the case finds both of the following:
> (i) A substantive right of the party has been impaired.
> (ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

Thus, because the legislation itself prohibits its application if it would result in unconstitutional retroactivity, the legislation could not be declared unconstitutionally retroactive. The legislature has left it open for courts to decide, on a case-by-case basis, whether its application to cases prior to the legislation's effective date would be unconstitutionally retroactive. Therefore, we limit our review to whether applying the legislation to appellant's case would be unconstitutionally retroactive.

> "'Retroactive laws and retrospective application of laws have received the near universal distrust of civilizations.' Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100, 104, 522 N.E.2d 489; see, also, Landgraf v. USI Film Products (1994), 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (noting that 'the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic'). In recognition of the 'possibility of the unjustness of retroactive legislation,' Van Fossen, 36 Ohio St.3d at 104, 522 N.E.2d 489, Section 28, Article II of the Ohio Constitution provides that the General Assembly 'shall have no power to pass retroactive laws.'"

State v. Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶9.

{¶ 12} The Ohio Supreme Court has interpreted Section 28, Article II of the Ohio Constitution to mean that the Ohio General Assembly may not pass retroactive, substantive laws. See Smith v. Smith, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, at ¶6; Bielat v. Bielat (2000), 87 Ohio St.3d 350, 352-353, 721 N.E.2d 28; State ex rel. Slaughter v. Indus. Comm. (1937), 132 Ohio St. 537, 542, 9 N.E.2d 505 (stating that the prohibition against retroactive laws "has reference only to laws which create and define substantive rights, and has no reference to remedial legislation"). Generally, a substantive statute is one that "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." Bielat, 87 Ohio St.3d at 354. In contrast, retroactive, remedial laws do not violate Section 28, Article II of the Ohio Constitution. State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; Van Fossen, 36 Ohio St.3d at 107. "[R]emedial laws are those affecting only the

remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570, citing Van Fossen v. Babcock & Wilson Co. (1988), 36 Ohio St.3d 100, 107, 522 N.E.2d 489.

{¶ 13} Thus, to determine whether a law is unconstitutionally retroactive, a court must employ a two-part analysis: (1) a court must evaluate whether the General Assembly intended the statute to apply retroactively; and (2) the court must determine whether the statute is remedial or substantive.

{¶ 14} In Walls, the court explained the first part of the analysis:

> "Because R.C. 1.48 establishes a presumption that statutes operate prospectively only, '[t]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply.' Van Fossen, paragraph one of the syllabus. If there is no '"'clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.'"' Id. at 106, quoting Kiser v. Coleman (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753. If we can find, however, a 'clearly expressed legislative intent' that a statute apply retroactively, we proceed to the second step, which entails an analysis of whether the challenged statute is substantive or remedial. Cook, 83 Ohio St.3d at 410; see, also, Van Fossen, paragraph two of the syllabus."

Walls, at ¶10. Thus, a court's inquiry into whether a statute may be constitutionally applied retroactively continues only after an initial finding that the General Assembly expressly intended that the statute be applied retroactively. Van Fossen, paragraph two of the syllabus.

{¶ 15} In the case at bar, the General Assembly did express its intent for the legislation to apply retroactively. R.C. 2307.93 states that R.C. Chapter 2307 applies to cases pending as of the effective date of the legislation. Thus, we must consider whether the legislation is substantive or remedial.

{¶ 16} "[A] statute is substantive when it does any of the following: impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations or liabilities as to a past transaction; creates a new right out of an act which gave no right and imposed no obligation when it occurred; creates a new right; gives rise to or takes away the right to sue or defend actions at law." Van Fossen, 36 Ohio St.3d at 107 (citations omitted); see, also, State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570. "In common usage, 'substantive' means 'creating and defining rights and duties' or 'having substance: involving matters of major or practical importance to all concerned[.]' Merriam-Webster's Collegiate Dictionary (11 Ed.2003) 1245. A substantive law is the 'part of the law that creates, defines, and regulates the rights, duties, and powers of parties.' Black's Law Dictionary (7 Ed.1999) 1443." Gen. Elec. Lighting v. Koncelik, Franklin App. Nos. 05AP-310 and 05AP-323, 2006-Ohio-1655, at ¶21.

{¶ 17} Conversely, "[r]emedial laws are those affecting only the remedy provided. These include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." Van Fossen, 36 Ohio St.3d at 107 (footnotes

omitted). "[L]aws which relate to procedures are ordinarily remedial in nature, including rules of practice, courses of procedure and methods of review." Van Fossen, 36 Ohio St.3d at 108 (citations omitted). Remedial laws are "those laws affecting merely 'the methods and procedure[s] by which rights are recognized, protected and enforced, not * * * the rights themselves.'" Bielat, 87 Ohio St.3d at 354, quoting Weil v. Taxicabs of Cincinnati, Inc. (1942), 139 Ohio St. 198, 205, 39 N.E.2d 148; see, also, State v. Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶15. Remedial laws affect only the remedy provided, and include laws that "'merely substitute a new or more appropriate remedy for the enforcement of an existing right.'" Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision (2001), 91 Ohio St.3d 308, 316, 744 N.E.2d 751, quoting State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; see, also, State ex rel. Romans v. Elder Beerman Stores Corp., 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82, at ¶15 (stating that remedial provisions are just what the name denotes-those that affect only the remedy provided). "'A statute undertaking to provide a rule of practice, a course of procedure or a method of review, is in its very nature and essence a remedial statute.'" Lewis v. Connor (1985), 21 Ohio St.3d 1, 3, 487 N.E.2d 285, quoting Miami v. Dayton (1915), 92 Ohio St. 215, 219, 110 N.E. 726. "Rather than addressing substantive rights, 'remedial statutes involve procedural rights or change the procedure for effecting a remedy. They do not, however, create

substantive rights that had no prior existence in law or contract.' Dale Baker Oldsmobile v. Fiat Motors of N. Am., (1986), 794 F.2d 213, 217." Euclid v. Sattler (2001), 142 Ohio App.3d 538, 540, 756 N.E.2d 201; see, also, State ex rel. Kilbane v. Indus. Comm. (2001), 91 Ohio St.3d 258, 259, 744 N.E.2d 708 ("Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, and generally come in the form of 'rules of practice, courses of procedure, or methods of review.'").

{¶ 18} In Van Fossen, the Ohio Supreme Court determined that R.C. 4121.80(G) was unconstitutionally retroactive. The statute provided a definition of the term "substantially certain": "'Substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death." Previously, the Ohio Supreme Court had defined substantial certainty as follows: "'Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain * * * to occur * * *.'" Id. at 108-109, quoting Jones v. VIP Development Co. (1984), 15 Ohio St.3d 90, 95, 472 N.E.2d 1046. The Van Fossen court stated that applying the new statute "would remove appellees' potentially viable, court-enunciated cause of action by imposing a new, more difficult statutory restriction upon appellees' ability to bring the instant action." Id. at 109. The court concluded that the statute "removes an employee's potential cause

of action against his employer by imposing a new, more difficult standard for the 'intent' requirement of a workers' compensation intentional tort than that established [under common law]." Id., paragraph four of the syllabus. The court concluded that this was a "new standard [that] constitute[d] a limitation, or denial of, a substantive right." Id.

{¶ 19} In Kunkler, the court determined that R.C. 4121.80(G)(1) was an unconstitutional, substantive, retroactive law. The court rejected the argument that "the new statute merely reiterates the common-law definition of an intentional tort * * *." Id. at 138. The court explained: "if the statute works no change in the common-law definition of intentional tort, the exercise in determining whether the statute applies to this case would be pointless." Id. "Since the new statute purports to create rights, duties and obligations, it is (to that extent) substantive law." Id.

{¶ 20} In Cook, the court determined that the sexual offender registration requirements of R.C. Chapter 2950 were not unconstitutionally retroactive. The court noted that "under the former provisions, habitual sex offenders were already required to register with their county sheriff. Only the frequency and duration of the registration requirements have changed. * * * * Further, the number of classifications has increased from one * * * to three * * * ." Id. at 411 (citations omitted). The court concluded that "the registration and address verification provisions of R.C. Chapter 2950 are de minimis procedural

requirements that are necessary to achieve the goals of R.C. Chapter 2950." Cook, 83 Ohio St.3d at 412.

{¶ 21} In Bielat, the court concluded that R.C. 1709.09(A) and 1709.11(D) constituted "remedial, curative statutes that merely provide a framework by which parties to certain investment accounts can more readily enforce their intent to designate a pay-on-death beneficiary." Id. at 354. "[T]he relevant provisions of R.C. Chapter 1709 remedially recognize, protect, and enforce the contractual rights of parties to certain securities investment accounts to designate a pay-on-death beneficiary. Before the Act, Ohio courts did not consistently recognize and enforce similar rights." Id. at 354-55. The new legislation "cure[d] a conflict between the pay-on-death registrations permitted in the Act and the formal requirements of our Statute of Wills." Id. at 356.

{¶ 22} In Kilbane, the court held that the settlement provisions in former R.C. 4123.65 were a course of procedure as part of the process for enforcing a right to receive workers compensation and, thus, was remedial legislation. The legislature had amended R.C. 4123.65 to remove the provision for Industrial Commission hearings on applications for settlement approval in State Fund claims.

{¶ 23} Two Ohio common pleas court cases have concluded that H.B. 292 constitutes unconstitutional retroactive legislation when applied to cases pending before the legislation's effective date. In In Re Special Docket No. 73958, January 6, 2006, three

Cuyahoga County Common Pleas Court judges determined that retroactively applying H.B. 292 violates Section 28, Article II of the Ohio Constitution because it requires "a plaintiff who filed his suit prior to the effective date of the statute to meet an evidentiary threshold that extends above and beyond the common law standard--the standard that existed at the time [the] plaintiff filed his claim." The court noted that Ohio common law required "a plaintiff seeking redress for asbestos-related injuries * * * to show that asbestos had caused an alteration of the lining of the lung without any requirement that he meet certain medical criteria before filing his claim," (citing In re Cuyahoga County Asbestos Cases (1998), 127 Ohio App.3d 358, 364, 713 N.E.2d 20),[4] and that H.B. 292 imposed new requirements regarding the quality of medical evidence to establish a prima facie asbestos-related claim. The court stated that the legislation "can retroactively eliminate the claims of those plaintiffs whose right to bring suit not only vested, but also was exercised." Because the court found application of the act

[4] The Asbestos Cases court explained the common law standard as follows:

> "[I]n Ohio the asbestos-related pleural thickening or pleural plaque, which is an alteration to the lining of the lung, constitutes physical harm, and as such satisfies the injury requirement for a cause of action for negligent failure to warn or for a strict products liability claim, even if no other harm is caused by asbestos. Verbryke v. Owens-Corning Fiberglas Corp. (1992), 84 Ohio App.3d 388, 616 N.E.2d 1162. The Verbryke court noted that 'even if Robert Verbryke's disease is asymptomatic it does not necessarily mean he is unharmed in the sense of the traditional negligence action.' Verbryke, supra, at 395, 616 N.E.2d at 1167."

Id. at 364.

unconstitutional, it applied R.C. 2307.93(A)(3)(b) which states that "in the event a court finds the retroactive application of the act unconstitutional, 'the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.'" If the plaintiff does not meet the prior standard, the court should administratively dismiss the claims. See R.C. 2307.93(A)(3)(c).

{¶ 24} In Thorton v. A-Best Products, Cuyahoga C.P. Nos. CV-99-395724, CV-99-386916, CV-01-450637, CV-95-293526, CV-95-293588-072, CV-95-296215, CV-03-499468, CV-95-293312-002, CV-00-420647, CV-02-482141, the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive. The court determined that H.B. 292 is substantive, as opposed to remedial, legislation: "[T]he Act's imposition of new, higher medical standards for asbestos-related claims is a substantive alteration of existing Ohio law which will have the effect of retroactively eliminating the claims of plaintiffs whose rights to bring suit previously vested." While the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive, it did not declare the legislation itself unconstitutional. The court found that the legislation cannot be unconstitutionally retroactive because R.C. 2307.93(A)(3)(a) precludes its application if to do so would violate Section 28, Article II of the Ohio Constitution.

{¶ 25} The court rejected the defendants' argument that the Act did not create a new standard for asbestos-related claims—similar to the argument appellees raise in the case sub judice:

> "Under R.C. 2305.10, Defendants argue it was the law of Ohio that an asbestos personal injury claim does not accrue until the plaintiff has developed an asbestos-related bodily injury and has been told by 'competent medical authority' that his injury was caused by his exposure to asbestos. However, in 1982 the legislature did not define the terms 'competent medical authority' and 'injury' in R.C. 2305.10. Defendants argue that the Act does not change the requirements for the accrual of an asbestos-related injury. Rather, the Act establishes minimum medical requirements and prima facie provisions to provide definitions and substantive standards for the provisions included by the legislature in R.C. 2305.10."

In rejecting the defendants' argument, the court noted that H.B. 292 requires the diagnosis of a "competent medical authority" and provides a specific definition of that phrase. "In contrast, R.C. 2305.10 does not define 'competent medical authority.' In the absence of a statutory definition, that meaning is supplied by common usage and common law." The court noted that no definition exists in the case law and thus, H.B. 292 requires medical experts "to 'jump additional hurdles' before they are permitted to walk into court."

{¶ 26} In the case at bar, applying R.C. Chapter 2307 to appellants' cause of action would remove their potentially viable, common law cause of action by imposing a new, more difficult statutory standard upon their ability to maintain the asbestos-related claims. The statute requires a plaintiff filing certain asbestos-related claims to present "competent medical

authority" to establish a prima facie case. The statute specifically defines "competent medical authority" and places limits on who qualifies as "competent medical authority." Previously, no Ohio court had placed such restrictions on what constituted competent medical authority. Instead, courts generally accepted medical authority that complied with the Rules of Evidence. This represents a change in the law, not simply a change in procedure or in the remedy provided. Therefore, the change is substantive and applying R.C. Chapter 2307 to appellants' asbestos-related claims would be unconstitutional. The legislation creates a new standard for maintaining an asbestos claim that was pending before the legislation's effective date and prohibits appellants from maintaining this cause of action unless they comply with the new statutory requirements. Because these requirements represent a substantive change in the law, they are not mere remedial requirements. Instead, they are substantive changes and may not be constitutionally applied retroactively. However, because the legislation contains a savings provision, the legislation itself is not unconstitutional. Thus, we conclude that applying H.B. 292 to appellants asbestos-related claims would be an unconstitutionally retroactive application.

{¶ 27} We disagree with appellees' assertion that the General Assembly, by enacting H.B. 292, simply "clarified" the law regarding asbestos-related litigation and R.C. 2305.10. In Nationwide Mut. Ins. Co. v. Kidwell (1996), 117 Ohio App.3d 633,

642-643, 691 N.E.2d 309, we observed that the General Assembly has the authority to clarify its prior acts. See Martin v. Martin (1993), 66 Ohio St.3d 110, 609 N.E.2d 537, fn. 2; Ohio Hosp. Assn. v. Ohio Dept. of Human Serv. (1991), 62 Ohio St.3d 97, 579 N.E.2d 695, fn. 4; State v. Johnson (1986), 23 Ohio St.3d 127, 131, 491 N.E.2d 1138; Hearing v. Wylie (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921. We explained:

> "When the Ohio General Assembly clarifies a prior Act, there is no question of retroactivity. If, however, the clarification substantially alters substantive rights, any attempt to make the clarification apply retroactively violates Section 28, Article II, Ohio Constitution. In Hearing [v. Wylie (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921], the court wrote as follows:
>
> 'Appellee has argued that the change made by the General Assembly in Section 4123.01, Revised Code, was not an amendment but was merely a clarification of what the General Assembly had always considered the law to be. There is, therefore, according to appellee, no question of retroactiveness so far as the application of the amendment to this action is concerned.
>
> With this contention we cannot agree. The General Assembly was aware of the decisions of this court interpreting the word, "injury." Those interpretations defined substantive rights given to the injured workmen to be compensated for their injuries. Those substantive rights were substantially altered by the General Assembly when it amended the definition of "injury." To attempt to make that substantive change applicable to actions pending at the time of the change is clearly an attempt to make the amendment apply retroactively and is thus violative of Section 28, Article II, Constitution of Ohio.' (Emphasis added.) Id., 173 Ohio St. at 224, 19 O.O.2d at 43-44, 180 N.E.2d at 923."

Nationwide Mut. Ins. Co. v. Kidwell (1996), 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309.

{¶ 28} In the case sub judice, H.B. 292 does not simply "clarify" prior legislation. Rather, H.B. 292 represents

entirely new legislation that changes the legal requirements for filing an asbestos-related claim. Before the legislation, a plaintiff was not required to set forth a prima-facie case. To the extent the legislation attempts to change the definition of "competent medical authority" in R.C. 2305.10, it is unconstitutional retroactive legislation when applied to cases pending before the effective date. Before the legislation's effective date, "competent medical authority" did not have the same stringent requirements that the legislation imposes. Instead, whether a plaintiff presented "competent medical authority" generally was determined by examining the rules of evidence. By purporting to change the definition of "competent medical authority" as used in R.C. 2305.10,[5] the legislation effects a substantive change in the meaning of that phrase.

{¶ 29} Consequently, we conclude that H.B. 292 cannot constitutionally be retroactively applied to appellants' asbestos-related claims. We therefore remand the case to the trial court so that it can evaluate appellants' cause of action under Ohio common law.

{¶ 30} Accordingly, we hereby sustain appellants' first assignment of error, reverse the trial court's judgment and

[5] We also question whether H.B. 292's definition of "competent medical authority" applies to R.C. 2305.10. The definition itself states that "competent medical authority" means a medical doctor who is providing a diagnosis for purposes of establishing a prima facie case under R.C. 2307.92; it does not state that it means a medical doctor who is providing a diagnosis for purposes of determining whether a claim accrued under R.C. 2305.10.

remand the matter for further proceedings. Our disposition of appellants' first assignment of error renders their remaining assignments of error moot and we will not address them. See App.R. 12(A)(1)(c).

JUDGMENT REVERSED AND CAUSE
REMANDED FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and the matter remanded for further proceedings consistent with this opinion. Appellant shall recover of appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, P.J.: Concurs in Judgment Only
Abele, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:
William H. Harsha
Presiding Judge

BY:
Peter B. Abele, Judge

BY:
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

APPENDIX

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(Cite as: Not Reported in N.W.2d)

C

Blatt v. Lynn

Mich.App.,1999.

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Paul J. BLATT and Faye Ruth Blatt, Plaintiffs-Appellants,

v.

Jerilynne Mary LYNN, Defendant-Appellee.

No. 209686.

June 22, 1999.

Before: ZAHRA, P.J., and SAAD and COLLINS, JJ.

PER CURIAM.

*1 Plaintiffs appeal as of right from an order granting defendant's motion for summary

disposition pursuant to MCR 2.116(C)(10). Plaintiff Paul Blatt filed this third-party no-fault action when his car was rear-ended by an auto driven by defendant. Plaintiff [FN1] alleges that he sustained ongoing neck, back, shoulder, and emotional injuries.

FN1. Mrs. Blatt is also a party to this action, but her claims are derivative to that of her husband. We use the term "plaintiff" only in reference to Mr. Blatt

I

This appeal concerns the retroactive application of a statutory amendment. Plaintiff was involved in an automobile accident on August 31, 1995. On March 28, 1996, a legislative amendment to Michigan's no-fault automobile insurance statute, M.C.L. § 500.3101 *et. seq.;* MSA 24.13101 *et. seq.,* took effect. 1995 PA 222. Prior to March 28, 1996, the language of M.C.L. § 500.3135; MSA 24.13135 required a party to suffer a serious impairment of a body function in order to seek non-economic damages, but the act did not define the term. In 1995, the Legislature extensively amended the no-fault statute to specifically define a serious impairment of a body function and to make the existence of a serious impairment a question of law for the court to resolve in most instances. Although plaintiff's accident took place before

the amendment became effective, he filed his complaint after March 28, 1996. The trial court applied the amended statute when it decided defendant's summary disposition motion, and concluded that plaintiff had not suffered a serious impairment of a body function for the purposes of the no-fault act.

On appeal, plaintiff argues that the trial court erred in applying the amended version of M.C.L. § 500.3135; MSA 24.13135, erred in concluding that plaintiff did not suffer a serious impairment of a body function under the amended statute, and finally, erred in ruling that amended language was not unconstitutional. We affirm.

II

Initially, plaintiff argues that the trial court erred in applying the amended version of M.C.L. § 500.3135; MSA 24.13135 retrospectively. Questions of statutory construction, including retrospective application, are reviewed de novo. *Michigan Basic Property Ins Ass'n v Ware,* 230 Mich.App 44, 48; 583 NW2d 240 (1998); *Haworth, Inc v. Wickes Mfg Co,* 210 Mich.App 222, 227; 532 NW2d 903 (1995).

The amended statute provides:

For a cause of action for damages pursuant to subsection (1) [i.e., for noneconomic damages for death, serious impairment of body function, or permanent serious disfigurement] *filed on or after 120 days after the effective date* of this subsection, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.... [MCL 500.3135(2); MSA 24.13135(2) (emphasis added).]

***2** The statute further provides that the term " 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7); MSA 24.13135(7).

Generally, statutes are presumed to operate only prospectively. *Riley v Northland Geriatric Center (After Remand),* 431 Mich. 632, 647 n 10; 433 NW2d 787 (1988). The Michigan

Supreme Court in *In re Certified Questions (Karl v Bryant Air Conditioning Co),* 416 Mich. 558, 570-572; 331 NW2d 456 (1982), outlined a number of considerations used when determining the retroactivity of a statute, including whether there is specific language in the new act which dictates that it should be given retrospective or prospective application, (*Hansen-Snyder Co v. General Motors Corp,* 371 Mich. 480; 124 NW2d 286 [1963]), whether the law takes away or impairs vested rights acquired under existing law, (*Ballog v. Knight Newspapers, Inc,* 381 Mich. 527, 533-534; 164 NW2d 19 [1969]); and whether the statute is remedial or procedural, in which case it will be given effect where the injury or claim is antecedent to the statutory enactment (*Rookledge v. Garwood,* 340 Mich. 444; 65 NW2d 785 [1954]).

