IN THE SUPREME COURT OF OHIO

Linda Ackison, Administratrix,	)	Case Nos. 2007-0219 and 2007-0415
	)	(consolidated)
Plaintiff-Appellee,	)	
	)	On Appeal from the
v.	)	Lawrence County Court of Appeals,
	)	Fourth Appellate District
Anchor Packing Co., et al.,	)	
	)	Court of Appeals Case No. 05 CA 46
Defendants-Appellants.	)	

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Introduction

Since 1980 Ohio's statutes have provided that an asbestos claim accrues when the plaintiff is "informed by a competent medical authority" (or should know) of "bodily injury caused by exposure to asbestos." R.C. 2305.