The language of the amended provisions states that the amendment will apply to actions "filed on or after 120 days after the effective date". The effective date of this amendment is March 28, 1996; the 120-day period ended on July 26, 1996. Plaintiff filed his complaint on September 6, 1996. Contrary to plaintiff's argument that the amendment is silent with respect to retroactivity, this language indicates that the amendment will apply to actions filed after July 26, 1996, though the cause of action occurred before July 26, 1996.

Furthermore, it is well established that the general rule of prospectivity does not apply to

statutes or amendments that are remedial or procedural. *Thompson v. Merritt,* 192 Mich.App 412; 417; 481 NW2d 735 (1991). "A statute is remedial or procedural if it is designed to correct an existing oversight in the law or redress an existing grievance or is intended to reform or extend existing rights." *Id.* When a statute is uncertain "any amendment adopted which serves to clarify that uncertainty is ordinarily given retroactive effect." *Allstate Ins Co v. Faulhaber,* 157 Mich.App 164, 167; 403 NW2d 527 (1987). For example, in *Truby v Farm Bureau General Ins of Michigan,* 175 Mich.App 569, 575; 438 NW2d 249 (1988), this Court would not retroactively apply an amendment to the no-fault statute which eliminated personal protection benefits to a particular class of injured persons, because the amendment diminished existing rights. In contrast, in *Faulhaber, supra,* the Court retroactively applied an amendment to the no-fault statute which provided a definitive statute of limitations in reimbursement actions. The Court concluded that the amendment "did not create a new substantive right for insurance companies, but instead simply provided for a definitive statute of limitations in reimbursement actions" in order to clarify an ambiguity in the statute and provide for uniformity. *Id.,* 167.

***3** Here, the statutory amendment is procedural. The statute does not create or abolish substantive rights, but rather assigns the trial court the role of determining whether the plaintiff has alleged facts which establish a serious impairment of body function or permanent serious disfigurement, and clarifies the meaning of the term "serious impairment of body function."

MCL 500.3135; MSA 24.13135; 1995 PA 222. This amendment is comparable to the amendment in *Faulhaber,* which did not implicate existing rights, but instead clarified the law by specifying the statute of limitations. *Id.,* 167. Accordingly, the trial court did not err in applying the amendment retroactively.

We reject plaintiff's contention that the amendment cannot be applied retroactively because it abrogates his vested rights. Generally a statute, or amendment to a statute, which nullifies previously vested claims or rights will be given only prospective application. *Karl, supra* at 571. Here, plaintiff had no vested rights which were infringed upon by the amended statute. A right cannot be considered a vested right, unless it is something more than a mere expectation based upon an anticipated continuance of the present general laws. *Minty v. Bd of State Auditors,* 336 Mich. 370, 390; 58 NW2d 106 (1953). A vested right is one that gives the holder legal or equitable title to the present or future enforcement of a demand, or a legal exemption from a demand. *Detroit v. Walker,* 445 Mich. 682, 699; 520 NW2d 135 (1994). Certainly, plaintiff had no vested right to a jury trial under the pre-amendment language of the no-fault statute. Plaintiff had a mere expectancy of surviving summary disposition. Furthermore, a plaintiff's right to a jury trial is not affected by the statutory amendment. The statute simply requires the trial court to decide a threshold issue as a matter of law before the issues of fact reach the jury. Therefore, the trial court did not err in giving the amendment retrospective

application.

III

Plaintiff contends that questions of fact bar summary disposition even under the amended statute. Under the amended language of M.C.L. § 500.3135(7); MSA 24.13135(7), courts are now required to analyze three considerations in addressing a claim of serious impairment of a body function: objective manifestation, important body function, and lifestyle effect. MCL 500.3135(7); MSA 24.13135(7). Under these elements there is no question of fact that plaintiff's injuries were not objectively manifested, did not affect an important body function and had little or no effect of his lifestyle. Although they pre-date the amendment to the statute, plaintiff's failure to meet the threshold is supported by *Kallio v. Fisher,* 180 Mich.App 516, 519; 448 NW2d 46 (1989); *Johnston v. Thorsby,* 163 Mich.App 161, 163; 413 NW2d 696 (1987).

The concept of objective manifestation is not a new one in the analysis of threshold injuries, the concept being utilized to some extent by *Cassidy v. McGovern,* 415 Mich. 483; 330 NW2d 22 (1982), and *DiFranco v. Pickard,* 427 Mich. 32, 70-75; 398 NW2d 896 (1986). The Supreme Court most recently discussed the objective manifestation issue in *DiFranco,* which held that

plaintiffs must introduce evidence establishing a physical basis for their subjective complaints of pain and suffering. *Id.*, at 74-75. Plaintiff fails to satisfy this requirement, as he has never had any objective manifestation of injuries other than a shoulder separation diagnosed a year after the accident.

***4** The issue of important body function was a recurring litigation dispute even before the amended statute; therefore, this Court is not completely without guidance as to its meaning. The new wording of the statute is akin to the idea raised by *Cassidy supra* at 505:

The language "impairment of body function" is ambiguous regarding whether the impairment must be of any body function or of the entire body function. On the one hand, if any body function were to be considered the intended meaning, arguably a serious impairment of the use of the little finger would meet the threshold requirement. On the other hand, if an impairment had to be of the entire body function, then arguably only life-threatening injuries would satisfy the requirement. We believe that neither of these options accurately reflect the legislative intent and that impairment of body function is better understood as referring to important body functions. [*Id.*, at 505.]

Under the new language of the no-fault act, reasonable minds could not differ that plaintiff did

not suffer an objectively manifested impairment of an important body function that affected his general ability to lead his normal life; therefore, plaintiff did not meet the serious impairment of body function threshold. Assuming, arguendo, that the injuries to plaintiff's neck, back, shoulder, and psyche impair important body functions, plaintiff fails to met the other components of the amended statute: the injuries have had negligible effect on his ability to lead a normal life. This is evideneed by plaintiff's failure to seek immediate medical treatment after the accident; his successful continuation of his career post-accident, including pay raises and good evaluations; his continued frequent attendance at a gym; his lack of need for prescribed medications, other than Motrin and Flexeril shortly after the accident; his failure to seek any medical services between December 11, 1995 and August 7, 1996; the absence of a claim for replacement services from his own no-fault insurer; the successful completion of physical therapy; and plaintiff's failure to seek therapy for panic attacks until August 26, 1996, nearly a year after the accident. This evidence demonstrates that, while plaintiff did suffer injuries and had resulting pain from the accident, these injuries did not rise to the level of the serious impairment of a body function. The trial court correctly ruled that plaintiff failed to establish a serious impairment of a body function.

IV

Finally, plaintiff argues that the amended no-fault statute is unconstitutional and a legislative usurption of the Supreme Court's power. As noted above, plaintiff had no vested rights that were abridged by the amended no-fault statute, therefore the legislation did not unconstitutionally impair his interests. In addition, plaintiff did not file a timely claim for a jury trial, but instead relied on defendant's request for a jury trial. His argument relating to the limitation on our Supreme Court's power to dictate court procedures is thus moot.

***5** Affirmed.

Mich.App.,1999.

Blatt v. Lynn

Not Reported in N.W.2d, 1999 WL 33441163 (Mich.App.)

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IN THE SUPREME COURT OF OHIO

LINDA ACKISON, Administratrix of the estate of Danny Ackison,	:	Case Nos. 2007-0219; 2007-0415
Appellee,	:	On appeal from the Lawrence County Court of Appeals, Fourth Appellate District
v.	:	
	:	Court of Appeals Case No. 05 CA 46
ANCHOR PACKING Co., et al.,	:	
Appellants	:	

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APPENDIX – PART II

--- S.W.3d ----, 2006 WL 1168782 (Tex.App.-Hous. (14 Dist.))
(Cite as: --- S.W.3d ----)

H

Robinson v. Crown Cork & Seal Co., Inc.

Tex.App.-Houston [14 Dist.],2006.

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas,Houston (14th Dist.).

Barbara ROBINSON, Individually and as Representative of the Estate of John Robinson, Deceased, Appellant

v.

CROWN CORK & SEAL COMPANY, INC., Appellee.

No. 14-04-00658-CV.

May 4, 2006.

Background: Worker diagnosed with mesothelioma brought action against successor to

manufacturer of asbestos products, seeking to recover for damages caused by exposure to asbestos. The 55th District Court, Harris County, entered summary judgment in favor of defendant pursuant to statute limiting liability of successor corporations for asbestos-related claims. Worker appealed.

Holdings: The Court of Appeals, Wanda McKee Fowler, J., held that:

(1) statute limiting liability of successor corporations for asbestos-related claims was a reasonable exercise of State's police power and was not unconstitutionally retroactive;

(2) statute was not an unconstitutional "special law," even if only defendant fit within statute's restrictive details; and

(3) statutory limitation on liability applied to defendant.

Affirmed.

Frost, J., dissented and filed opinion.

[1] Constitutional Law 92 ⇦190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

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101 Corporations

101XI Corporate Powers and Liabilities

101XI(C) Property and Conveyances

101k441 Conveyances by Corporations

101k445.1 k. Assumption of Transferor's Liabilities. Most Cited Cases

Statute limiting liability of successor corporations for asbestos-related claims was a reasonable exercise of State's police power and was not unconstitutionally retroactive; goal of statute was

to benefit fiscal health of the State and its inhabitants, statute was limited in scope to target those corporations most in need of financial relief and assistance, and statute was limited in scope to companies least responsible for continued manufacture of asbestos. Vernon's Ann.Texas Const. Art. 1, § 16; V.T.C.A., Civil Practice & Remedies Code § 149.001 et seq.

Statute limiting liability of successor corporations for asbestos-related claims was a reasonable exercise of State's police power and was not unconstitutionally retroactive; goal of statute was to benefit fiscal health of the State and its inhabitants, statute was limited in scope to target those corporations most in need of financial relief and assistance, and statute was limited in scope to companies least responsible for continued manufacture of asbestos. Vernon's Ann.Texas Const. Art. 1, § 16; V.T.C.A., Civil Practice & Remedies Code § 149.001 et seq.

[2] Constitutional Law 92 ⇦81

92 Constitutional Law

92IV Police Power in General

92k81 k. Nature and Scope in General. Most Cited Cases

State's police power, though not unfettered, is broad and comprehensive; it is founded upon public necessity which alone can justify its exercise, and hinges upon the public need for safety,

health, security, and protection of the general welfare of the community.

[3] Constitutional Law 92 ⇦188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

When a statute is attacked as violating the state constitution's retroactivity clause, the language of the clause must be balanced against the state's interest in exercising its police power; although the language of the retroactivity clause is facially absolute, its prohibition must be accommodated to the inherent police power of the state to safeguard the interests of its people. Vernon's Ann.Texas Const. Art. 1, § 16.

[4] Corporations 101 ⇦445.1

101 Corporations

101XI Corporate Powers and Liabilities

101XI(C) Property and Conveyances

101k441 Conveyances by Corporations

101k445.1 k. Assumption of Transferor's Liabilities. Most Cited Cases

Corporations 101 ⚿590(4)

101 Corporations

101XIV Consolidation

101k590 Liabilities for Debts and Acts of Original Corporations

101k590(4) k. Liability for Torts. Most Cited Cases

Fiscal health of the State and its inhabitants is the goal of statute limiting liability of successor corporations for asbestos-related claims. V.T.C.A., Civil Practice & Remedies Code § 149.001 et seq.

[5] Constitutional Law 92 ⚿81

92 Constitutional Law

92IV Police Power in General

92k81 k. Nature and Scope in General. Most Cited Cases

If there is room for a fair difference of opinion as to the necessity and reasonableness of a

legislative enactment on a subject which lies within the police power, the courts will not hold it void.

[6] Constitutional Law 92 ⇐81

92 Constitutional Law

92IV Police Power in General

92k81 k. Nature and Scope in General. Most Cited Cases

Financial viability of the State and businesses in the State is a valid exercise of police power.

[7] Statutes 361 ⇐77(1)

361 Statutes

361II General and Special or Local Laws

361k77 Laws of Special, Local, or Private Nature in General

361k77(1) k. In General. Most Cited Cases

A "special law," within meaning of state constitutional provision providing that "where a general law can be made applicable, no local or special law shall be enacted," is defined as one limited to a particular class of persons distinguished by some characteristic other than

geography. Vernon's Ann.Texas Const. Art. 3, § 56(b).

[8] Statutes 361 ⇐67

361 Statutes

361II General and Special or Local Laws

361k67 k. Constitutional Requirements and Restrictions. Most Cited Cases

Purpose of state constitutional prohibition on special laws is to prevent the granting of special privileges and to secure uniformity of law throughout the State as far as possible; in particular, it prevents lawmakers from engaging in the practice of trading votes for the advancement of personal rather than public interests. Vernon's Ann.Texas Const. Art. 3, § 56.

[9] Statutes 361 ⇐77(1)

361 Statutes

361II General and Special or Local Laws

361k77 Laws of Special, Local, or Private Nature in General

361k77(1) k. In General. Most Cited Cases

Statute is not a "special law," for purposes of state constitutional prohibition on special laws, if

persons or things throughout the State are affected by it, or if it operates upon a subject in which the people at large are interested. Vernon's Ann.Texas Const. Art. 3, § 56.

[10] Constitutional Law 92 ⇦48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

In passing upon the constitutionality of a statute, courts begin with a presumption of validity.

[11] Constitutional Law 92 ⇦48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

Courts presume that the Legislature has not acted unreasonably or arbitrarily, and the burden is on party who challenges the statute to establish its unconstitutionality.

[12] Statutes 361 ⇦77(1)

361 Statutes

361II General and Special or Local Laws

361k77 Laws of Special, Local, or Private Nature in General

361k77(1) k. In General. Most Cited Cases

Limits to the Legislature's authority under state constitutional prohibition on special laws are that the classification must be (1) broad enough to include a substantial class, and (2) based on characteristics legitimately distinguishing the class from others with respect to the public purpose sought to be accomplished by the proposed legislation. Vernon's Ann.Texas Const. Art. 3, § 56.

[13] Statutes 361 ⇦77(1)

361 Statutes

361II General and Special or Local Laws

361k77 Laws of Special, Local, or Private Nature in General

361k77(1) k. In General. Most Cited Cases

Primary and ultimate test of whether a law is general or special, for purposes of state c onstitutional prohibition on special laws, is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class. Vernon's Ann.Texas Const. Art. 3, § 56.

[14] Statutes 361 ⇦77(1)

361 Statutes

361II General and Special or Local Laws

361k77 Laws of Special, Local, or Private Nature in General

361k77(1) k. In General. Most Cited Cases

Before a statute can be struck down as violating state constitutional prohibition on special laws it must clearly appear that there is no reasonable basis for the classification adopted by the Legislature to support the statute; this lack of reasonable basis should be a substantial thing and not something merely apparent but not real. Vernon's Ann.Texas Const. Art. 3, § 56.

[15] Corporations 101 ⇦445.1

101 Corporations

101XI Corporate Powers and Liabilities

101XI(C) Property and Conveyances

101k441 Conveyances by Corporations

101k445.1 k. Assumption of Transferor's Liabilities. Most Cited Cases

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Statutes 361 ⇐85(1)

361 Statutes

361II General and Special or Local Laws

361k85 Regulation of Civil Remedies and Proceedings

361k85(1) k. In General. Most Cited Cases

Statute limiting liability of successor corporations for asbestos-related claims was not an unconstitutional "special law," even if only one corporation fit within statute's restrictive details, and that corporation was mentioned expressly by legislator during legislative committee meeting; statute reasonably narrowed the class to include only the most innocent of successor corporations, excluding those that continued in the asbestos business, and corporation's inclusion in class was rationally related to statute's purpose of limiting innocent successors' liability. Vernon's Ann.Texas Const. Art. 3, § 56; V.T.C.A., Civil Practice & Remedies Code §

149.001 et seq.

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[16] Constitutional Law 92 ⇐48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

Constitutional Law 92 ⇐48(6)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(4) Application to Particular Legislation or Action or to Particular Constitutional Questions

92k48(6) k. Classification, Uniformity and Discrimination; Special or Local Laws. Most Cited Cases

Courts must indulge a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.

[17] Civil Rights 78 ⇐1748

78 Civil Rights

78V State and Local Remedies

78k1747 Questions of Law or Fact

78k1748 k. In General. Most Cited Cases

Constitutional Law 92 ⇐48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

Generally, the constitutionality of a law is not to be determined on a question of fact to be ascertained by the court, and if under any possible state of facts an act would be constitutional, the courts are bound to presume such facts exist; therefore the courts will not make a separate investigation of the facts, or attempt to decide whether the legislature has reached a correct conclusion with respect to them.

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conclusion with respect to them.

[18] Judgment 228 ⇦185(5)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(5) k. Weight and Sufficiency. Most Cited Cases

Judgment 228 ⇦185(6)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(6) k. Existence or Non-Existence of Fact Issue. Most Cited Cases

Summary judgment for a defendant is proper only when the defendant negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes

each element of an affirmative defense.

[19] Corporations 101 ⚿445.1

101 Corporations

101XI Corporate Powers and Liabilities

101XI(C) Property and Conveyances

101k441 Conveyances by Corporations

101k445.1 k. Assumption of Transferor's Liabilities. Most Cited Cases

Successor corporation's selling asbestos products, following purchase of asbestos manufacturer, for only three months until a division was sold, did not qualify as "continuing the asbestos related business" as contemplated by statute limiting liability of successor corporations for asbestos-related claims, and thus limitation on liability would apply to successor corporation. V.T.C.A., Civil Practice & Remedies Code § 149.001 et seq.

Deborah G. Hankinson, Jeffery Mundy and Elana S. Einhorn, for Barbara Robinson Individually and as Representative of the Estate of John Robin.

Frank Harmon and Kimberly Rose Stuart, for CROWN CORK & SEAL COMPANY, INC.,

--- S.W.3d ----, 2006 WL 1168782 (Tex.App.-Hous. (14 Dist.))
(Cite as: --- S.W.3d ----)

Individually and as Successor to Mundet Cork Co.

Panel consists of Chief Justice HEDGES and Justices FOWLER and FROST.

MAJORITY OPINION

WANDA McKEE FOWLER, Justice.

***1** At its essence, this appeal requires us to consider the breadth of the Legislature's power to curtail individual rights. John and Barbara Robinson sued Crown Cork and others after discovering Mr. Robinson had developed mesothelioma from years of working with products containing asbestos. In the trial court, Crown Cork admitted liability; however, before the court entered judgment, the Legislature enacted-and made immediately effective-a law that would preclude any recovery by the Robinsons from Crown Cork.

The Legislature, concerned about the financial toll of asbestos suits, limited the liability of corporations that (1) had purchased companies manufacturing asbestos, but (2) did not continue in the asbestos business. By making the legislation effective immediately, the Legislature affected the Robinsons' suit. Crown Cork moved for summary judgment, arguing that the legislation exempted it from paying any damages to the Robinsons because the damages it had already paid to other plaintiffs exceeded the monetary cap contained in the legislation. The trial

court agreed and granted summary judgment in favor of Crown Cork.

Mrs. Robinson [FN1] attacks the summary judgment on three grounds, two of which are constitutional in nature. First, Mrs. Robinson claims that the legislation is unconstitutionally retroactive as applied to her because it extinguished a vested right. Next, she claims that the law is unconstitutional because it is a special law, designed specifically to aid Crown Cork. Finally, she claims that Crown Cork failed to establish as a matter of law each element of its affirmative defense.

As to Mrs. Robinson's first issue, we agree that the legislation acted retroactively upon her claims. But we do not conclude that the legislation is unconstitutionally retroactive as applied to Mrs. Robinson because it was a "valid exercise of the police power by the Legislature to safeguard the public safety and welfare...." *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633-34 (Tex.1996).

Regarding Mrs. Robinson's second constitutional claim-that the statute is unconstitutional because it is a special law-we conclude the statute is not a special law. Clearly it was drafted to include Crown Cork within its scope, but it was not written to exclude companies similarly situated to Crown Cork. And, because it operates on a subject in which the public at large is

interested, it affects all of the citizens of the State.

Finally, we hold that Crown Cork proved the elements of its affirmative defense as a matter of law. Consequently, we affirm the trial court's judgment. We explain below.

Factual Background

John Robinson joined the United States Navy in 1956, and served for approximately twenty years as a boiler tender on several Navy vessels. Mr. Robinson maintained boilers, pipes, steam lines, and other machinery and equipment insulated with asbestos products, including insulation products of Mundet Cork Corporation.

***2** Crown Cork is a manufacturer and distributor of packaging products for consumer goods. In 1963, Crown Cork, then a New York corporation, was the nation's largest producer and seller of metal bottle caps, known in the industry as "crowns." Mundet also produced and sold crowns. Seeking to acquire the assets of Mundet's competing bottle cap division, in November of 1963, Crown Cork purchased the majority of Mundet stock. Approximately three months later, Mundet sold its insulation division.[FN2] Crown Cork continued to purchase Mundet stock until

February of 1966, when the remaining assets of Mundet were transferred to Crown Cork by merger. In 1989, Crown Cork merged into a new Pennsylvania corporation of the same name.

Years later, John Robinson was diagnosed with mesothelioma. He and his wife, Barbara, sued Crown Cork, Mundet's successor, and others for damages caused by Mr. Robinson's exposure to asbestos. The Robinsons moved for partial summary judgment to establish Crown Cork's liability for the damages allegedly caused by Mundet's products. Crown Cork did not contest its liability for compensatory damages. The trial court granted the Robinsons' motion as to compensatory damages, but not as to punitive damages.

While the Robinsons' suit was pending, the Texas Legislature passed House Bill 4; House Bill 4 included a new affirmative defense limiting the liability of successor corporations for asbestos-related claims. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847. Section 17 of House Bill 4 directly impacted the Robinsons' suit. That section provides that certain successor corporations of asbestos manufacturers may limit their total asbestos liability to the total gross asset value of the predecessor company at the time of the merger or consolidation. *Id.* § 17.01. The only section of House Bill 4 made immediately effective upon its passage by two-thirds of each house of the Legislature was Section 17; it became effective on June 11, 2003. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 23.02(b), 2003 Tex. Gen.

Laws 898, 899. In addition, the only section made retroactive to all cases pending on its effective date was, again, Section 17. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.02(2), 2003 Tex. Gen. Laws 895. Section 17 is codified at Chapter 149 of the Texas Civil Practice & Remedies Code, entitled "Limitations in Civil Actions of Liabilities Relating to Certain Mergers or Consolidations." *See* Tex. Civ. Prac. & Rem.Code Ann. §§ 149.001-.006. Throughout the remainder of the opinion we will refer to Section 17 as "the Statute."

The stated purpose of the Statute is to limit cumulative "successor asbestos-related liabilities" [FN3] in Texas. A successor corporation is liable for asbestos claims [FN4] only up to the total gross assets of the transferor corporation from whom it received the asbestos-related liabilities; total gross assets are determined as of the time of the merger or consolidation. *See id.* § 149.003(a); *see also id.* §§ 149.001(4) (defining "successor" as "a corporation that assumes or incurs, or has assumed or incurred, successor asbestos-related liabilities"); 149.001(5) (defining "transferor" as "a corporation from which successor asbestos-related liabilities are or were assumed or incurred").[FN5] A successor corporation is not responsible for successor asbestos-related liabilities that exceed this limitation. *Id.* § 149.003(a). Additionally, the Statute provides that, if a transferor corporation had assumed or incurred successor asbestos-related liabilities from a prior merger or consolidation with a transferor, then the fair market value of the total assets of the first transferor shall be used to determine the successor corporation's

liability. *Id.* § 149.003(b). To the fullest extent permissible, Texas law applies to successor asbestos-related liabilities. *See id.* § 149.006 ("The courts in this state shall apply, to the fullest extent permissible under the United States Constitution, this state's substantive law, including the limitation under this chapter, to the issue of successor asbestos-related liabilities.").

***3** As noted previously, after the Statute became effective, Crown Cork moved for summary judgment. Crown Cork argued that it had already paid successor asbestos claims in excess of Mundet's total gross assets, and therefore, it had no further liability in any asbestos case.[FN6] The trial court granted the motion and severed the Robinsons' claims against Crown Cork from those against the other defendants. This appeal followed.

Robinson's Issues

On appeal, Mrs. Robinson raises three issues, contending the trial court erred in granting Crown Cork's motion for summary judgment because (1) the Statute violates the Texas Constitution's prohibition on retroactive laws, (2) the Statute violates the Texas Constitution's prohibition on special laws, and (3) Crown Cork failed to establish as a matter of law each element of the Statute.

I. The Statute Does Not Violate the Texas Constitution's Prohibition on Retroactive Laws.

In her first issue, Mrs. Robinson contends the Statute violates Article I, section 16 of the Texas Constitution. That section provides as follows: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Tex. Const. art I, § 16. Mrs. Robinson does not contend section 16 bans all retroactive laws. Instead, she argues *vested* rights cannot be extinguished retroactively; she maintains that an accrued cause of action is a vested right and thus not retroactively extinguishable. She asserts that her accrued tort claims were vested before the Statute became effective and therefore could not be extinguished by subsequently enacted legislation. Yet, she argues, the Statute completely eliminated the accrued tort claims against Crown Cork in contravention of section 16.[FN7]

We do not find the law on vested rights to be as consistent and lucid as Mrs. Robinson claims. For this reason, as we explain below, we choose not to employ a vested-rights analysis to assess the Statute's constitutionality. Instead, we conclude that we may look to the police power of the Legislature to find authority for the Statute's enactment and for its validation-in spite of its retroactivity. The Legislature may exercise its police power to balance competing individual and societal interests and to enact legislation that reasonably responds to the issues and interests before it. That power and responsibility goes to the very essence of the Legislature's role in our

tripartite democratic system.

A. The Case Law on Vested Rights is Inconsistent and Difficult to Use as a Guide.

Courts have struggled for years to settle upon a reliable method for judging the constitutionality of a retroactive statute. Many Texas courts and courts of other states have used the designation " vested right" to describe a right that cannot be abrogated by a retroactive law. *See, e.g., Middleton v. Tex. Power & Light,* 108 Tex. 96, 185 S.W. 556, 560 (1916); *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 253 (1887); *Phillips v. Curiale,* 128 N.J. 608, 608 A.2d 895, 901-02 (1992); *Peterson v. City of Minneapolis,* 285 Minn. 282, 173 N.W.2d 353, 356-358 (1969); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L.Rev.. 692, 696 (1960); Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation,* 51 Nw. U.L.Rev. 540, 561-62 (1956). But a problem arises when one tries to define a vested right. Some Texas cases arguably have used language implying that an accrued cause of action is a vested right. *See Mellinger,* 3 S.W. at 253 ("When ... a state of facts exists as the law declares shall entitle a plaintiff relief in a court of justice on a claim which he makes against another ..., then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation ...."); *but see Ex Parte*

Abell, 613 S.W.2d 255, 261 (Tex.1981) ("[A] right cannot be considered a vested right unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable to the present or future enjoyment of a demand or a legal exemption from the demand made by another."). Other cases have held that a right is not vested until a final judgment is entered. *See Walls v. First State Bank of Miami,* 900 S.W.2d 117, 122 (Tex.App.-Amarillo 1995, writ denied) (stating that "only final, nonreviewable judgments will be accorded the dignity of vested, constitutionally guarded rights...."); *Houston Indep. Sch. Dist. v. Houston Chronicle Pub. Co.,* 798 S.W.2d 580, 589 (Tex.App.-Houston [1st Dist.] 1990, writ denied) (stating that " the triggering event for the vesting of a right is the resolution of the controversy and the final determination....").

*4 Thus, our predicament in answering the precise question Mrs. Robinson has raised-whether her allegedly vested right was retroactively altered in an unconstitutional way-is this: no clear answer exists. For example, Mrs. Robinson declares that her tort claims were vested rights because the set of facts underlying her cause of action had already occurred. This long has been a way of describing vested rights. *See Mellinger,* 3 S.W. at 253-54. But even this designation is subject to variances in application, as the following quote, written more than seventy-five years ago, illustrates:

One's first impulse on undertaking to discuss retroactive laws and vested rights is to define a vested right. But when it appears, as soon happens, that this is impossible, one decides to fix the attention upon retroactive laws and leave the matter of definition to follow rather than precede the discussion, assuming for the purpose that a right is vested when it is immune to destruction, and that it is not vested when it is liable to destruction, by retroactive legislation. The simplification of the task which this plan seems to involve, turns out to be something of an illusion, however, when it appears, as also soon happens, that one's preconceived notions of retroactive laws are irreconcilable with the data with which one has to deal.

Bryant Smith, *Retroactive Laws and Vested Rights,* 5 Tex. L.Rev. 231, 231 (1927) (footnote omitted). Apparently, the job of ascertaining when a right is vested, and when it is not, has vexed courts and commentators for years.

B. Some Courts Have Looked to Alternative Methods to Assess When a Statute is Unconstitutionally Retroactive.

Courts in other states also have recognized the dilemma they confront when an allegedly vested right is pitted against a retroactive law:

"[D]iscerning commentators and judges" have questioned the value of vested-rights analysis and have suggested that "the true test of the constitutionality of a retrospective law is whether a party has changed his [or her] position in reliance upon the existing law, or whether the retrospective act gives effect to or defeats the reasonable expectations of the parties." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L.Rev.. 692, 696 (1960) (Hochman) (footnotes omitted). Although agreeing that the parties' reasonable expectations may be relevant, Hochman has argued that the constitutionality of a retroactive statute is in fact determined by courts through a weighing of the following factors: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates the asserted right, and (3) the nature of the right that the statute alters. *Id.* at 697. In *Rothman v. Rothman,* 65 N.J. 219, 320 A.2d 496 (1974), we applied a similar test to determine whether a retroactively-applied statute constituted a deprivation of due process. We said in *Rothman* that that analysis essentially involves asking whether, after examining the importance of the public interest served by the statute and comparing it with and balancing it against the quality and value of the right affected by the retroactive legislation, [one could conclude] that the statute in question represented a valid exercise of police power, despite the * * * clear incursion upon individual private rights. [*Id.* at 226, 320 A.2d 496.] *See also Berkley Condominium Ass'n v. Berkley Condominium Residences, Inc.,* 185 N.J.Super. 313, 320, 448 A.2d 510 (Ch.Div.1982) (when determining what rights may become vested, "one

must examine what it is that is being taken away and weigh that loss against the social gain being achieved").

***5** *Phillips,* 608 A.2d at 902; *see also Nobrega v. Edison Glen Assoc.,* 167 N.J. 520, 772 A.2d 368, 379-83 (2001) (noting that New Jersey courts have had difficulty clearly defining "vested right" and choosing to use a "rational basis" inquiry rather than a "vested rights" inquiry).

The Texas Supreme Court also has acknowledged the quandary. *See Texas Water Rights Comm'n v. Wright,* 464 S.W.2d 642, 648-49 (Tex.1971). Justice Pope, speaking for the Court, acknowledged the confusion in the case law, noting that "[a] number of scholars have endeavored to discover the underlying rationale for the cases which either uphold or strike down a statute which is attacked as unconstitutionally retroactive." *Id.* at 649. Justice Pope then briefly discussed several alternative methods commentators have relied on to determine if a law was unconstitutionally retroactive.[FN8] *Id.*

In light of the inconsistency surrounding vested rights and the apparent difficulty in determining if a right is vested, we will follow Justice Pope's lead and use a gauge other than vested rights to measure the Statute's constitutionality.

C. The Legislature's Police Power to Enact Retroactive Laws.

Facing claims that a statute unconstitutionally abrogated allegedly vested rights, a number of older Texas court of appeals opinions have resolved the issue by considering the Legislature's police power. *See, e.g., Texas State Teachers Ass'n v. State,* 711 S.W.2d 421, 424 (Tex.App.-Austin 1986, writ ref'd n.r.e.); *Ismail v. Ismail,* 702 S.W.2d 216, 222 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.); *State Bd. of Registration for Prof'l Eng'rs v. Wichita Eng'g Co.,* 504 S.W.2d 606, 608 (Tex.Civ.App.-Fort Worth 1973, writ ref'd n.r.e.); *City of Breckenridge v. Cozart,* 478 S.W.2d 162, 165 (Tex.Civ.App.-Eastland 1972, writ ref'd n.r.e.); *City of Coleman v. Rhone,* 222 S.W.2d 646, 648 (Tex.Civ.App.-Eastland 1949, writ ref'd.). The Texas Supreme Court also has done this, most recently relying on the police power to validate a retroactive statute in *Barshop v. Medina County Underground Water Conservation District,* 925 S.W.2d 618, 633-34 (Tex.1996). *Barshop* gives scant guidance on how to measure the legitimacy of an act of police power against a private right. Fortunately, a number of the courts of appeals considering the issue have written rather extensively on the balancing of rights they have performed when comparing a statute with the private right that is being altered. After looking generally at the scope of the police power, we will then follow the lead of these courts by considering the reasons the legislature enacted the Statute, including precautions taken to narrow the scope of the Statute's reach. Then, we will measure those legislative

justifications against the private rights the Statute impacts.

1. *The Legislature's Police Power.*

[1] Although Mrs. Robinson strenuously argues that we cannot rely on the police power to validate the Statute, we disagree. In fact, we are of the opinion that the enactment of the Statute was a reasonable exercise of the Legislature's police power.

***6** [2] Many courts have spoken to the breadth of the police power. Though not unfettered, it is "broad and comprehensive." *Rhone,* 222 S.W.2d at 648. "It is founded upon public necessity which alone can justify its exercise" and "hinges upon the public need for safety, health, security, and protection of the general welfare of the community." *Id.*

[3] When a statute is attacked as violating the retroactivity clause, the language of the clause must be balanced against the state's interest in exercising its police power. *See Texas State Teachers Ass'n v. State,* 711 S.W.2d at 425. "Although the language of the [retroactivity] clause is facially absolute, its prohibition must be accommodated to the inherent police power of the state 'to safeguard the interests of its people.' " *Id.* at 424 (quoting *Energy Reserves v. Kan.*

Power & Light, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)). For this reason, we must balance the two, and, for this reason, "the nature of the power being exercised by the state is important in determining whether any resulting impairment is permissible." *Id.* at 425; *see also Lebohm v. City of Galveston,* 154 Tex. 192, 275 S.W.2d 951, 955 (1955) (stating that the Legislature may withdraw a common-law remedy for a well-established common-law cause of action when it is a reasonable exercise of police power in the interest of the general welfare); *Cozart,* 478 S.W.2d at 165 ("Police power is not static and unchanging. As the affairs of the people and government change and progress, so the police power changes and progresses to meet the needs.").

2. *The Statute's Purpose.*

[4] Certainly the fiscal health of this State and its inhabitants contributes to the welfare of the citizenry and is an important concern of the public at large. The fiscal health of the State and its inhabitants were the main goals of this legislation. We quote extensively from the Statement of Legislative Intent accompanying the Statute to illustrate the reasonableness of the Statute's purpose and the Legislature's attempts to make its impact as narrow as possible:

-There was concern that the benefits of this legislation should be limited in some way to those

successor corporations who were the most innocent about the potential hazards of asbestos;

-There was further concern that the benefits should be limited in some way to innocent successors who were also at the greatest financial peril, especially those threatened with bankruptcy;

-There was also concern that the legislature should test this new concept by taking one step at a time and providing realistic relief to those innocent successor corporations most at peril financially without limiting every type of asbestos liability.

In order to meet these concerns, the limitations on total liability were themselves narrowed or restricted in three ways-by two restrictions premised upon the innocence of the successor and one based upon financial viability.

*7 To focus the benefits upon innocent successor corporations, two restrictions were added:

-Under § 149.002(a), the original transfer of successor asbestos liabilities has to have occurred prior to May 13, 1968. Of course, subsequent successors who receive only that same bundle of original asbestos liabilities through successive mergers will also be entitled to the liability limits applicable to that first successor pre-1968 no matter when the later mergers occur.

It wasn't until the mid-1960s that Dr. Irving Selikoff issued his now famous warnings about the dangers of asbestos in the workplace. The earliest date after Selikoff's warnings when even a quasi-governmental organization in the United States suggested a tighter standard for asbestos in the workplace was, however, May 13, 1968. On that date, the influential American

Conference of Governmental Industrial Hygienists (ACGIH) first adopted a change in the recommended, longstanding threshold limit for asbestos in the air of a workplace from 5 mppcf to 2 mppcf (the ACGIH 1958 Standard).

A successor corporation would therefore have been much less likely to be aware of the hazards of asbestos prior to May 13, 1968. By requiring that the first transfer of asbestos liabilities to a successor occurred prior to May 13, 1968, the legislation therefore focuses its benefits upon innocent successors.

-One class of successors might, however, have been less innocent than others: those in the asbestos business. Therefore, § 149.002(b)(5) restricts the benefits of the legislation to successor corporations that did not continue the predecessor's asbestos business: the business of mining asbestos, of selling or distributing asbestos fibers, or of manufacturing, distributing, installing, or removing asbestos products. A successor that did not merge with a predecessor in order to continue that predecessor's asbestos business was less likely to have known of the hazards of asbestos. For example, a successor that was merely trying to acquire a predecessor's non-asbestos line of business would be less knowledgeable about asbestos than a successor who wanted to continue a predecessor's asbestos line of business. A successor that did not continue the asbestos business of its predecessor also could not have caused any of the injuries that arose from the discontinued asbestos business.

Together, the preceding restrictions limit the benefits of the statute to those who were more

innocent than others and were unwittingly saddled with often massive longtail liabilities only because of a merger.

The third restriction in the legislation deals primarily with the issue of financial viability. Corporations actually in the asbestos business and their successors through merger have been financially drained by decades of litigation. As a result, nearly 70 such corporations have sought protection through bankruptcy. The cost in jobs and pension benefits, to cite just two examples, has been substantial. This legislation seeks to help keep remaining hard-pressed successors out of bankruptcy. In an effort to help those most in need first, the legislation focuses upon the most hard-pressed of successors, rather than all successors. Any successor would be liable-even beyond the total gross asset value of its predecessor-for any asbestos-related premises liabilities it received from a predecessor for injuries caused on premises the successor continued to own or control after a merger. Such successors have not thus far been so financially burdened by litigation as the successors to those in the asbestos business itself. Unlike successors to those in the asbestos business, much greater insurance resources remain available to successors facing premises liability claims. In addition, successor liability for premises claims are still protected under the legislation in the case of any premises the successor did not continue to own or control after the merger. That distinction shows additional concern for successors who are likely to be more innocent of having caused any injury themselves. Such successors may also still qualify for limits upon other successor

asbestos-related liabilities that are not based upon premises liability claims.

***8** A last item worth noting is that the liability limits provided by this legislation do not apply to anyone already in bankruptcy. It is the purpose of this legislation to help keep corporations out of bankruptcy, not to assist corporations already in bankruptcy. In order to avoid encouraging any rush to force a corporation into bankruptcy in order to avoid the liability limits imposed by this legislation, the liability limits will apply if a corporation is forced into bankruptcy after April 1, 2003.

H.J. of Tex., 78th Leg., R.S. 6043-45 (2003).

3. *A Reasonable Exercise of Police Power.*

[5] Courts of this State have held that two considerations determine whether a legislative act is valid under the police power: (1) whether the act is appropriate and reasonably necessary to accomplish a purpose within the scope of the police power, and (2) whether the ordinance is reasonable by not being arbitrary and unjust or whether the effect on individuals is unduly harsh so that it is out of proportion to the end sought to be accomplished. *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 591 (Tex.Civ.App.-Austin 1969, writ ref'd n.r.e.) (citing *Rhone,*

222 S.W.2d at 648). "If there is room for a fair difference of opinion as to the necessity and reasonableness of a legislative enactment ... on a subject which lies within the police power, the courts will not hold it void." *Id.* at 592. Applying these considerations to this case, we conclude that the Statute is a reasonable exercise of the Legislature's police power.

[6] First, the purpose for which it was enacted-the financial viability of the State and businesses in the State-is a valid exercise of police power. The purpose recites that nearly seventy companies have filed for bankruptcy, exacting a heavy toll in both jobs and pension benefits. Evidence before the trial court showed that asbestos lawsuits have negatively impacted Crown Cork's financial vigor. Moreover, by enacting the Statute, the Legislature impacted over 1,000 lawsuits against Crown Cork in courts across the State.[FN9] In addition, Crown Cork's summary judgment evidence shows that Crown Cork's financial viability alone is important to citizens in all parts of the State; its subsidiaries and affiliates have about 1,000 employees across the State, and roughly the same number of retirees relying on its continued financial viability for their own and their families' financial security as they age. The citizens of the three municipalities in which Crown Cork's plants are located across the state-Sugar Land, Conroe, and Abilene-have an interest in Crown Cork's continued financial viability. Thus, the Statute benefits the entire economy of the State, an appropriate purpose for which to exercise the police power.

Second, the Legislature limited the Statute's detrimental impact on plaintiffs such as the Robinsons so that the impact was not out of proportion to the end sought. *See Martin,* 437 S.W.2d at 591. The requirements restrict the number of corporations that qualify for the limitation of liability, and therefore leave the pool of potential defendants as large as possible for claimants having valid claims for damages resulting from asbestos products. The Statute was limited in scope to target those corporations most in need of financial relief and/or assistance-those corporations subject to asbestos suits and payouts because they purchased companies that manufactured asbestos. The Statute also restricts its scope to those companies who are least responsible for the continued manufacture of asbestos and, therefore, least responsible for the continued negative impact of asbestos-related health problems on the public. As a result, Crown Cork was the only defendant of the number of companies the Robinsons sued that was able to take advantage of the Statute.

***9** In short, we find the Statute (1) within the Legislature's police power and (2) narrowly tailored (a) to protect the most innocent corporations hard hit by asbestos litigation but (b) to leave the potential pool of asbestos defendants as large as possible. Although Mrs. Robinson claims that the Statute is unconstitutional, we find that her claims at most show that room for a fair difference of opinion exists as to the necessity and reasonableness of the Statute. By enacting the Statute, we conclude that the Legislature performed its unique role within our

democratic system by making a judgment call on an issue uniquely within its purview and within its police power. Finding a reasonable basis for that decision, we decline to declare it void.

For these reasons, we conclude that the Statute was a valid exercise of the State's police power and that the Statute was not unconstitutionally retroactive.

4. *Robinson's Case Law Does Not Contradict This Conclusion.*

Mrs. Robinson argues that we cannot rely on police power to validate the retroactive effect of the statute on her accrued rights. She relies on two cases to undergird her argument the police power is a facile, potentially all-encompassing doctrine that we should not rely on to validate this retroactive statute. Those cases are *City of Tyler v. Likes,* 962 S.W.2d 489 (Tex.1997), and *Baker Hughes, Inc. v. Keco R. & D., Inc.,* 12 S.W.3d 1 (Tex.1999)-both Texas Supreme Court opinions involving retroactive laws that altered allegedly vested rights. In evaluating the validity of the retroactive laws in these cases, the Supreme Court did not consider the Legislature's police power. According to Mrs. Robinson, this is proof that the police power cannot be used to validate a law that has altered retroactively a vested right. We disagree

because we are of the opinion that the court had alternative, and more straight-forward means of evaluating those laws.

For example, in *Likes,* the Court relied on a long-standing method of evaluating the constitutionality of a statute that retroactively abridged an allegedly vested right. Likes sued the City of Tyler for negligent maintenance of a culvert. *Likes,* 962 S.W.2d at 502. At common law, maintenance of culverts was a proprietary function for which the City of Tyler could be sued. However, the Legislature amended the Texas Tort Claims Act, reclassifying the operation of culverts as a governmental function for which property damages claims could not be brought. *Id.* By the time Likes sued the City of Tyler, the City was immune from suit for the damages. *Id.* The Court held that the statute affected a remedy only, noting that "laws affecting a remedy are not unconstitutionally retroactive unless the remedy is entirely taken away." *Id.* In the enactment of the statute, "the Legislature affected the remedy but allowed Likes a reasonable time to preserve her rights." *Id.* Because the Legislature provided Likes and others a grace period within which they could have exercised their remedy before its alteration, the statute was not unconstitutionally retroactive. *See id.*

***10** Likewise, a simple answer was available to the court in *Keco.* There, the Legislature extended the statute of limitations for a particular cause of action brought against Baker

Hughes, thus making Baker Hughes potentially liable on a cause of action that would have been barred by the previous law. *Keco,* 12 S.W.3d at 2. As in *Likes,* the court relied on a firmly established rule-that a cause cannot be revived after it is barred by the statute of limitations-to hold that the legislation was unconstitutionally retroactive. *Id.* at 4; *see also Wilson v. Work,* 122 Tex. 545, 62 S.W.2d 490, 490-91 (1933); *Mellinger,* 3 S.W. at 254-55.

Thus, unlike this case, in both *Keco* and *Likes,* the Court had rather simple, straightforward answers available to it. There was no reason for the Court to consider the Legislature's police power. For this reason, we do not interpret the Court's silence on the Legislature's police power as a statement that the police power did not apply, or could not be applied, to the cases.

More importantly, the Supreme Court and other courts of this state have used the Legislature's police power to validate retroactive statutes that are allegedly unconstitutional. *See Barshop,* 925 S.W.2d at 633-34 (citing cases). In *Barshop,* the Court held, "[a] valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive." *Barshop,* 925 S.W.2d at 633-34.[FN10]

D. The Pennsylvania Supreme Court's *Ieropoli* Decision is Not Persuasive.

Mrs. Robinson also urges us to apply the reasoning of the Pennsylvania Supreme Court in *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 932 (2004), in which that court held that a similar statute enacted in Pennsylvania was unconstitutional as applied under the Pennsylvania Constitution. The *Ieropoli* court found that the statute eliminated all remedy for an accrued cause of action, and because "an accrued cause of action is a vested right," it could not be eliminated by subsequent legislation. *Id.* at 930, 932. However, in several significant ways, the *Ieropoli* decision is quite different from this appeal.

To begin with, *Ieropoli* rested on a different constitutional provision than this appeal. The plaintiff, Ieropoli, alleged that the pertinent Pennsylvania statute violated that state's open courts provision contained in the state constitution. Here, Mrs. Robinson alleges the Statute violates this state's constitutional prohibition against retroactive laws, not the open courts provision.

Next, the Pennsylvania Supreme Court used a vested rights analysis to strike down that state's statute, pointing out Pennsylvania's unwavering historical stance, as evidenced in the case law, that an accrued cause of action is a vested right that cannot be extinguished. It appears from *Ieropoli* that Pennsylvania courts have applied vested rights analysis in a much more consistent manner than have Texas courts. As already noted, we have chosen to eschew a vested rights

analysis for what we consider to be a more reliable analysis.

***11** Finally, the most important differences appear in the statutes themselves. The Pennsylvania statute was not as narrowly drawn as the Statute. The Pennsylvania statute does not appear to have been crafted to encompass only the most innocent successor corporations. While the Statute requires that a corporation must have purchased the asbestos division before May 13, 1968 and must not have manufactured asbestos itself, the Pennsylvania statute had neither of these winnowing characteristics.

For all of these reasons, we do not find *Ieropoli* persuasive authority.

E. Summary of Holding on Robinson's First Issue.

In summary, we hold that the Statute is not unconstitutionally retroactive as applied to Mrs. Robinson's claims because it is a valid exercise of the Legislature's police power. The Statute, therefore, does not violate Article I, section 16 of the Texas Constitution. We overrule Mrs. Robinson's first issue.

II. The Statute is Not an Unconstitutional Special Law.

In her second issue, Mrs. Robinson contends the Statute is a special law in violation of Texas Constitution Article III, section 56. Section 56 provides in part: "where a general law can be made applicable, no local or special law shall be enacted." Tex. Const. art. III, § 56(b). Mrs. Robinson contends that Crown Cork is the only beneficiary of the Statute, and the Statute singles out Crown Cork for special treatment without a reasonable public purpose. Mrs. Robinson's issue is a facial challenge, meaning that the Statute, by its terms, always operates unconstitutionally. *See Garcia,* 893 S.W.2d at 518.

A. The Applicable Law.

[7][8][9] A special law is defined as one " 'limited to a particular class of persons distinguished by some characteristic other than geography.' " *Ford Motor Co. v. Sheldon,* 22 S.W.3d 444, 450 (Tex.2000) (quoting *Tex. Boll Weevil Eradication Found. v. Lewellen,* 952 S.W.2d 454, 465 (Tex.1997); *Maple Run at Austin Mun. Util. Dist. v. Monaghan,* 931 S.W.2d 941, 945 (Tex.1996)). The purpose of the prohibition on special laws in Article III, section 56 is to " ' prevent the granting of special privileges and to secure uniformity of law throughout the State

as far as possible.' " *Maple Run at Austin Mun. Util. Dist. v. Monaghan,* 931 S.W.2d 941, 945 (Tex.1996) (quoting *Miller v. El Paso County,* 136 Tex. 370, 150 S.W.2d 1000, 1001 (1941)). In particular, it prevents lawmakers from engaging in the " 'reprehensible' " practice of trading votes for the advancement of personal rather than public interests. *Id.* (quoting *Miller,* 150 S.W.2d at 1001). A statute is not special if persons or things throughout the State are affected by it, or if it operates upon a subject in which the people at large are interested. *See Sheldon,* 22 S.W.3d at 451; *Scurlock Permian Corp. v. Brazos County,* 869 S.W.2d 478, 485 (Tex.App.-Houston [1st Dist.] 1993, writ denied) (citing *Lower Colorado River Auth. v. McCraw,* 125 Tex. 268, 83 S.W.2d 629, 636 (1935)).

***12** [10][11][12] In passing upon the constitutionality of a statute, we begin with a presumption of validity. *Robinson v. Hill,* 507 S.W.2d 521, 524 (Tex.1974); *Cameron County v. Wilson,* 160 Tex. 25, 326 S.W.2d 162, 166 (1959). We presume that the Legislature has not acted unreasonably or arbitrarily, and the burden is on Mrs. Robinson, who challenges the Statute, to establish its unconstitutionality. *Robinson,* 507 S.W.2d at 524. The limits to the Legislature's authority are that the classification must be (1) broad enough to include a substantial class, and (2) based on characteristics legitimately distinguishing the class from others with respect to the public purpose sought to be accomplished by the proposed legislation. *Sheldon,* 22 S.W.3d at 450; *Maple Run,* 931 S.W.2d at 945.

[13][14] However, the "primary and ultimate" test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class. *Sheldon,* 22 S.W.3d at 451; *Maple Run,* 931 S.W.2d at 945. Before a statute can be struck down as violating Article III, section 56, "it must clearly appear that there is no reasonable basis for the classification adopted by the Legislature" to support the statute. *Cameron County,* 326 S.W.2d at 167. This lack of reasonable basis "should be a substantial thing and not something merely apparent but not real." *Id.*

B. Robinson's Arguments.

Mrs. Robinson contends that the Statute was enacted to benefit Crown Cork alone, and, therefore, the Legislature's classification does not include a substantial class and is not based on characteristics legitimately distinguishing the class from others. *See Sheldon,* 22 S.W.3d at 450; *Maple Run,* 931 S.W.2d at 945. Mrs. Robinson argues that (1) the Statute is tailored to fit Crown Cork exclusively and Crown Cork is the only company known to have taken advantage of it, (2) the Statute's narrowly defined class bears no reasonable relation to its stated purposes, and (3) a senator's comments in committee reveal the Statute to be nothing more than a prohibited "pretend" class based on an agreement to advance Crown Cork's personal interests.

We address each argument in turn.

1. *Robinson Has Not Shown that the Statute Benefits Crown Cork Exclusively.*

[15] These are Mrs. Robinson's specific reasons for maintaining that the Statute is tailored to fit only Crown Cork:

• The Statute was modeled after similar statutes enacted to benefit Crown Cork in Pennsylvania and Mississippi; [FN11]

• Neither Crown Cork nor Mrs. Robinson can identify another company that has taken advantage of the Statute or the Pennsylvania and Mississippi statutes;

• The narrowing details of the Statute precisely fit Crown Cork's purchase, manufacturing, and merger history, thereby enabling only Crown Cork to fit within the Statute's limitation of liability;

• Crown Cork's valuation expert could not identify another corporation meeting the requirements; and

***13** • Crown Cork's valuation expert used the same valuation prepared for the Pennsylvania litigation.

As we have noted, each of these specific complaints raises an issue universal to all of them: that the Statute was enacted to benefit only Crown Cork. For the reasons explained below, we disagree that these facts transform the Statute into a special law.

[16][17] First, even though this is a summary judgment requiring that we view all facts in a light most favorable to Mrs. Robinson, we still must indulge " 'a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.' " *City of Irving v. Dallas/Fort Worth Int'l Airport Bd.*, 894 S.W.2d 456, 466 (Tex.App.-Fort Worth 1995, writ denied) (citing *Smith v. Davis,* 426 S.W.2d 827, 831 (Tex.1968)). In addition, the primary test is not whether the Statute does, in fact, apply to only one entity. The primary test, in actuality a two-part test, is (a) whether a reasonable basis exists for the classification, and (b) whether the law operates equally on all within the class. *Sheldon,* 22 S.W.3d at 451. Factual inquiries have a similarly taxing presumption:

[Generally,] the constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume such facts exist; and therefore the courts will not make a separate investigation of the facts, or attempt to decide whether the legislature has reached a correct conclusion with respect to them.

Garcia, 893 S.W.2d at 520 (citing *Corsicana Cotton Mills v. Sheppard,* 123 Tex. 352, 71 S.W.2d 247, 250 (Tex. Comm'n App.1934)).

Thus, with these guidelines in mind we turn to the specific complaints. As noted, if the allegation were true that only Crown Cork fits within the Statute's restrictive details, that is not, in and of itself, proof that the Statute is a special law. Moreover, the fact that only Crown Cork has taken advantage of the law is not necessarily proof that it applies only to Crown Cork.

Even assuming that only Crown Cork can benefit from the Statute, the primary test is whether a reasonable basis exists for the classification and whether it operates equally on all within its class. Mrs. Robinson has not alleged that the statute does not operate equally on all those in its class, so the only question before us is whether a reasonable basis for the classification exists.

The policy goals underlying the Statute are expressly set out in the Statute's Statement of Legislative Intent, detailed above. The statement reflects that the rationale and purpose of the legislation was (1) "to limit the benefits of the statute to those who were more innocent than others and were unwittingly saddled with often massive long-tail liabilities only because of a merger," and (2) "to help keep remaining hard-pressed successors out of bankruptcy." H.J. of Tex., 78th Leg., R.S. 6044 (2003).

***14** The Statement of Legislative Intent also explained the unique merger, succession and year requirements contained in the Statute. Representative Nixon, the author of House Bill 4, explained that successor corporations would have been much less likely to be aware of the hazards of asbestos prior to May 13, 1968, because

It wasn't until the mid-1960s that Dr. Irving Selikoff issued his now famous warnings about the dangers of asbestos in the workplace. The earliest date after Selikoff's warnings when even a quasi-governmental organization in the United States suggested a tighter standard for asbestos in the workplace was, however, May 13, 1968. On that date, the influential American Conference of Governmental Industrial Hygienists (ACGIH) first adopted a change in the recommended, longstanding threshold limit for asbestos in the air of a workplace from 5 mppcf to 2 mppcf (the ACGIH 1958 Standard).

... By requiring that the first transfer of asbestos liabilities to a successor occurred prior to May 13, 1968, the legislation therefore focuses its benefits upon innocent successors.

H.J. of Tex., 78th Leg., R.S. 6044 (2003).

Although Mrs. Robinson disputes the dates contained in the Statement of Legislative Intent and claims that the Texas Department of Health suspected at least some of the harmful impact of asbestos, a mere difference of opinion, where reasonable minds could differ-as between 1968

and 1958-is not a sufficient basis for striking down legislation. *See Garcia,* 893 S.W.2d at 520 (citing *Davis,* 426 S.W.2d at 831).

As we noted in the previous section, when we compare the purposes of the legislation with its requirements, we find the requirements tailored to serve the Statute's purposes. By enacting the Statute, the Legislature impacted many lawsuits against Crown Cork in various courts across the State,[FN12] and did much to ensure financial stability to the company's current workforce and pensioners. The viability of corporations and their ability to continue to provide jobs and pension benefits are matters of importance to Texas and its citizens.

The Legislature sought to ameliorate the effects of asbestos-related liabilities by limiting the amount of money innocent successor corporations are liable for in damages to the total gross asset value of the original corporation. Moreover, the Legislature sought to narrow the class to include only the most innocent of successor corporations, excluding those that continued in the asbestos business. We cannot say that there is no reasonable basis for this classification. We therefore hold that a reasonable basis exists for the Statute's classification of innocent successor corporations, like Crown Cork, burdened by asbestos liabilities. *See Sheldon,* 22 S.W.3d at 451; *Maple Run,* 931 S.W.2d at 945; *Cameron County,* 326 S.W.2d at 167; *see also City of Irving,* 894 S.W.2d at 465-67 (upholding classification applying to one airport as reasonable because it

addressed a matter of statewide importance).

2. *Robinson Has Not Shown that the Statute's Class Bears No Reasonable Relation to Its Stated Purposes.*

***15** We next turn to Mrs. Robinson's contention that the Statute's narrowly defined class bears no reasonable relation to its stated purposes. According to Mrs. Robinson, Crown Cork is not on the verge of bankruptcy, and so a class that includes only Crown Cork is not rationally related to the objective of saving "hard-pressed successors" from bankruptcy. Mrs. Robinson's argument ignores the other stated purpose of the Statute-to eliminate unfairness to innocent successor corporations-and the effect of the Statute's limitation of liability. Following the 1966 merger with Mundet, Crown Cork did not sell, distribute, or manufacture any asbestos products; yet, it has paid over $413 million to settle asbestos-related claims as a result of the merger. This amount far exceeds the fair market value of Mundet's total gross assets, which Crown Cork has calculated to be between $55.6 million and $57.5 million. Moreover, the Statute does not include any requirement that a successor corporation demonstrate that it faces impending bankruptcy. Instead, the Statute seeks to ameliorate unfairness and the threat of bankruptcy by limiting the innocent successor's liability to the fair market value of the total

gross assets of the transferor corporation.

Thus, Crown Cork's inclusion in the class is rationally related to the Statute's stated purposes, because it will cap the amount of money Crown Cork is liable to pay out for asbestos-related liabilities resulting solely from its merger with Mundet. Beyond this, we decline to second-guess the Legislature "or attempt to decide whether the legislature has reached a correct conclusion with respect to" the facts before it. *See Garcia,* 893 S.W.2d at 520.

3. *A Senator's Comment Does Not Reveal a "Pretend Class."*

Finally, we address Mrs. Robinson's contention that a member of the Texas Senate State Affairs Committee made comments that unmask the Statute as creating a prohibited "pretend class" based on an agreed arrangement to advance Crown Cork's personal interests rather than the public welfare. *See Scurlock Permian Corp.,* 869 S.W.2d at 485 ("The class created by the statute must be a real class, and not a 'pretended' class created by the legislature to evade the constitutional restriction.") (citations omitted). During a meeting of this committee, its chair described Article 17 of House Bill 4 to the members of the committee as follows:

Article 17, limitations in civil actions of liabilities relating to certain mergers or consolidations.

This, members, is the Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this-in this matter.

Meeting on Proposed Senate Substitute for Tex. H.B. 4, State Senate Affairs Committee, 79th Leg., R.S., 13 (April 30, 2003). Although the Senator identified Crown Cork by name to describe the issue addressed by Article 17, we do not agree that this is proof positive that the Legislature has acted improperly to benefit Crown Cork's private interests exclusively.

***16** In *Juliff Gardens,* the appellant made a similar argument that the legislative history of a statute evidenced a legislative effort to prevent it from building a particular landfill. *Juliff Gardens, L.L.C. v. Tex. Comm'n on Envtl. Quality,* 131 S.W.3d 271, 283 (Tex.App.-Austin 2004, no pet.). The court, after reviewing the legislative history, rejected this argument, explaining that "[w]hen reviewing a statute to determine whether it is an unconstitutional local or special law, we review the reasonableness of the statute's classifications, ... not the precipitating forces that led to its enactment." *Id.* The court reasoned that merely because the appellant's proposed landfill and the subsequent community opposition to it may have initiated the senator to sponsor the proposed legislation, that did not render it a prohibited local or special law. *Id.* at 284.

Similarly, the senator's brief mention of Crown Cork as a beneficiary of the Statute-in a single paragraph of a fifteen-page transcript-demonstrates at most that Crown Cork's situation may have provided the impetus for its passage. It does not, as Mrs. Robinson suggests, demonstrate that the Legislature acted improperly to evade constitutional requirements.

In light of our foregoing discussion, we overrule Mrs. Robinson's second issue.

III. Crown Cork is Entitled to Summary Judgment.

[18] In her third issue, Mrs. Robinson contends that she raised a fact question about whether Crown Cork continued Mundet's asbestos business for several months after acquiring it. The existence of this fact question, Mrs. Robinson argues, prevents Crown Cork from showing that it is entitled to the Statute's limitation of liability as a matter of law. Summary judgment for a defendant is proper only when the defendant negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 911 (Tex.1997). In considering this issue, we use the well-established standards of review for traditional summary judgments. *See* Tex.R. Civ. P. 166a; *Nixon v. Mr. Prop. Mgmt. Co., Inc.,* 690 S.W.2d 546,

548-49 (Tex.1985).

[19] The Statute's limitation of liability does not apply to "a successor that, after a merger or consolidation, continued in the business of ... manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured, distributed, removed, or installed by the transferor." Tex. Civ. Prac. & Rem.Code § 149.002(b)(5). Mrs. Robinson contends that, after Crown Cork acquired a majority of stock in Mundet-but before the 1966 merger-Crown Cork continued Mundet's asbestos-related business as a division of Crown Cork.

Mrs. Robinson points to the following evidence. First, a now-deceased former Mundet employee, who was in charge of Mundet's Houston operation at the time of the acquisition, testified in another case that all the Mundet employees he knew went to work for Crown Cork, and that for about three months Crown Cork continued to sell, contract for, and fill orders for Mundet products-including those containing asbestos. Second, Mrs. Robinson points out that the 1964 bill of sale in which Mundet sold its insulation division to B-E-H referred to Mundet as "a Division of Crown Cork & Seal," and was signed by Crown Cork's chairman of the board on behalf of "Mundet Cork Corporation, a Division of Crown Cork & Seal Company, Inc."

***17** Mrs. Robinson's evidence, however, does not raise a fact question on whether Crown Cork is entitled to take advantage of the Statute's limitation of liability, because it predates the 1966 merger of Crown Cork and Mundet, and the plain language of the Statute provides that it does not apply when the transferee corporation continues the asbestos-related business of the transferor company "*after* a merger or consolidation." *See* Tex. Civ. Prac. & Rem.Code § 149.002(b)(5) (emphasis added). Thus, evidence related to Crown Cork's and Mundet's activities before the merger is irrelevant to whether Mrs. Robinson's claims constitute " successor asbestos-related liabilities" that are limited by the Statute. Indeed, section 149.001(3) explicitly applies the limitation of liability to all claims "that are related in any way to asbestos claims *based on the exercise of control or the ownership of stock* of the corporation *before* the merger or consolidation." *Id.* § 149.001(3) (emphasis added); *see also* § 149.003.

Therefore, because Mrs. Robinson's evidence all relates to events before the 1966 merger of Mundet and Crown Cork and because selling products for only three months until a division is sold does not qualify as "continuing the asbestos related business" as contemplated by the Statute, Mrs. Robinson did not raise a fact question as to whether Crown Cork continued Mundet's asbestos-related business after the merger. We conclude that Crown Cork has demonstrated its entitlement to summary judgment based on the Statute's limitation of liability.

We overrule Mrs. Robinson's third issue.

Conclusion

Although Mrs. Robinson and her husband appear to have had valid causes of action against Crown Cork as a successor of Mundet Corporation, the Legislature took action uniquely within its role as the legislative branch of our government and enacted a statute it concluded was reasonably necessary. The purpose of the Statute was to minimize the statewide negative financial effects of asbestos litigation. A consequence of the Statute was to eliminate Mrs. Robinson's ability to recover against Crown Cork for her and her husband's damages. Because we hold that the Statute was a valid exercise of the Legislature's police power and that the beneficial reasons for its enactment outweigh the negative impact on Mrs. Robinson's right to address the untimely death of her husband, because we hold that the Statute benefitted the State as a whole and is not a special law, and because Mrs. Robinson failed to create a fact issue concerning the evidence Crown Cork presented to prove its affirmative defense, we overrule Mrs. Robinson's issues and affirm the trial court's judgment.

FROST, J., dissenting.

KEM THOMPSON FROST, Justice, dissenting.

In deciding whether the legislation at issue violates the prohibition against retroactive laws in the Texas Bill of Rights, the court concludes that if the Texas Legislature reasonably exercises its police power to enact a statute, then that statute does not violate the Texas Constitution, even though the statute is retroactive and destroys the vested rights of some individuals. The people of the State of Texas, in emphatic and compelling language set forth in section 29 of the Texas Bill of Rights, have expressly withheld from the Legislature the authority to enact retroactive laws in violation of section 16 of the Texas Bill of Rights. Because the Legislature has no police power to enact retroactive laws in violation of section 16, this court should not use a police-power analysis to determine whether the statute is unconstitutionally retroactive. Furthermore, the weight of precedent from the Texas Supreme Court and this court requires the use of the vested-rights analysis. Under this analysis, the statute in question destroys the vested rights of the appellant in this case and therefore violates section 16 of the Texas Bill of Rights, as applied. Because the court, using a police-power analysis, reaches the opposite conclusion, I respectfully dissent.

The Applicable Text of the Texas Constitution

*18 In her first issue, Mrs. Robinson asserts that Chapter 149 of the Texas Civil Practice and Remedies Code (hereinafter "the Statute") violates section 16 of the Texas Bill of Rights as applied to her claims against appellee Crown Cork & Seal Company, Inc. In interpreting the Texas Constitution, Texas courts rely heavily on the literal text and must give effect to its plain language. *Republican Party of Texas v. Dietz,* 940 S.W.2d 86, 89 (Tex.1997). The Texas Constitution states in pertinent part:

PREAMBLE

Humbly invoking the blessings of Almighty God, *the people of the State of Texas,* do ordain and establish this Constitution.

ARTICLE I

BILL OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

...

§ 16. Bills of attainder; ex post facto or retroactive laws; impairing obligation of contracts

Sec. 16. *No* bill of attainder, ex post facto law, *retroactive law,* or any law impairing the obligation of contracts, *shall be made.*

...

§ 29. Provisions of Bill of Rights excepted from powers of government; to forever remain inviolate

Sec. 29. To guard against transgressions of the high powers herein delegated, we declare that *everything in this "Bill of Rights" is excepted out of the general powers of government,* and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Tex. Const. Preamble, art. I, §§ 16, 29 (emphasis added).

Every constitution of the State of Texas has contained the language currently found in sections 16 and 29 of the Texas Bill of Rights. *See* Tex. Const. of 1869, art. I, §§ 14, 23; Tex. Const. of 1866, art. I, §§ 14, 21; Tex. Const. of 1861, art. I, §§ 14, 21; Tex. Const. of 1845, art. I, §§ 14,

21. The Constitution of the Republic of Texas contained substantially similar language. *See* Repub. Tex. Const. of 1836, Declaration of Rights, Preamble & Sixteenth, *reprinted in* Tex. Const. app. 482, 493-94 (Vernon 1993). Under the plain meaning of this text, "retroactive laws" shall not be made, and the people of Texas have not given the Texas Legislature any police power to enact "retroactive laws." *See* Tex. Const. Preamble, art. I, §§ 16, 29; *Dietz,* 940 S.W.2d at 89-90 (stating that article I, section 29 of the Texas Constitution expressly limits the power of Texas government by excepting everything in the Bill of Rights out of the general powers of government and citing with approval *Travelers' Ins. Co. v. Marshall,* 124 Tex. 45, 76 S.W.2d 1007 (1934)); *City of Beaumont v. Bouillion,* 896 S.W.2d 143, 148-49 (Tex.1995) (stating that the guarantees found in the Bill of Rights are excepted from the general powers of government and that the state has no power to act in a manner contrary to the Bill of Rights); *Travelers' Ins. Co. v. Marshall,* 124 Tex. 45, 76 S.W.2d 1007, 1010-11 (1934) (holding that Texas Legislature has no police power to violate article I, section 16 of the Texas Constitution because section 29 emphatically and unambiguously excepts this power from the powers of the government of the State of Texas); *Fazekas v. Univ. of Houston,* 565 S.W.2d 299, 305 (Tex.Civ.App.-Houston [1st Dist.] 1978, writ ref'd n.r.e.) (stating that, although State of Texas has a broad police power, the Texas Constitution excepts from this power the authority to enact laws contrary to article I, section 16 of the Texas Constitution); *but see Barshop v. Medina Cty. Underground Water Conserv. Dist.,* 925 S.W.2d 618, 633-34 (Tex.1996) (stating that a valid

exercise of the Legislature's police power can prevail over a finding that a law is unconstitutionally retroactive); *Texas State Teachers Ass'n v. State,* 711 S.W.2d 421, 424-25 (Tex.App.-Austin 1986, writ ref'd n.r.e.) (presuming, despite stated doubts, that teachers' certificates were vested rights for purpose of retroactivity challenge under article I, section 16 of the Texas Constitution, but stating that such rights are still subject to the Legislature's police power, without discussing section 29 of the Texas Constitution's Bill of Rights); *Martin v. Wholesome Dairy, Inc.,* 437 S.W.2d 586, 590-91 (Tex.Civ.App.-Austin 1969, writ ref'd n.r.e.) (indicating that equal rights and due course of law provisions of Texas Bill of Rights are subject to the police power without discussing section 29 or the *Marshall* case).

***19** On many occasions over the past 160 years, the Texas Supreme Court has considered whether a given statute violates this express constitutional prohibition against retroactive laws, yet the issue presented today is not easily answered. The difficulty arises not because the issue itself is complex but because Texas jurisprudence is a bit unclear with respect to the proper analytical framework for evaluating the constitutionality of a statute challenged under section 16 of the Texas Bill of Rights. One case from the Texas Supreme Court raises questions as to the authority of the Legislature to exercise its police power to enact a "retroactive law."

In *Barshop,* the Texas Supreme Court stated that even if a statute violates the prohibition

against retroactive laws contained in article I, section 16 of the Texas Constitution, the statute is not void if it was a valid exercise of the Legislature's police power. *See Barshop,* 925 S.W.2d at 633-34. *Barshop,* however, does not contain any reference to section 29 of the Texas Bill of Rights or rest upon any Texas Supreme Court holding to support this proposition. *See id.* at 633-36. Texas Supreme Court decisions both before and after *Barshop* state that section 29 expressly limits the power of Texas government by excepting everything in the Bill of Rights out of the general powers of government. *See Dietz,* 940 S.W.2d at 89-90; *Bouillion,* 896 S.W.2d at 148-49; *Marshall,* 76 S.W.2d at 1010-11. In *Marshall,* the Texas Supreme Court held that the Texas Legislature has no police power to violate article I, section 16 of the Texas Constitution because section 29 unambiguously excepts this power from the powers of the Texas state government. *See Marshall,* 76 S.W.2d at 1010-11. Although the *Barshop* court, in conducting its analysis under the Contract Clause of the Texas Constitution, distinguished *Marshall,* it did not overrule *Marshall. See Barshop,* 925 S.W.2d at 633-35. Furthermore, since *Barshop,* the Texas Supreme Court, addressing this issue, has cited *Marshall* with approval. *See Dietz,* 940 S.W.2d at 89-90.

In its Contract Clause analysis, the *Barshop* court also stated that in an 1851 precedent, *State v. Delesdenier,* the Texas Supreme Court concluded that the Contract Clause may yield to statutes necessary to safeguard the public welfare. *See Barshop,* 925 S.W.2d at 635 (citing *State v.*

Delesdenier, 7 Tex. 76, 99-100 (1851)). The part of *Delesdenier* cited by *Barshop* is dicta because the court held that the statute in question affected the remedy and did not infringe on any vested rights. *See Delesdenier,* 7 Tex. at 98-101. The dicta in *Delesdenier* cited by *Barshop* is a recitation of a federal court's decision under the Contract Clause of the United States Constitution. *See* U.S. Const. art. I, § 10 cl. 1 (stating "No state shall ... pass any ... Law impairing the Obligation of Contracts"); *Delesdenier,* 7 Tex. at 99. In a similar vein, many of the court of appeals cases cited in *Barshop* trace their reasoning back to federal Contract Clause cases. *See, e.g., Texas State Teachers Ass'n,* 711 S.W.2d at 424 (relying on and quoting federal Contract Clause case); *see also ante* at p. ---- (quoting federal Contract Clause case). As the Texas Supreme Court pointed out in *Marshall,* this reasoning is problematic. *See Marshall,* 76 S.W.2d at 1010-11. Though a court applying the Contract Clause of the United States Constitution may conclude that this clause yields to and accommodates the police power of a state to safeguard the interests of its people, this does not mean that the people of Texas are precluded from withholding certain powers from the Texas government. And that is just what the people of Texas have done in section 29.[FN1] *See* Tex. Const. art. I, § 29; *Marshall,* 76 S.W.2d at 1010-11 (holding that federal Contract Clause cases deferring to the police power of the states have no application to the Texas Constitution because section 29 expressly limits the police power of Texas government, whereas the United States Constitution does not expressly limit the police power of the states); *see also Andrada v. City of San Antonio,* 555 S.W.2d 488,

491 (Tex.Civ.App.-San Antonio 1977, writ dism'd) (citing in dicta federal Contract Clause cases, one of which states that "the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising *such powers as are vested in it* for the promotion of the common weal, or are necessary for the general good of the public") (emphasis added, citing *Manigault v. Springs,* 199 U.S. 473, 480, 26 S.Ct. 127, 50 L.Ed. 274 (1905)). This court is bound by our high court's precedent; however, *Barshop* is contradicted by both prior and subsequent Texas Supreme Court precedent. In this unusual situation, it is better to follow the weight of controlling precedent.

***20** Texas courts need a clear legal standard for determining whether a challenged statute constitutes a "retroactive law" that is impermissible under the Texas Constitution. The majority holds that a statute is not an unconstitutional retroactive law if the Texas Legislature reasonably exercised its police power in enacting the statute. This legal standard seems problematic given the structure and plain language of the Texas Constitution, which, in clear and forceful terms, expressly and unequivocally withholds from Texas government the power to enact retroactive laws. *See* Tex. Const. Preamble, art. I, § 16 ("No ... retroactive law ... shall be made."), § 29 (" [E]verything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto ... shall be void."). Under well-reasoned constitutional theory, a constitution is a charter of government that derives its

whole authority from the governed. *Dietz,* 940 S.W.2d at 91. A constitution is a compact between the government and the people in which the people delegate powers to the government and in which the powers of the government are prescribed. *Id.* The Texas Constitution states that the people of Texas have not delegated to their government the power to enact any " retroactive law." Whatever shortcomings the vested-rights analysis may have, it is consistent with the structure and plain language of the Texas Constitution. Under this analysis, the Texas Legislature lacks the power to enact statutes that nullify or destroy vested rights. *See, e.g., DeCordova v. City of Galveston,* 4 Tex. 470, 473-80 (1849).

A police-power legal standard may be consistent with the structure of some other states' constitutions. But the constitutions of these states have language that is very different from the Texas Constitution. Consequently, cases interpreting these states' constitutions provide little, if any, insight in evaluating the availability and scope of the police power under the Texas Constitution. For example, the majority cites two New Jersey cases in support of its police-power analysis. *See ante* at p. ----; *Nobrega v. Edison Glen Assoc.,* 167 N.J. 520, 772 A.2d 368, 378-82 (2001); *Phillips v. Curiale,* 128 N.J. 608, 608 A.2d 895, 900-02 (1992). Unlike the Texas Constitution, the New Jersey Constitution contains no explicit prohibition against retroactive civil laws that do not impair contractual obligations or remedies. N.J. Const. art. IV, sec. VII, par. 3 ("The Legislature shall not pass any bill of attainder, ex post facto law,

or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made."). The New Jersey Constitution has no provision analogous to article I, section 29 of the Texas Constitution. *See* N.J. Const. arts. I, IV. Therefore, unlike the Texas Legislature, the New Jersey Legislature has the general power to enact retroactive civil statutes that do not impair contractual obligations or remedies. *See Nobrega,* 772 A.2d at 378-82; *Phillips,* 608 A.2d at 900-02; *State Dep't of Envtl. Prot. v. Ventron Corp.,* 94 N.J. 473, 468 A.2d 150, 163 (1983). The only general limitation on such statutes imposed by the New Jersey Constitution is supplied by the substantive due process protection that New Jersey courts have held is implied in the New Jersey Constitution. *See* N.J. Const. art. I, sec. 1; *Nobrega,* 772 A.2d at 378-82; *Phillips,* 608 A.2d at 900-02. The two New Jersey cases cited by the majority did not use a police-power analysis to determine what constitutes an impermissible "retroactive law" under the New Jersey Constitution; rather, these cases state that a police-power or rational-basis analysis is better than the vested-rights analysis for determining whether a statute is so unreasonable and harsh as to violate the substantive due process protections implied in the New Jersey Constitution. *See* N.J. Const. art. I, sec. 1; *Nobrega,* 772 A.2d at 378-82 (stating that, although the vested-rights analysis had been used to determine whether a retroactive statute violates implied substantive due process, the better analysis is the deferential, rational-basis test-whether the statute is supported by a legitimate legislative purpose furthered by rational means); *Phillips,* 608 A.2d at 900-02 (stating that, in

substantive due process analysis of retroactive statute, New Jersey courts should balance the importance of the public interest as compared with the value of the right affected by the statute to determine if the legislature reasonably exercised its police power or whether it violated substantive due process by enacting particularly harsh and oppressive legislation).

***21** In the case at hand, Mrs. Robinson does not assert a substantive due process violation; rather, she asserts that, as applied to her, the Statute violates the Texas Constitution's prohibition against enacting any "retroactive law." If the Statute falls within this category, then the Texas Legislature had no police power to enact it. Thus, in this context, it makes no sense to ask whether the Texas Legislature reasonably exercised its police power to enact a "retroactive law" because the Texas Legislature has no police power to enact such a law at all.

Precedent Regarding the Vested-Rights Analysis

Even without considering article I, section 29, the weight of Texas precedent requires this court to apply the vested-rights analysis. In its 1843 term, the Supreme Court of the Republic of Texas used the vested-rights analysis in applying the protection against retroactive laws contained in the Constitution of the Republic of Texas. *See Taylor v. Duncan,* Dallam 514, 517

(Tex.1843). In 1849, in *DeCordova,* the Texas Supreme Court also used the vested-rights analysis in applying this provision of the Republic of Texas Constitution. *See DeCordova v. City of Galveston,* 4 Tex. 470, 473-80 (1849). At that time, our high court indicated that a " retrospective law" under the Republic of Texas Constitution had the same meaning as a " retroactive law" under the State of Texas Constitution. *See id.* at 475; *see also* Tex. Const. of 1845, art. I, §§ 14; Repub. Tex. Const. of 1836, Declaration of Rights, Sixteenth, *reprinted in* Tex. Const. app. 482, 493-94. The *DeCordova* court stated that a "retroactive law" literally means a law that acts on things that are past. *See DeCordova,* 4 Tex. at 475. Observing that if this term were given its literal meaning, it would have such a broad reach as to be incapable of practical application, the *DeCordova* court held that it is unconstitutional to enact a statute that retroactively destroys or impairs vested rights, such as an accrued claim or a right to assert that a claim is barred by the statute of limitations. *See id.* at 473-80. The *DeCordova* court also stated that statutes modifying the remedy for a claim do not violate the constitution; however, statutes that take away all remedies for an accrued claim are unconstitutional. *See id.* at 479-80.

In applying the Texas Constitution's prohibition against retroactive laws, the Texas Supreme Court and this court have used the vested-rights analysis on numerous occasions to determine if a given statute constitutes a "retroactive law" that should be declared void. *See Subaru of America, Inc. v. David McDavid Nissan, Inc.,* 84 S.W.3d 212, 219-23 (Tex.2002) (holding that

statute changing tribunal for resolving issues under the Texas Motor Vehicle Commission Code did not affect any vested rights and was not an unconstitutional retroactive law); *In re A.D.,* 73 S.W.3d 244, 247-49 (Tex.2002) (holding that statute would be an unconstitutional, retroactive law if it destroyed a vested right by eliminating a matured statute-of-limitations defense but concluding that statute in question did not do so); *Baker Hughes, Inc. v. Keco R. & D., Inc.,* 12 S.W.3d 1, 4-5 (Tex.1999) (holding that statute of limitations was unconstitutional retroactive statute as applied because it destroyed a vested right to assert a matured statute-of-limitations defense); *City of Tyler v. Likes,* 962 S.W.2d 489, 502-03 (Tex.1997) (citing *DeCordova* and holding that statute was not an unconstitutional retroactive law under vested-rights analysis); *Middleton v. Texas Power & Light Co.,* 108 Tex. 96, 185 S.W. 556, 559-61 (1916) (holding that statute was not unconstitutional retroactive law using vested-rights analysis); *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 251-54 (1887) (holding that, as applied, statute was unconstitutional retroactive law based on the vested-rights analysis); *In re S.C.S.,* 48 S.W.3d 831, 835 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (holding that amendment to statute was not an unconstitutional, retroactive law because the statute does not confer any vested right); *Price Pfister, Inc. v. Moore & Kimmey, Inc.,* 48 S.W.3d 341, 353-55 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (stating that, to establish that a statute is an unconstitutional, retroactive law a party must show that the statute's application would take away or impair vested rights under existing law and holding that statute did not affect any vested rights of

appellant); *Zeolla v. Zeolla,* 15 S.W.3d 239, 242-43 (Tex.App.-Houston [14th Dist.] 2000, pet. denied) (stating that although Family Code does not define statutory term "retroactive effect," this term is commonly used to describe a law that takes away or impairs vested rights under existing law); *Reames v. Police Officers' Pension Bd.,* 928 S.W.2d 628, 631 (Tex.App.-Houston [14th Dist.] 1996, no writ) (stating that an unconstitutional retroactive law is "one which takes away or impairs vested rights acquired under existing laws" and holding that statute in question did not impair party's vested rights) (quotations omitted). The majority states that, in the *Wright* case, the Texas Supreme Court acknowledged problems with the vested-rights analysis, outlined alternatives to this analysis, and indicated that the vested-rights analysis should no longer be used. *See ante* at pp. ---- - ---- (citing *Texas Water Rights Comm'n v. Wright,* 464 S.W.2d 642, 648-49 (Tex.1971)).

***22** In *Wright,* L.A. Wright, Myrlee McNary, and George McNary challenged the cancellation of their water permits. *See Wright,* 464 S.W.2d at 644. The Texas Water Rights Commission had canceled the permits under a 1957 statute because the permit owners had not used the permits for ten years. *See id.* The permit owners asserted that the statute was unconstitutionally retroactive as applied to them. *See id.* at 644-48. Before the 1957 statute took effect, a water permit could be canceled if it had been willfully abandoned for three consecutive years; however, the law required proof of a subjective intent to abandon the permit as well as three

consecutive years of non-use. *See id.* at 644. The challenged 1957 statute allowed cancellation of water permits without any proof of subjective intent to abandon if the owner failed to use the water permit for ten consecutive years. *See id.* at 645. The Texas Supreme Court determined that the owners had vested rights to the beneficial, non-wasteful use of water but that they did not have a right to the non-use of water. *See id.* at 647-48. The challenged statute took effect six months into the ten-year period used to determine that the owners had willfully abandoned their water rights under the permits. *See id.* at 649. The *Wright* court determined that the owners had no right to an unlimited period of non-use of water and that the owners had nine and a half years after the effective date of the statute to use some water under the permits to avoid a finding of willful abandonment. *See id.* at 649-50. Rejecting the owners' constitutional challenges, the *Wright* court held that the 1957 statute's alteration of the standard for determining willful abandonment did not constitute an unconstitutional retroactive law. *See id.*

As to the legal standard used in *Wright,* the Texas Supreme Court cited various cases regarding the vested-rights analysis; it did not discuss the police-power legal standard or any other possible alternatives to the vested-rights legal standard. *See id.* at 649-50. The *Wright* court did not indicate that the vested-rights analysis should be discarded; rather, it used the vested-rights analysis to uphold the challenged statute, citing the *DeCordova* case in determining that nine and a half years was a reasonable period for the owners to have a chance to use their permits to

avoid a finding of willful abandonment. *See id.* at 649 (citing *DeCordova,* 4 Tex. at 480). There is one paragraph in the *Wright* opinion in which the court cites four law review articles and notes that some legal scholars have tried to discover the underlying rationale for what makes a statute unconstitutionally retroactive. *See id.* at 649. Though the Texas Supreme Court recognized that efforts to catalogue cases have provided some assistance and also shown some confusion in the decisions, our high court did not suggest abandonment of the vested-rights analysis nor did it propose any other legal standard as a substitute. *See id.* at 648-50. The *Wright* case does not support a change from the well-established vested-rights analysis to a new police-power analysis.

***23** The majority also relies on the Texas Supreme Court's opinion in *Barshop. See ante* at p. ----. In *Barshop,* our high court rejected various constitutional claims that the Edwards Aquifer Act was unconstitutional on its face, holding that the plaintiffs failed to establish that this statute, by its terms, always operates to unconstitutionally deprive them of their property rights in underground water. *See Barshop,* 925 S.W.2d at 627, 638. The *Barshop* plaintiffs asserted, among other things, that the challenged statute was an unconstitutional retroactive law under the Texas Constitution. *See id.* at 633-34. The *Barshop* court began by recognizing that retroactive laws that impair vested rights violate the Texas Constitution. *See id.* at 633. Although the State asserted that the plaintiffs did not have vested rights in the water in

question, the *Barshop* court did not address this argument. *See id.* at 625, 633-34. Instead, the court applied a police-power analysis, stating that "[a] valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive." *See id.* at 633-34. The only authorities cited by the *Barshop* court for this proposition are five court of appeals opinions and one Texas Supreme Court opinion. *See id.* Except for the *Texas State Teachers Ass'n* case, the parts of these opinions cited by *Barshop* are obiter dicta. *See Texas State Bd. of Barber Exam'rs v. Beaumont Barber Coll., Inc.,* 454 S.W.2d 729, 732 (Tex.1970) (stating, after concluding that barber college had no vested right to operate with less floorspace and equipment than required by new statute, that barber college's right was to be protected from legislation that constitutes an unreasonable exercise of the police power); *Texas State Teachers Ass'n v. State,* 711 S.W.2d 421, 424-25 (Tex.App.-Austin 1986, writ ref'd n.r.e.) (presuming, despite expressed doubts, that teachers' certificates in question were vested rights and holding that constitutional prohibition against retroactive laws must yield to the state's right to safeguard the public welfare through valid exercise of its police power, citing *Kilpatrick* and *Wichita Engineering*); *Ismail v. Ismail,* 702 S.W.2d 216, 222 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.) (stating that an overriding public interest justifies application of statute to property acquired before the enactment, but concluding that court was bound by prior Texas Supreme Court case, which held that legal principle contained in statute was the law in Texas even before the statute took

effect); *Kilpatrick v. State Bd. of Registration for Prof'l Eng'rs,* 610 S.W.2d 867, 870-71 (Tex.Civ.App.-Fort Worth 1980, writ ref'd n.r.e.) (holding appellants had no vested rights that would be protected from retroactive laws but also citing *Wichita Engineering* for the statement that the constitutional protections against retroactive laws are not absolute and must yield to the state's right to safeguard public welfare); *State Bd. of Registration for Prof'l Eng'rs v. Wichita Eng'g Co.,* 504 S.W.2d 606, 608-09 (Tex.Civ.App.-Fort Worth 1973, writ ref'd n.r.e.) (stating that corporation had no vested right in using "engineering" in its name based on statute that was in effect when it was incorporated but stating that the constitutional protections against retroactive laws are not absolute and must yield to the state's right to safeguard public welfare); *Caruthers v. Bd. of Adjustment of City of Bunker Hill Village,* 290 S.W.2d 340, 345-50 (Tex.Civ.App.-Galveston 1956, no writ) (concluding property owners had no vested right to compel recognition of their planned subdivision in case in which parties did not assert an article I, section 16 violation, but stating that all property rights are subordinate to the valid and reasonable use of the police power). Nonetheless, the *Barshop* court stated that it agreed with the reasoning of these cases. The *Barshop* court did not reach the issue of whether the plaintiffs had vested rights, and it rejected the retroactivity challenge because it concluded that the Edwards Aquifer Act was "necessary to safeguard the public welfare of the citizens of this state. " *Barshop,* 925 S.W.2d at 634.

***24** The *Barshop* opinion supports the majority's application of a police-power analysis rather than the vested-rights analysis. But neither *Barshop* nor the cases cited therein mention or discuss section 29 of the Texas Bill of Rights. *See* Tex. Const. art. I, § 29. Under the plain meaning of this constitutional provision, the people of Texas have not given the Texas government the police power to enact any "retroactive law." *See* Tex. Const. Preamble, art. I, §§ 16, 29; *Dietz,* 940 S.W.2d at 89-90; *Bouillion,* 896 S.W.2d at 148-49; *Marshall,* 76 S.W.2d at 1010-11; *Fazekas,* 565 S.W.2d at 305. Although *Barshop* supports a police-power analysis, it does not mention or overrule prior Texas Supreme Court authority that uses the vested-rights analysis. *See, e.g., Wright,* 464 S.W.2d at 648-50; *Middleton,* 185 S.W. at 559-61; *Mellinger,* 3 S.W. at 251-54. Since *Barshop* was decided nearly a decade ago, the Texas Supreme Court and this court have used the vested-rights analysis without mentioning or discussing *Barshop. See, e.g., Subaru of America, Inc.,* 84 S.W.3d at 219-23; *In re A.D.,* 73 S.W.3d at 247-49; *Baker Hughes, Inc.,* 12 S.W.3d at 4-5; *Likes,* 962 S.W.2d at 502-03; *In re S.C.S.,* 48 S.W.3d at 835; *Price Pfister, Inc.,* 48 S.W.3d at 353-55; *Reames,* 928 S.W.2d at 631. Research indicates that *Barshop* is the only Texas Supreme Court case holding that a police-power type of analysis is appropriate for evaluating a claim that a statute violates the Texas Constitution's prohibition against retroactive laws. As an intermediate court of appeals, this court is bound by Texas Supreme Court precedent; however, *Barshop* is contradicted by several other Texas Supreme Court precedents existing when *Barshop* was decided and by several such precedents decided

after *Barshop*.[FN2] In this difficult position in which this court cannot possibly follow both *Barshop* and the other Texas Supreme Court precedents, the better course would be to follow the other precedents. Not only does the weight of authority rest in these cases, but these opinions discuss the issue in light of section 29 of the Texas Bill of Rights. Therefore, this court should apply the vested-rights analysis rather than a police-power analysis.

The Vested-Rights Analysis

Both the Texas Supreme Court and this court have concluded that an accrued cause of action is a vested right. *See Likes,* 962 S.W.2d at 502; *Mellinger,* 3 S.W. at 253 ("When ... a state of facts exists as the law declares shall entitle a plaintiff relief in a court of justice on a claim which he makes against another ..., then it must be said that a right exists [and] has become fixed or vested...."); *Price Pfister, Inc.,* 48 S.W.3d at 354 (determining that, for purposes of retroactivity analysis under Texas Constitution, company had a vested right when its contract claim accrued); *but see Walls v. First State Bank of Miami,* 900 S.W.2d 117, 122 (Tex.App.-Amarillo 1995, writ denied) (stating that right does not become vested until claim is reduced to a final, nonreviewable judgment); *Houston Indep. Sch. Dist. v. Houston Chronicle Pub. Co.,* 798 S.W.2d 580, 589 (Tex.App.-Houston [1st Dist.] 1990, writ denied) (indicating

that right is not vested until lawsuit is filed and finally determined). This logic is also supported by the various cases holding that a right to a limitations defense becomes vested when the claim becomes barred by limitations, rather than when the party obtains a judgment to this effect that is final by appeal. *See, e.g., Baker Hughes, Inc.,* 12 S.W.3d at 4 (stating that it is well settled that a statute may not retroactively destroy a party's right to a limitations defense, which becomes vested after the claim is barred by limitations). Though some courts of appeals have stated that an accrued claim is not vested until it is reduced to a judgment final by appeal, these holdings are contrary to precedents binding on this court. *See Likes,* 962 S.W.2d at 502; *Mellinger,* 3 S.W. at 253; *Price Pfister, Inc.,* 48 S.W.3d at 354. Moreover, these holdings are not logically sound. If a judgment final by appeal is necessary, then parties whose claims accrued on the same day would have their entitlement to constitutional protection from retroactive statutes determined based in part on how expeditious the trial and appellate process happened to be in their particular lawsuits. That would not be reasonable.

***25** Because Mrs. Robinson's claims accrued and were pending in the trial court when the Statute took effect, Mrs. Robinson held vested rights in these claims that could not be destroyed. [FN3] *See Likes,* 962 S.W.2d at 502; *Mellinger,* 3 S.W. at 253; *Price Pfister, Inc.,* 48 S.W.3d at 354. Crown Cork & Seal asserts that the Statute does not bar all of Mrs. Robinson's remedy for the claimed injuries because she can sue other companies not protected by the Statute. This

argument lacks merit because Mrs. Robinson claims that the Statute retroactively destroyed her vested rights in her claims against Crown Cork & Seal, rather than any vested rights she might have to sue other entities. Crown Cork & Seal has cited no cases supporting the notion that the Texas Constitution permits a statute to retroactively destroy a vested right in an accrued claim if other parties may be liable on other claims seeking damages for the same injury. This argument lacks merit.[FN4]

In *Ieropoli v. AC & S Corp.*, the Pennsylvania Supreme Court addressed the constitutionality of a Pennsylvania statute limiting the successor asbestos-related liabilities of certain companies that, as applied, would have retroactively destroyed accrued tort claims against Crown Cork & Seal. *See* 577 Pa. 138, 842 A.2d 919, 932 (2004). Although *Ieropoli* involved the open courts provision of the Pennsylvania Constitution and a somewhat different Pennsylvania statute, the case has some persuasive value in evaluating the constitutional issue in the instant case. *See* 577 Pa. 138, 842 A.2d 919, 932 (2004). In *Ieropoli,* Pennsylvania's high court held that the Pennsylvania statute, as applied, offended the Pennsylvania Constitution. *See id.* at 929-32. Reversing and remanding the lower court, the Pennsylvania Supreme Court found that the Pennsylvania statute violated the open courts provision of the Pennsylvania Constitution by destroying all remedy for an accrued cause of action. *See id.* at 932. The *Ieropoli* court held that an accrued claim is a vested right that cannot be eliminated by subsequent legislation. *See id.* at

927-32,. In explaining why the statute violated the remedies clause of the Pennsylvania Constitution, the *Ieropoli* court stated:

Before the Statute's enactment, each cause of action that [plaintiffs] brought against Crown Cork was a remedy-it was the vehicle by which [plaintiffs] lawfully pursued redress, in the form of damages, from Crown Cork for an alleged legal injury. But under the Statute, [plaintiffs] cannot obligate Crown Cork to pay them damages on those causes of action. In this way, each cause of action has been stripped of its remedial significance, as it can no longer function as the means by which [plaintiffs] may secure redress from Crown Cork. As a remedy, each cause of action has been in essence, extinguished. Under [the open courts provision of the Pennsylvania Constitution], however, a statute may not extinguish a cause of action that has accrued. Therefore, as [plaintiffs'] causes of action accrued before the Statute was enacted, we hold that the Statute's application to [plaintiffs'] causes of action is unconstitutional

***26** *Id.* at 930. The Pennsylvania Supreme Court rejected the argument that because the plaintiffs could recover from other potential defendants, no cause of action had been extinguished. The court's logic in rejecting this point is persuasive:What this reasoning overlooks is the individual nature of a cause of action. A plaintiff does not assert one cause of action against multiple defendants. Rather, a plaintiff asserts one cause of action (or two or several causes of action) against a single defendant ... Thus, the fact that the causes of action

[plaintiffs] brought against Crown Cork's co-defendants are proceeding has no bearing on the Statute's unconstitutional effect on the accrued causes of action that [plaintiffs] brought against it.

Id. Although the Pennsylvania Constitution is different from the Texas Constitution, both states use the vested-rights analysis and both constitutions prohibit statutes that retroactively eliminate accrued claims; therefore, the majority's distinctions between the *Ieropoli* decision and this case are not convincing. The majority states that "the most important differences appear in the statutes themselves," noting that the Pennsylvania statute was not as narrowly drawn as the Texas statute, was not crafted to encompass "only the most innocent successor corporations," and did not impose the requirement that a corporation must have purchased the asbestos division before May 13, 1968, and must not have manufactured asbestos itself. *Ante* at p. ----. But, if the enactment of the Statute violates a constitutional prohibition on retroactive laws, these points are not relevant to the analysis.

In sum, by enacting this expressly retroactive statute, our Legislature created a new substantive defense to successor liability and made it immediately effective in all pending cases, destroying Mrs. Robinson's vested rights in her accrued tort claims against Crown Cork & Seal. The Statute, as applied to Mrs. Robinson, is unconstitutional because it violates the Texas Bill of

Rights's prohibition against retroactive laws.

Conclusion

Based on the structure and plain language of the Texas Constitution as well as the weight of binding precedent, this court should utilize the vested-rights analysis to determine whether the Statute is an unconstitutional retroactive law as applied to Mrs. Robinson's claims against Crown Cork & Seal. This analysis compels the conclusion that, as applied to her, the Statute retroactively destroys Mrs. Robinson's vested rights in accrued tort claims against Crown Cork & Seal. Therefore, to this extent, the Statute violates article I, section 16 of the Texas Constitution.

FN1. Mr. Robinson succumbed to his illness during the litigation in the trial court, and Barbara Robinson continued to pursue his claims under the wrongful death statute.

FN2. Mundet sold its insulation division to Baldwin-Ehret-Hill ("B-E-H") on February 8, 1964.

FN3. "Successor asbestos-related liabilities" is defined in the Statute as:

any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, that are related in any way to asbestos claims that were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation, with or into another corporation or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under Section 149.004, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged, by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction.

Tex. Civ. Prac. & Rem.Code § 149.001(3).

FN4. An "asbestos claim" is defined in the Statute as:

any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos,

including:

(A) property damage caused by the installation, presence, or removal of asbestos;

(B) the health effects of exposure to asbestos, including any claim for:

(i) personal injury or death;

(ii) mental or emotional injury;

(iii) risk of disease or other injury; or

(iv) the costs of medical monitoring or surveillance; and

(C) any claim made by or on behalf of any person exposed to asbestos, or a representative, spouse, parent, child, or other relative of the person.

Tex. Civ. Prac. & Rem.Code § 149.001(1).

FN5. The Statute provides that a corporation may establish the fair market value of total gross assets by any method reasonable under the circumstances, including (1) by reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arm's-length transaction; or (2) in the absence of other readily available information from which fair market value can be determined, by reference to the value of the assets recorded on a balance sheet. Tex. Civ. Prac. & Rem.Code § 149.004(a). The fair market value of total gross assets may not reflect a deduction for any liabilities arising from any asbestos claim. *See id.* § 149.004(d). The fair market

value at the time of the merger or consolidation is then adjusted as provided for inflation. *See id.* § 149.005.

FN6. Sections 149.001(2) and 149.002(a) limit the Statute's application to a domestic corporation or a foreign corporation "that has had a certificate of authority to transact business in this state or has done business in this state." It is undisputed that Crown Cork meets this criteria.

FN7. Mrs. Robinson's challenge to the retroactive application of the Statute is an "as applied" challenge, meaning that a generally constitutional statute operates unconstitutionally as to her because of her particular circumstances. *See Tex. Workers' Comp. Comm'n v. Garcia,* 893 S.W.2d 504, 518 n. 16 (Tex.1995).

FN8. Courts have not tested retroactive legislation only by employing a vested rights analysis. Some Texas courts and courts of other states have employed additional terminology to help them assess if a right is alterable. Some of these courts have referred to some alleged rights merely as "remedies" to illustrate what can be altered (remedy) and what cannot be altered (vested right). *See Ex Parte Abell,* 613 S.W.2d at 259-61; *Wright,* 464 S.W.2d at 648-49; *In re Goldman,* 151 N.H. 770, 868 A.2d 278,

281-82 (2005); *In re Estate of DeWitt,* 54 P.3d 849, 854 & n. 3 (Colo.2002) (en banc); *State v. MacKenzie,* 114 Wash.App. 687, 60 P.3d 607, 614 (2002); *In re Good Samaritan Hosp.,* 107 Ohio App.3d 351, 668 N.E.2d 974, 977 (1995); *Olsen v. Special Sch. Dist. # 1,* 427 N.W.2d 707, 711-12 (Minn.Ct.App.1988); Smith, 5 Tex. L.Rev. at 241 ("Rights, it has frequently been said, may not be retrospectively denied, but no man can have a vested right to a particular remedy.") (footnote omitted). To further confuse matters, other courts have held that even a remedy cannot be taken away entirely by a retroactive statute. *See City of Tyler v. Likes,* 962 S.W.2d 489, 502 (Tex.1997) (citing *De Cordova v. City of Galveston,* 4 Tex. 470, 480 (1849)). Each of these methods has been applied inconsistently. *See* Smith, 5 Tex. L.Rev. at 240-48. Other courts have analyzed allegedly vested rights using other factors altogether. *See Plotkin v. Sajahtera, Inc.,* 106 Cal.App.4th 953, 131 Cal.Rptr.2d 303, 310-11 (2003) (weighing the significance of the state interest served by the law and the importance of the retroactive application of law to achieve the law's purposes, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which retroactive application would disrupt those actions); *see also Nobrega,* 772 A.2d at 379-83.

FN9. Asbestos litigation has also strained the resources of our courts. The United States

Supreme Court has described the ever-increasing number of asbestos cases in our state courts as an "elephantine mass" that "defies customary judicial administration and calls for national legislation." *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (" 'The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.' ") (quoting Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar.1991)). The Texas Legislature recently enacted additional asbestos-related legislation in an effort to address some of the problems faced by litigants in our courts. *See* Act of May 11, 2005, 79th Leg., R.S., ch. 97, 2005 Tex. Gen. Laws 169 & § 1(e) ("An Act Relating to Civil Claims Involving Exposure to Asbestos and Silica") (to be codified at Tex. Civ. Prac. & Rem.Code §§ 90.001-90.0012) ("Texas has not been spared this crisis. In the period from 1988 to 2000, more lawsuits alleging asbestos-related disease were filed in Texas than in any other state. Thousands of asbestos lawsuits are pending in Texas courts today.").

FN10. Federal courts also address many claims of allegedly unconstitutional retroactive statutes. In fact, until the 1930s, the United States Supreme Court routinely and consistently struck down retroactive statutes. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach,* 110 Harv. L.Rev.. 1055, 1063-64 (1997); Daniel E.Troy, *Toward a Definition and Critique of Retroactivity,* 51 Ala. L.Rev. 1329, 1350-51 (2000). Not until the New Deal did the Court begin to affirm the constitutionality of retroactive statutes. Fisch, 110 Harv. L.Rev. . at 1063-64; Troy, 51 Ala. L.Rev. at 1351; see also, *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265-69, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (noting that the Supreme Court has given greater deference in the 1900s to legislative judgments that a statute must be applied retroactively). Since that time, the Court has been more accepting of retroactive laws. Fisch, 110 Harv. L.Rev.. at 1064; Troy, 51 Ala. L.Rev. at 1351. Recently, however, some justices have begun to review retroactive laws in a more negative light. *See U.S. v. Carlton,* 512 U.S. 26, 39-41, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994) (Scalia, J., joined by Thomas, J., concurring).

FN11. *See* 15 Pa. C.S. § 1929.1 (2004); Miss.Code Ann. §§ 79-31-1-79-31-11 (2004).

FN12. Crown Cork represents that there are currently more than 20,000 cases in Texas

alone in which Crown Cork is being sued for asbestos-related liabilities because it is a successor through merger or consolidation. Mrs. Robinson does not dispute this claim.

FN1. In its Contract Clause analysis, the *Barshop* court also cites dicta from two courts of appeals. *See Texas Water Comm'n v. City of Fort Worth,* 875 S.W.2d 332, 335-36 (Tex.App.-Austin 1994, pet. denied) (citing *Kilpatrick* in dicta and stating that contract clause of Texas Constitution is subject to the police power but holding the statute in question does not impair contractual obligations); *Andrada v. City of San Antonio,* 555 S.W.2d 488, 491 (Tex.Civ.App.-San Antonio 1977, writ dism'd) (citing federal Contract Clause cases regarding police power in case in which the statute did not apply retroactively or impair existing contractual obligations).

FN2. The majority also cites other cases that are not persuasive or not on point as to this issue. *See Lebohm v. City of Galveston,* 154 Tex. 192, 275 S.W.2d 951, 954-55 (1955) (stating in dictum in case involving only a successful open courts challenge that legislature may withdraw common law remedy if it is a reasonable exercise of the police power); *City of Coleman v. Rhone,* 222 S.W.2d 646, 648 (Tex.Civ.App.-Eastland 1949, writ ref'd) (stating that the police power is broad in case that did not involve an alleged

violation of the Texas Bill of Rights but only an assertion that a statute was not a reasonable exercise of the police power); *City of Breckenridge v. Cozart,* 478 S.W.2d 162, 165 (Tex.Civ.App.-Eastland 1972 writ ref'd n.r.e.) (holding that shutting off of person's water services did not constitute a taking of property without due process of law and stating that statute authorizing such action was a valid exercise of the police power); *Martin v. Wholesome Dairy, Inc.,* 437 S.W.2d 586, 590-91 (Tex.Civ.App.-Austin 1969, writ ref'd n.r.e.) (discussing the police power in case involving alleged violations of Equal Rights and Due Course of Law provisions).

FN3. Furthermore, there is no merit in Crown Cork & Seal's argument that Mrs. Robinson's claims are statutory claims in which she has no vested rights under *Dickson v. Navarro County Levee Improv. Dist. No.3,* 135 Tex. 95, 139 S.W.2d 257, 259 (1940) and *Aetna Ins. Co. v. Richardelle,* 528 S.W.2d 280, 284 (Tex.Civ.App.-Corpus Christi 1975, writ ref'd n.r.e.). Likewise, there is no merit in Crown Cork & Seal's assertion that the Statute is a change in the conflict-of-laws rules, in which Mrs. Robinson has no vested right.

FN4. In addition, although the majority stresses the asbestos litigation crisis, the Texas Supreme Court has held that emergency conditions do not allow the Texas Legislature

to constitutionally enact a statute that destroys vested rights. *See Marshall,* 76 S.W.2d at 1011.

Tex.App.-Houston [14 Dist.],2006.

Robinson v. Crown Cork & Seal Co., Inc.

--- S.W.3d ----, 2006 WL 1168782 (Tex.App.-Hous. (14 Dist.))

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DEBORAH STAHLHEBER, Administratrix of the Estate of Cecil Sizemore, Deceased,	:	
Plaintiff-Appellee,	:	CASE NO. CA2006-06-134
- vs -	:	OPINION 12/28/2006
LAC D'AMIANTE DU QUEBEC, LTEE, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2003-05-1292

Young, Reverman & Mazzei Co., L.P.A., Richard E. Reverman, The Kroger Bldg., Suite 2400, 1014 Vine Street, Cincinnati, Ohio 45202 and Motley Rice LLC, Vincent L. Greene IV, 321 South Main Street, Providence, Rhode Island 02903, for plaintiff-appellee,

Vorys, Sater, Seymour and Pease LLP, Richard D. Schuster, Nina I. Webb-Lawton, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008 and Vorys, Sater, Seymour and Pease LLP, Rosemary D. Welsh, 221 East Fourth Street, Suite 2000, Cincinnati, Ohio 45202, for defendants-appellants, American Standard, Inc., Oglebay Norton Company, Certainteed Corporation, 3M Company, and Union Carbide Corporation

Baker & Hostetler LLP, Robin E. Harvey, Angela M. Hayden, 312 Walnut Street, Suite 3200, Cincinnati, Ohio 45202, for defendants-appellants, Uniroyal, Inc. and Georgia-Pacific Corp.

Baker & Hostetler LLP, Randall L. Soloman, Edward L. Papp, Diane Feigi, 3200 National City Center, 1900 East 9th Street, Cleveland, Ohio 44114-3485, for defendant-appellant, Maremont Corporation

Evanchan & Palmisano, Nicholas L. Evanchan, Ralph J. Palmisano, John Sherrod, Twin Oaks Estate, 1225 West Market Street, Akron, Ohio 44313, for defendant-appellant, Foster Wheeler Energy Corporation

Ulmer & Berne LLP, Bruce P. Mandel, James N. Kline, Kurt S. Siegfried, Robert E. Zulandt III, Suite 1100, 1660 West 2nd Street, Cleveland, Ohio 44113-1448, for defendant-appellant, Ohio Valley Insulating Company, Inc.

McCarthy, Lebit, Crystal & Liffman Co., L.P.A., David A. Schaefer, 1800 Midland Bldg., 101 Prospect Avenue West, Cleveland, Ohio 44115, for defendant-appellant, Rapid American Corporation

Jim Petro, Ohio Attorney General, Holly J. Hunt, Constitutional Offices Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, for amicus curiae, Ohio Attorney General Jim Petro

BRESSLER, J.

{¶1} This matter is before us on an appeal[1] by numerous defendants-appellants[2] who are challenging an order of the Butler County Court of Common Pleas finding that certain provisions in Amended Substitute House Bill 292 could not be applied prospectively to the asbestos claim of plaintiff-appellee, Deborah Stahlheber, Administratrix of the Estate of Cecil Sizemore, but administratively dismissing appellee's claim, anyway, pursuant to R.C. 2307.93(C).

{¶2} From 1952 to 1979, Cecil Sizemore worked as a truck driver and forklift operator at the Nicolet Industry Plant in Hamilton, Ohio. Sizemore was exposed to asbestos during the period in which he worked at the plant. Sizemore died on May 14, 2001.

{¶3} On May 13, 2003, appellee, Sizemore's daughter, acting as the administratrix of the Estate of Cecil Sizemore (hereinafter "decedent"), filed a complaint against a number of

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

2. The defendants-appellants in this case are: American Standard, Inc., 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide, Uniroyal, Inc., Georgia-Pacific Corporation, Maremont Corporation, Foster Wheeler Energy Corporation, Ohio Valley Insulating Company, Inc., and Rapid American Corporation.

companies (hereinafter "appellants"[3]) that have been engaged in the mining, processing or manufacturing, or sale and distribution of asbestos or asbestos-containing products or machinery. Appellee alleged that decedent had been exposed to asbestos or asbestos-containing products or machinery in his occupation, and that appellants were jointly and severally liable for decedent's "asbestos-related lung injury, disease, illness and disability and other related physical conditions."

{¶4} On September 2, 2004, Amended Substitute House Bill 292 (hereinafter "H.B. 292") went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D).

{¶5} Appellee advanced two claims in her action against appellants: (1) that decedent had contracted asbestosis[4] as a result of his exposure to asbestos in his workplace; and (2) that appellants were also liable under a theory of wrongful death.

{¶6} In March 2006, appellee filed a motion with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. Appellants responded with a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow her case to proceed, and requesting that appellee's case be administratively dismissed pursuant to R.C. 2307.93(C).

{¶7} On April 24, 2005, the trial court held a hearing on the parties' various

3. The companies named as defendants in Staley's original complaint included the companies listed in fn. 2, plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference, we shall refer to all of these defendants as "appellants" even though several of them have been dismissed from this action and are not parties to this appeal.

4. "'Asbestosis' means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers." R.C. 2307.91(D).

arguments regarding appellee's asbestos-related claims. Appellee conceded at the hearing that based on decedent's death certificate, which had been filed in the case, "there is no evidence ***, at the moment, that [decedent's] death was caused as a result of an [asbestos-related] disease." Appellee requested the trial court to administratively dismiss both her asbestosis and wrongful death claims until she had an opportunity to gather additional evidence in support of them. Appellee also asked the trial court to find that the retroactive application of H.B. 292 to her case would be unconstitutional, as the trial court had found in previous cases. See *Wilson v. AC&S, Inc.* (Mar. 7, 2006), Butler Cty. C.P. No. CV2001-12-3029.

{¶8} On June 1, 2006, the trial court issued an "Amended Order of Administrative Dismissal" with respect to appellee's asbestos claim. Initially, the trial court found that pursuant to R.C. 2307.93(A)(3)(a), applying R.C. 2307.92 to appellee's case "would impair [her] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." Consequently, the trial court announced its intention to review the prima facie materials that had been filed in the case according to the law as it existed prior to September 2, 2004.

{¶9} However, the trial court concluded that the prima facie evidence presented by appellee failed "to meet the criteria for maintaining an asbestos-related bodily injury claim that existed prior to September 2, 2004." Consequently, the trial court administratively dismissed appellee's case without prejudice pursuant to R.C. 2307.93(C).

{¶10} Appellants now appeal from the trial court's June 1, 2006 order, raising the following assignment of error:

{¶11} "THE TRIAL COURT ERRED IN ITS INTERPRETATION THAT R.C. 2307.92 VIOLATES THE OHIO CONSTITUTION."

{¶12} Appellants argue that the trial court erred in determining that it could not apply

certain provisions of H.B. 292, including R.C. 2307.92, without violating the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution. We agree with this argument.

{¶13} Initially, appellee contends that the order from which appellants are appealing is not a final appealable order. We disagree with this contention.

{¶14} R.C. 2505.02, which governs "final orders," states in pertinent part:

{¶15} "(A) As used in this section:

{¶16} "***

{¶17} "(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to *** a prima facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

{¶18} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶19} "***

{¶20} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶21} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶22} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶23} In this case, the proceedings in the trial court constituted a "provisional remedy" under R.C. 2505.02(A)(3) since they involved a proceeding for "a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division

(A)(3) of section 2307.93 of the Revised Code." Additionally, the order being appealed is one "that grants or denies a provisional remedy[,]" in that the trial court (1) found that appellee had not made a sufficient prima facie showing under R.C. 2307.92, and (2) made a finding under R.C. 2307.93(A)(3). See R.C. 2505.02(A)(3) and (B)(4).

{¶24} The order appealed from is also one that "determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy." R.C. 2505.02(B)(4)(a). Specifically, the trial court found that pursuant to R.C. 2307.93(A)(3)(a), applying R.C. 2307.92 to appellee's case "would impair [appellee's] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." As a result, the trial court concluded that the law in effect prior to the effective date of H.B. 292, i.e., September 2, 2004, must be applied to this action. Consequently, the order appealed from meets both of the requirements listed in R.C. 2505.02(B)(4)(a).

{¶25} Finally, in light of all of the facts and circumstances of these proceedings, appellants "would not be afforded a meaningful or effective remedy" by having to wait to file an appeal "following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). Therefore, we conclude that the order from which the instant appeal was taken was final and appealable. This court has reached the same conclusion in similar, recent cases. See, e.g., *Wilson v. AC&S, Inc.* (Dec. 18, 2006), Butler App. No. CA2006-03-056, 2006-Ohio-6704, at fn. 3.

{¶26} As to the issues raised in appellants' assignment of error, we first note that in *Wilson*, this court held that R.C. 2307.91, 2307.92, and 2307.93 are procedural or remedial provisions rather than substantive ones, and, therefore, their retroactive application to cases filed before the effective date of those provisions, i.e., September 2, 2004, did not violate the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution.

{¶27} In light of our decision in *Wilson*, the trial court erred when it found, pursuant to R.C. 2307.93(A)(3)(a), that applying R.C. 2307.92 to appellee's case "would impair [her] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." The trial court also erred when it "review[ed] the prima facie materials that had been filed in the case according to the law as it existed prior to September 2, 2004."

{¶28} The trial court's decision to administratively dismiss appellee's case pursuant to R.C. 2307.93(C), on the other hand, was correct. Since appellee did not make the requisite prima facie showing, the trial court was obligated to dismiss both of appellee's asbestos claims (for asbestosis and wrongful death) without prejudice pursuant to R.C. 2307.93(C).

{¶29} If appellee seeks to reinstate her case pursuant to R.C. 2307.93(C), then she must make the prima facie showing that meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D), whichever is applicable; however, she may *not* rely on the law as it existed prior to September 2, 2004, contrary to what the trial court had indicated in its decision. See R.C. 2307.93(C) ("Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code").

{¶30} Appellants' assignment of error is sustained.

{¶31} The trial court's June 1, 2006 order is affirmed in part and reversed in part, and this cause is remanded to the trial court with instructions to issue a new order consistent with this opinion and in accordance with the law of this state.

POWELL, P.J., and YOUNG, J., concur.

[Cite as *Staley v. AC&S, Inc.*, 2006-Ohio-7033.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

GEORGE A. STALEY,	:	
Plaintiff-Appellee,	:	CASE NO. CA2006-06-133
	:	OPINION
- vs -		12/28/2006
	:	
AC&S, INC., et al,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2001-12-2971

Price Waicukauski & Riley, LLC, William N. Riley, Christopher Moeller, 301 Massachusetts

Baker & Hostetler LLP, Randall L. Solomon, Edward D. Papp, Diane L. Feigi, 3200 National City Center, 1900 East 9th Street, Cleveland, OH 44114-3485, for defendant-appellant, Maremont Corporation.

Evanchan & Palmisano, Nicholas L. Evanchan, Ralph J. Palmisano, John Sherrod, Twin Oaks Estate, 1225 West Market Street, Akron, OH 44313, for defendant-appellant, Foster Wheeler Energy Corporation

McCarthy, Lebit, Crystal & Liffman, Co., L.P.A., David A. Schaefer, 1800 Midland Building, 101 Prospect Avenue, West Cleveland, OH 44115, for defendant-appellant, Rapid American Corporation

State of Ohio Office of Attorney General, Constitutional Offices Section, Jim Petro, Holly J. Hunt, 30 East Broad Street, 17th Floor, Columbus, OH 43215, for amicus curiae, Ohio Attorney General Jim Petro

POWELL, P.J.

{¶1} This matter is before us on an appeal[1] by numerous defendants-appellants[2] who are appealing an order of the Butler County Court of Common Pleas that: (1) found that the "medical criteria provisions" of Amended Substitute House Bill 292 cannot be applied prospectively to the asbestos claim of plaintiff-appellee, George A. Staley, but (2) administratively dismissed plaintiff-appellee's claim, anyway, pursuant to R.C. 2307.93(C).

{¶2} From 1946 to his retirement in 1984, appellee was employed by A.K. Steel Corporation (f.k.a. Armco Steel Corporation), located in Butler County, Ohio. Appellee worked as a laborer in various jobs and locations around the plant. On November 16, 1999, appellee was diagnosed with asbestos-related disease.

{¶3} On December 14, 2001, appellee filed a complaint against a number of companies (hereinafter "appellants"[3]) that have been engaged in the mining, processing or

1. This matter is sua sponte removed from the accelerated calendar.

2. The defendants-appellants in this case are: 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide, CBS Corporation, Uniroyal, Inc., Georgia-Pacific Corporation, Cleaver-Brooks, Inc., Maremont Corporation, Foster Wheeler Energy Corporation, and Rapid American Corporation.

3. The companies named as defendants in Staley's original complaint included the companies listed in fn. 2, plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference,

manufacturing, or sale and distribution of asbestos or asbestos-containing products or machinery. Appellee alleged that he had been exposed to asbestos or asbestos-containing products or machinery in his occupation, and that appellants were jointly and severally liable for his "asbestos-related lung injury, disease, illness and disability and other related physical conditions."

{¶4} On September 2, 2004, Amended Substitute House Bill 292 (hereinafter "H.B. 292") went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D) and 2307.93(A)(1).

{¶5} In December 2005, appellee filed a motion, with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. In March 2006, appellants filed a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow his case to proceed, and requesting that appellee's case be administratively dismissed pursuant to R.C. 2307.93(C).

{¶6} In April 2006, the trial court held a hearing on the parties' various assertions regarding appellee's asbestos claim. At the hearing, appellee acknowledged that his evidence was insufficient to make the prima facie showing required under H.B. 292. Nevertheless, appellee argued that H.B. 292 should not apply to his asbestos claim since applying the new law to his case would constitute an unconstitutional retroactive application of the law.

{¶7} On June 1, 2006, the trial court issued an "Amended Order of Administrative

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we shall refer to all of these defendants as "appellants" even though several of them have been dismissed from this action and are not parties to this appeal.

Dismissal" with respect to appellee's asbestos claim. The trial court began its analysis by adopting its recent decision in *Wilson v. AC&S, Inc.* (Mar. 7, 2006), Butler Cty. C.P. No. CV2001-12-3029, and finding "that the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case." However, the trial court then found that "the prima facie proceeding required by R.C. 2307.92 is procedural and may be applied retrospectively." As a result of these findings, the trial court announced its intention to "review the prima facie materials [filed] in this case according to the law as it existed prior to H.B. 292's effective date of September 2, 2004."

{¶8} The trial court concluded that the prima facie evidence presented by appellee—by appellee's own admission—failed "to meet the criteria for maintaining an asbestos-related bodily injury claim that existed prior to September 2, 2004." Consequently, the trial court administratively dismissed appellee's case, without prejudice, pursuant to R.C. 2307.93(C).

{¶9} Appellants now appeal from the trial court's June 1, 2006 order, raising the following assignment of error:

{¶10} "THE TRIAL COURT ERRED IN ITS INTERPRETATION THAT R.C. 2307.92 VIOLATES THE OHIO CONSTITUTION."

{¶11} Appellants argue that the trial court erred in determining that it could not apply the procedural requirements outlined in R.C. 2307.92 without violating the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution. We agree with this argument.

{¶12} The trial court, citing its recent decision in *Wilson*, Butler Cty. C.P. No. CV2001-12-3029, found "that the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case." The trial court did not define what it meant when it used the phrase "medical criteria provisions of H.B. 292," but presumably, the court was referring to the "minimum medical requirements" listed throughout R.C. 2307.92, and the definitions of certain

key terms in R.C. 2307.91, like "competent medical authority." See, e.g., R.C. 2307.91(Z) (defining "competent medical authority").

{¶13} However, in *Wilson v. AC&S, Inc.*, Butler App. No. CA2006-03-056, 2006-Ohio-6704, this court reversed the trial court's decision. In *Wilson*, this court held that R.C. 2307.91, 2307.92, and 2307.93 were procedural or remedial provisions rather than substantive ones, and, therefore, their retroactive application to cases filed before the effective date of those provisions (i.e., September 2, 2004), did not violate the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution.

{¶14} In light of our decision in *Wilson*, the trial court erred when it found that "the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case[,]" and when it decided to "review the prima facie materials [filed] in this case according to the law as it existed prior to H.B. 292's effective date of September 2, 2004."

{¶15} The trial court's decision to administratively dismiss appellee's case pursuant to R.C. 2307.93(C) was correct. Appellee conceded during these proceedings that he did not make the prima facie showing required under R.C. 2307.92 and 2307.93. For the reasons stated in our decision in *Wilson*, those provisions apply to appellee's case. Because appellee could not make the requisite prima facie showing, the trial court was obligated to dismiss appellee's asbestos claim without prejudice pursuant to R.C. 2307.93(C).

{¶16} However, if appellee seeks to reinstate his case pursuant to R.C. 2307.93(C), then he must make the prima facie showing that meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D), whichever is applicable. See R.C. 2307.93(C) ("Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code"). Appellee may *not* rely on the law as it existed prior to September 2, 2004, as the trial court

indicated in its decision.

{¶17} Appellants' assignment of error is sustained.

{¶18} The trial court's June 1, 2006 order is affirmed in part and reversed in part, and this cause is remanded to the trial court with instructions to issue a new order consistent with this opinion and in accordance with the law of this state.

YOUNG and BRESSLER, JJ., concur.

Civ. R. Rule 3

C

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Civil Procedure (Refs & Annos)

Title II. Commencement of Action and Venue; Service of Process; Service and Filing of Pleadings and Other Papers Subsequent to the Original Complaint; Time

→Civ R 3 Commencement of action; venue

(A) Commencement

A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

(B) Venue: where proper

Any action may be venued, commenced, and decided in any court in any county. When applied

to county and municipal courts, "county," as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

(1) The county in which the defendant resides;

(2) The county in which the defendant has his or her principal place of business;

(3) A county in which the defendant conducted activity that gave rise to the claim for relief;

(4) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;

(5) A county in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;

(6) The county in which all or part of the claim for relief arose; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose;

(7) In actions described in Civ.R. 4.3, in the county where plaintiff resides;

(8) In an action against an executor, administrator, guardian, or trustee, in the county in which the executor, administrator, guardian, or trustee was appointed;

(9) In actions for divorce, annulment, or legal separation, in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;

(10) In actions for a civil protection order, in the county in which the petitioner currently or temporarily resides;

(11) In tort actions involving asbestos claims, silicosis claims, or mixed dust disease claims, only in the county in which all of the exposed plaintiffs reside, a county where all of the exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or the county in which the defendant has his or her principal place of business.

(12) If there is no available forum in divisions (B)(1) to (B)(10) of this rule, in the county in which plaintiff resides, has his or her principal place of business, or regularly and systematically conducts business activity;

(13) If there is no available forum in divisions (B)(1) to (B)(11) of this rule:

(a) In a county in which defendant has property or debts owing to the defendant subject to attachment or garnishment;

(b) In a county in which defendant has appointed an agent to receive service of process or in which an agent has been appointed by operation of law.

(C) Change of venue

(1) When an action has been commenced in a county other than stated to be proper in division (B) of this rule, upon timely assertion of the defense of improper venue as provided in Civ.R. 12 , the court shall transfer the action to a county stated to be proper in division (B) of this rule.

(2) When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in division (B) of this rule.

(3) Before entering a default judgment in an action in which the defendant has not appeared, the court, if it finds that the action has been commenced in a county other than stated to be proper

in division (B) of this rule, may transfer the action to a county that is proper. The clerk of the court to which the action is transferred shall notify the defendant of the transfer, stating in the notice that the defendant shall have twenty-eight days from the receipt of the notice to answer in the transferred action.

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

(D) Venue: no proper forum in Ohio

When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action

in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action.

If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action.

(E) Venue: multiple defendants and multiple claims for relief

In any action, brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief.

Neither the dismissal of any claim nor of any party except an indispensable party shall affect the jurisdiction of the court over the remaining parties.

(F) Venue: notice of pending litigation; transfer of judgments

(1) When an action affecting the title to or possession of real property or tangible personal property is commenced in a county other than the county in which all of the real property or tangible personal property is situated, the plaintiff shall cause a certified copy of the complaint to be filed with the clerk of the court of common pleas in each county or additional county in which the real property or tangible personal property affected by the action is situated. If the plaintiff fails to file a certified copy of the complaint, third persons will not be charged with notice of the pendency of the action.

To the extent authorized by the laws of the United States, division (F)(1) of this rule also applies to actions, other than proceedings in bankruptcy, affecting title to or possession of real property in this state commenced in a United States District Court whenever the real property is situated wholly or partly in a county other than the county in which the permanent records of the court are kept.

(2) After final judgment, or upon dismissal of the action, the clerk of the court that issued the judgment shall transmit a certified copy of the judgment or dismissal to the clerk of the court of common pleas in each county or additional county in which real or tangible personal property affected by the action is situated.

(3) When the clerk has transmitted a certified copy of the judgment to another county in

accordance with division (F)(2) of this rule, and the judgment is later appealed, vacated, or modified, the appellant or the party at whose instance the judgment was vacated or modified must cause a certified copy of the notice of appeal or order of vacation or modification to be filed with the clerk of the court of common pleas of each county or additional county in which the real property or tangible personal property is situated. Unless a certified copy of the notice of appeal or order of vacation or modification is so filed, third persons will not be charged with notice of the appeal, vacation, or modification.

(4) The clerk of the court receiving a certified copy filed or transmitted in accordance with the provisions of division (F) of this rule shall number, index, docket, and file it in the records of the receiving court. The clerk shall index the first certified copy received in connection with a particular action in the indices to the records of actions commenced in the clerk's own court, but may number, docket, and file it in either the regular records of the court or in a separate set of records. When the clerk subsequently receives a certified copy in connection with that same action, the clerk need not index it, but shall docket and file it in the same set of records under the same case number previously assigned to the action.

(5) When an action affecting title to registered land is commenced in a county other than the county in which all of such land is situated, any certified copy required or permitted by this division (F) of this rule shall be filed with or transmitted to the county recorder, rather than the

clerk of the court of common pleas, of each county or additional county in which the land is situated.

(G) Venue: collateral attack; appeal

The provisions of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue; however, nothing here shall affect the right to appeal an error of court concerning venue.

(H) Definitions

As used in division (B)(11) of this rule:

(1) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code;

(2) "Silicosis claim" and "mixed dust disease claim" have the same meaning as in section 2307.84 of the Revised Code;

(3) In reference to an asbestos claim, "tort action" has the same meaning as in section 2307.91 of the Revised Code;

(4) In reference to a silicosis claim or a mixed dust disease claim, "tort action" has the same meaning as in section 2307.84 of the Revised Code.

(Adopted eff. 7-1-70; amended eff. 7-1-71, 7-1-86, 7-1-91, 7-1-98, 7-1-05)

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-05 amendment added new division (B)(11); redesignated former divisions (B)(11) and (B)(12) as new divisions (B)(12) and (B)(13); substituted "in the forum" for "therein" in division (E); and added new division (H).

Amendment Note: The 7-1-98 amendment added new division (B)(10); redesignated former divisions (B)(10) and (B)(11) as new divisions (B)(11) and (B)(12); and made changes to reflect gender neutral language and other nonsubstantive changes.

STAFF NOTES

2005:

Civ. R. 3 is amended in response to requests from the General Assembly contained in Section 3

C

Baldwin's Ohio Revised Code Annotated Currentness

General Provisions

Chapter 1. Definitions; Rules of Construction (Refs & Annos)

Statutory Provisions (Refs & Annos)

→1.50 Severability of statutory provisions

If any provision of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

(1971 H 607, eff. 1-3-72)

HISTORICAL AND STATUTORY NOTES

Ed. Note: 1.50 is analogous to former 1.13, repealed by 1971 H 607, eff. 1-3- 72.

R.C. § 2305.10

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)

Limitations--Torts

→2305.10 Product liability, bodily injury or injury to personal property; when certain causes of action arise

(A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs.

(B)(1) For purposes of division (A) of this section, a cause of action for bodily injury that is not described in division (B)(2), (3), (4), or (5) of this section and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on

which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(2) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to chromium in any of its chemical forms accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(3) For purposes of division (A) of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(4) For purposes of division (A) of this section, a cause of action for bodily injury caused by

exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(5) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(2) Division (C)(1) of this section does not apply if the manufacturer or supplier of a product

engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(3) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the accrual of the cause of action, has not expired in accordance with the terms of that warranty.

(4) If the cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues.

(5) If a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, an action based on the product liability claim may be commenced within two years after the disability is removed.

(6) Division (C)(1) of this section does not bar an action for bodily injury caused by exposure to

asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(7)(a) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product if all of the following apply:

(i) The action is for bodily injury.

(ii) The product involved is a substance or device described in division (B)(1), (2), (3), or (4) of this section.

(iii) The bodily injury results from exposure to the product during the ten-year period described in division (C)(1) of this section.

(b) If division (C)(7)(a) of this section applies regarding an action, the cause of action accrues upon the date on which the claimant is informed by competent medical authority that the bodily injury was related to the exposure to the product, or upon the date on which by the exercise of

reasonable diligence the claimant should have known that the bodily injury was related to the exposure to the product, whichever date occurs first. The action based on the product liability claim shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(D) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

(E) An action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, as defined in section 2305.111 of the Revised Code, shall be brought as provided in division (C) of that section.

(F) As used in this section:

(1) "Agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

(2) "Ethical drug," "ethical medical device," "manufacturer," "product," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(3) "Harm" means injury, death, or loss to person or property.

(G) This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to April 7, 2005.

(2006 S 17, eff. 8-3-06; 2004 S 80, eff. 4-7-05; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 [FN1]; 1984 H 72, eff. 5-31-84; 1982 S 406; 1980 H 716; 1953 H 1; GC 11224-1)

[FN1] See Notes of Decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

UNCODIFIED LAW

2006 S 17, § 5, eff. 8-3-06, reads:

If any provision of a section of the Revised Code as amended or enacted by this act or the

application of the provision to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections that can be given effect without the invalid provision or application, and to this end the provisions are severable.

2004 S 80, § 3(B): See Uncodified Law under RC 2305.131.

2004 S 80, § 3(C): See Uncodified Law under RC 2305.09.

2001 S 108, § 1: See Uncodified Law under 2305.251.

2001 S 108, § 3, eff. 7-6-01, reads, in part:

(A) In Section 2.01 of this act:

(3) Sections 109.36, 2117.06, 2125.01, 2125.02, 2125.04, 2305.10, 2305.16, 2305.27, 2305.38, 2307.31, 2307.32, 2307.75, 2307.80, 2315.01, 2315.19, 2501.02, 2744.06, 3722.08, 4112.14, 4113.52, 4171.10, and 4399.18 of the Revised Code are revived and amended, supersede the versions of the same sections that are repealed by Section 2.02 of this act, and include amendments that gender neutralize the language of the sections (as contemplated by section 1.31 of the Revised Code) and that correct apparent error.

R.C. § 2307.91

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

Chapter 2307. Civil Actions (Refs & Annos)

Asbestos Claims

→2307.91 Definitions

As used in sections 2307.91 to 2307.96 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(C) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(D) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(E) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(F) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(G) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(H) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(I) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(J) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(K) "Certified industrial hygienist" means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

(L) "Certified safety professional" means a safety professional who has met and continues to meet all requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

(M) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(1) A civil action relating to any workers' compensation law;

(2) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(3) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(N) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under section 2307.92 of the Revised Code.

(O) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(P) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(Q) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of

radiographs of pneumoconioses (2000), as amended.

(R) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma.

(S) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(T) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(U) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(V) "Physical impairment" means a nonmalignant condition that meets the minimum requirements specified in division (B) of section 2307.92 of the Revised Code, lung cancer of

an exposed person who is a smoker that meets the minimum requirements specified in division (C) of section 2307.92 of the Revised Code, or a condition of a deceased exposed person that meets the minimum requirements specified in division (D) of section 2307.92 of the Revised Code.

(W) "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes.

(X) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(Y) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(Z) "Competent medical authority" means a medical doctor who is providing a diagnosis for

purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted

without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(AA) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(BB) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(CC) "Regular basis" means on a frequent or recurring basis.

(DD) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections 2307.92 and 2307.93 of the Revised Code, during the last fifteen years.

(EE) "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung.

(FF) "Substantial contributing factor" means both of the following:

(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.

(GG) "Substantial occupational exposure to asbestos" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled raw asbestos fibers;

(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers.

(HH) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer.

(II) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract

R.C. § 2307.91

or another agreement between persons.

(JJ) "Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration.

(KK) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(LL) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code.

(2004 H 292, eff. 9-2-04)

UNCODIFIED LAW

2004 H 292, § 3 and § 4, eff. 9-2-04, read:

SECTION 3. (A) The General Assembly makes the following statement of findings and intent:

(1) Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases.

(2) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of fifty-four billion dollars have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range from two hundred to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick.

(3) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts.

(a) Today, it is estimated that there are more than two hundred thousand active asbestos cases

in courts nationwide. According to a recent RAND study, over six hundred thousand people have filed asbestos claims for asbestos-related personal injuries through the end of 2000.

(b) Before 1998, five states, Mississippi, New York, West Virginia, Texas, and Ohio, accounted for nine per cent of the cases filed. However, between 1998 and 2000, these same five states handled sixty-six per cent of all filings. Today, Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.

(c) According to testimony by Laura Hong, a partner at the law firm of Squire, Sanders & Dempsey who has been defending companies in asbestos personal injury litigation since 1985, there are at least thirty-five thousand asbestos personal injury cases pending in Ohio state courts today.

(d) If the two hundred thirty-three Ohio state court general jurisdictional judges started trying these asbestos cases today, Ms. Hong noted, each would have to try over one hundred fifty cases before retiring the current docket. That figure conservatively computes to at least one hundred fifty trial weeks or more than three years per judge to retire the current docket.

(e) The current docket, however, continues to increase at an exponential rate. According to

Judge Leo Spellacy, one of two Cuyahoga County Common Pleas Court judges appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999 there were approximately twelve thousand eight hundred pending asbestos cases in Cuyahoga County. However, by the end of October 2003, there were over thirty-nine thousand pending asbestos cases. Approximately two hundred new asbestos cases are filed in Cuyahoga County every month.

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(4) Nationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(a) As stated by Linda Woggon, Vice President of Governmental Affairs of the Ohio Chamber of Commerce, a recent RAND study found that during the first ten months of 2002, fifteen companies facing significant asbestos-related liabilities filed for bankruptcy and more than sixty thousand jobs have been lost because of these bankruptcies. The RAND study estimates that the eventual cost of asbestos litigation could reach as high as four hundred twenty-three thousand jobs.

(b) Joseph Stiglitz, Nobel award-winning economist, in "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," calculated that bankruptcies caused by asbestos have already

resulted in the loss of up to sixty thousand jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated twenty-five thousand to fifty thousand dollars in wages over the worker's career, and at least a quarter of the accumulated pension benefits.

(c) At least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick.

(d) Owens Corning, a Toledo company, has been sued four hundred thousand times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy. The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off two hundred seventy-five workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of five hundred jobs and a fifteen-million to twenty-million dollar annual reduction in regional income.

(e) According to testimony presented by Robert Bunda, a partner at the firm of Bunda, Stutz & DeWitt in Toledo, Ohio who has been involved with the defense of asbestos cases on behalf of Owens-Illinois for twenty-four years, at least five Ohio-based companies have gone bankrupt

because of the cost of paying people who are not sick. Wage losses, pension losses, and job losses have significantly affected workers for the bankrupt companies like Owens Corning, Babcox & Wilcox, North American Refractories, and A-Best Corp.

(5) The General Assembly recognizes that the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment. Eighty-nine per cent of asbestos claims come from people who do not have cancer. Sixty-six to ninety per cent of these non-cancer claimants are not sick. According to a Tillinghast-Towers Perrin study, ninety-four per cent of the fifty-two thousand nine hundred asbestos claims filed in 2000 concerned claimants who are not sick. As a result, the General Assembly recognizes that reasonable medical criteria are a necessary response to the asbestos litigation crisis in this state. Medical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future. As stated by Dr. James Allen, a pulmonologist, Professor and Vice-Chairman of the Department of Internal Medicine at The Ohio State University, the medical criteria included in this act are reasonable criteria and are the first step toward ensuring that impaired plaintiffs are compensated. In fact, Dr. Allen noted that these criteria are minimum medical criteria. In his clinical practice, Dr. Allen stated that he always performs additional tests before assigning a diagnosis of asbestosis

and would never rely solely on these medical criteria.

(6) The cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings, retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

(7) The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state's employees and the well being of the Ohio economy.

(B) In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the

defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

SECTION 4. (A) As used in this section, "asbestos," " asbestos claim," "exposed person," and " substantial contributing factor" have the same meanings as in section 2307.91 of the Revised Code.

(B) The General Assembly acknowledges the Supreme Court's authority in prescribing rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution.

(C) The General Assembly hereby requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of asbestos claims brought pursuant to sections 2307.91 to 2307.95 of the Revised Code.

(D) With respect to procedures for venue in regard to asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that requires that an asbestos claim meet specific nexus requirements, including the requirement that the plaintiff be domiciled in Ohio or that Ohio is the state in which the plaintiff's exposure to asbestos is a substantial contributing

factor.

(E) With respect to procedures for consolidation of asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that permits consolidation of asbestos claims only with the consent of all parties, and in absence of that consent, permits a court to consolidate for trial only those asbestos claims that relate to the same exposed person and members of the exposed person's household.

2004 H 292, § 6 and § 7, eff. 9-2-04, read:

SECTION 6. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

SECTION 7. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted

by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given affect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Death § 34, Generally; Common-Law Rule.

OH Jur. 3d Negligence § 1, Generally; Definitions.

OH Jur. 3d Veterans § 17, Generally; Veterans' Service Commissions.

OH Jur. 3d Workers' Compensation § 17, Exclusiveness.

NOTES OF DECISIONS

Constitutional issues 1

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

Chapter 2307. Civil Actions (Refs & Annos)

Asbestos Claims

→2307.92 Requirements for prima-facie showing of physical impairment for certain tort actions involving asbestos exposure

(A) For purposes of section 2305.10 and sections 2307.92 to 2307.95 of the Revised Code, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307. 93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That

prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and

pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower

limit of normal;

(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed

person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified

safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed person's occupational history and history of exposure to asbestos.

(2) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (C)(1)(c) of this section, and alleges that the plaintiff lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code, the plaintiff is considered as having satisfied the requirements specified in division (C)(1)(c) of this section.

(D)(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in section 2125.01 of the Revised Code of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of section 2307. 93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(2) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as

described in section 2125.01 of the Revised Code, of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section, and alleges that the exposed person lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(3) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under division (D)(1) or (2) of this section regarding a tort action of the type described in that division.

(E) No prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.

(F) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive

standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decisions are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

(2004 H 292, eff. 9-2-04)

R.C. § 2307.92

UNCODIFIED LAW

2004 H 292, §§ 3, 4, 6 and 7: See Uncodified Law under 2307.91.

CROSS REFERENCES

Final order, 2505.02

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Appellate Review § 49, Orders Granting or Denying a Provisional Remedy.

OH Jur. 3d Death § 130, Right of Maintenance of Action by Decedent.

OH Jur. 3d Employment Relations § 248, Occupational or Contagious Diseases.

OH Jur. 3d Employment Relations § 338, Particular Allegations--Duty, Negligence, and Proximate Cause.

R.C. § 2307.93

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

Chapter 2307. Civil Actions (Refs & Annos)

Asbestos Claims

→2307.93 Filing of report and test results supporting physical impairment claim; defendant's challenge of evidence; dismissal

(A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence

is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide

sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

R.C. § 2307.93

(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

(2004 H 292, eff. 9-2-04)

UNCODIFIED LAW

2004 H 292, §§ 3, 4, 6, and 7: See Uncodified Law under 2307.91.

CROSS REFERENCES

Final order, 2505.02

RESEARCH REFERENCES

R.C. § 2307.94

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

Chapter 2307. Civil Actions (Refs & Annos)

Asbestos Claims

→2307.94 Statute of limitations for asbestos claim arising out of nonmalignant condition as distinct cause of action; damages; settlement; release

(A) Notwithstanding any other provision of the Revised Code, with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person has a cause of action for bodily injury pursuant to section 2305.10 of the Revised Code. An asbestos claim based upon a nonmalignant condition that is filed before the cause of action for bodily injury pursuant to that section arises is preserved for purposes of the period of limitations.

(B) An asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of

asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition.

(C) No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer.

(2004 H 292, eff. 9-2-04)

UNCODIFIED LAW

2004 H 292, §§ 3, 4, 6, and 7: See Uncodified Law under 2307.91.

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Compromise, Accord, & Release § 41, Subject Matter.

OH Jur. 3d Damages § 17, Future Damages.

Const. Art. II, § 28

C

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio

Article II. Legislative (Refs & Annos)

→O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

(1851 constitutional convention, adopted eff. 9-1-1851)

UNCODIFIED LAW

2002 S 180, § 4, eff. 4-9-03, reads, in part:

Const. Art. II, § 28

(C) It is the intent of the General Assembly to exercise its authority under Ohio Constitution, Article II, Section 28, to pass a general law authorizing courts to carry into effect, upon such terms as are just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors in instruments and proceedings arising out of their want of conformity with the laws of this state. This section is remedial legislation and does not affect pending or past complaints where jurisdiction over a complainant absolutely vested with a county board of revision. It is the intent of the General Assembly that if a board of revision never had jurisdiction over a complainant because the complainant's previous complaint failed to vest jurisdictional validity because of an unauthorized practice of law violation, then no rights have vested with respect to the determination of the total valuation or assessment of a commercial parcel owned by the complainant, and, as such, there is not a reasonable expectation of finality with regard to said determination. Further, it is the intent of the General Assembly that this section merely modifies the existing right of a property owner, granted under sections 5715.13 and 5715.19 of the Revised Code, to file a complaint against a determination of the total valuation or assessment of a commercial parcel owned by the complainant, by expanding the statute of limitations under which a complaint can be filed.

2002 S 180, § 5, eff. 4-9-03, reads:

Const. Art. II, § 28

Section 4 of this act is hereby repealed on the first day of the seventh month beginning after the effective date of this section.

EDITOR'S COMMENT

1990:

This section was included in light of §10, Article I, US Constitution, which prohibits the states from passing any "ex post facto Law, or Law impairing the Obligation of Contracts." Its immediate predecessor was §16, Article VIII, 1802 Ohio Constitution. The Ordinance of 1787, §14, Article II, forbade making or enforcing any law that would in any way "interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed."

The term "retroactive" as used in this section applies literally to all laws, whether civil or criminal in nature, whereas the term "ex post facto" as used in the federal Constitution affects only penal laws. Originally, the terms probably were thought to be synonymous, but the US Supreme Court in an early decision limited the ex post facto doctrine to penal laws only. Calder v Bull, 3 Dallas 386, 1 LEd 483 (1798).

The prohibition against retroactivity applies only to laws or procedures which affect substantive

rights; it does not prohibit remedial laws or procedures from having retrospective effect. See, e.g., Kilbreath v Rudy, 16 OS(2d) 70, 242 NE(2d) 658 (1969). Thus, whether a statute having retroactive effect violates this section often turns on the question of whether it is substantive or remedial in nature. For example, compare, Gregory v Flowers, 32 OS(2d) 48, 290 NE(2d) 181 (1972) and State ex rel Holdridge v Industrial Comm, 11 OS(2d) 175, 228 NE(2d) 621 (1967).

With respect to penal laws, the ban on retroactivity forbids laws which place an accused person or offender in a worse position than under the law applicable at the time the alleged crime was committed, such as by imposing a penalty for conduct which was not previously criminal, imposing a more severe penalty, weakening or doing away with a defense, or repealing sentencing laws favorable to the defendant. See, e.g., State v Smith, 16 App(3d) 114, 16 OBR 121, 474 NE(2d) 685 (Hamilton 1984); State v Ahedo, 14 App(3d) 254, 14 OBR 283, 470 NE(2d) 904 (Cuyahoga 1984); State ex rel Corrigan v Barnes, 3 App(3d) 40, 3 OBR 43, 443 NE(2d) 1034 (Cuyahoga 1982); Weaver v Graham, 450 US 24, 101 SCt 960, 67 LEd(2d) 17 (1981).

For purposes of §10, Article I, US Constitution (and thus for purposes of this section), a law impairing the obligation of a contract is one which materially dilutes the obligations of one of the parties or makes enforcement particularly difficult or impossible. See Home Building & Loan Assn v Blaisdell, 290 US 398, 54 SCt 231, 78 LEd 413 (1934). Note that this section

expressly permits remedial laws or procedures to carry out "the manifest intention of the parties... by curing omissions, defects, and errors." See Wayne Bank v Bob Schmidt Chevrolet, Inc, 70 Misc 7, 433 NE(2d) 1294 (CP, Lucas 1981). The US Supreme Court has held that neither the Contract Clause nor the Due Process Clause overrides the state's police power, i.e., the state's authority "to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community." Atlantic Coast Line Co v Goldsboro, 232 US 548, at 558, 34 SCt 364, 58 LEd 721 (1914).

CROSS REFERENCES

Certain terms in rental agreement void, 5321.13

Change in judicial construction does not affect prior valid obligation, 1.22

Contracts violating trade practices act are void, 1333.16

Effect of reenactment, amendment, or repeal of statute on existing conditions, 1.58

Equitable jurisdiction of municipal court to reform or rescind contract, 1901.18

West's F.S.A. § 774.202

C

Effective: July 01, 2005

West's Florida Statutes Annotated Currentness

Title XLV. Torts (Chapters 766-774) (Refs & Annos)

Chapter 774. Asbestos-Related and Silica-Related Claims

Part II. Asbestos and Silica Compensation Fairness Act

→774.202. Purpose

It is the purpose of this act to:

(1) Give priority to true victims of asbestos and silica, claimants who can demonstrate actual physical impairment caused by exposure to asbestos or silica;

(2) Fully preserve the rights of claimants who were exposed to asbestos or silica to pursue compensation if they become impaired in the future as a result of the exposure;

(3) Enhance the ability of the judicial system to supervise and control asbestos and silica litigation; and

(4) Conserve the scarce resources of the defendants to allow compensation to cancer victims and others who are physically impaired by exposure to asbestos or silica while securing the right to similar compensation for those who may suffer physical impairment in the future.

CREDIT(S)

Laws 2005, c. 2005-274, § 2, eff. July 1, 2005.

HISTORICAL AND STATUTORY NOTES

Amendment Notes:

Laws 2005, c. 2005-274, § 10, provides:

"This act shall take effect July 1, 2005. Because the act expressly preserves the right of all injured persons to recover full compensatory damages for their loss, it does not impair vested rights. In addition, because it enhances the ability of the most seriously ill to receive a prompt

recovery, it is remedial in nature. Therefore, the act shall apply to any civil action asserting an asbestos claim in which trial has not commenced as of the effective date of this act [July 1, 2005]."

West's F. S. A. § 774.202, FL ST § 774.202

Current with chapters in effect from the 2007 First Regular Session of the Twentieth Legislature through May 29, 2007

END OF DOCUMENT

Code of Laws of South Carolina 1976 Annotated Currentness

Title 44. Health

Chapter 135. The Asbestos and Silica Claims Procedure Act of 2006

→§ 44-135-70. Service of reports on defendants.

(A) In order to have an asbestos or silica claim placed on any active trial docket in this State, or brought to trial in this State, or conduct discovery in an asbestos or silica claim in this State, an individual must provide prima facie evidence of impairment by serving on each defendant who answers or otherwise appears, a report prescribed by this act.

(B) In an action pending on the date this chapter becomes law, the case shall not be allowed to be called for or proceed to trial until ninety days after a report has been served on each defendant.

(C) This act shall not be interpreted to create, alter, or eliminate a legal cause of action for any asbestos- and/or silica-related claimant who has been diagnosed with any asbestos- and/or silica-related disease. The act sets the procedure by which the courts in South Carolina shall

manage trial settings for all asbestos- and/or silica-related claims.

HISTORY: Added by 2006 Act No. 303, § 1, eff May 24, 2006.

Code 1976 § 44-135-70, SC ST § 44-135-70

Current through End of 2006 Reg. Sess.

END OF DOCUMENT

Vernon's Ann.Texas Const. Art. 1, § 16

C

Effective: [See Text Amendments]

Vernon's Texas Statutes and Codes Annotated Currentness

Constitution of the State of Texas 1876 (Refs & Annos)

Article I. Bill of Rights (Refs & Annos)

→§ 16. Bills of attainder; ex post facto or retroactive laws; impairing obligation of contracts

Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

INTERPRETIVE COMMENTARY

2007 Main Volume

The Federal Constitution forbids both Congress and the legislatures of the states from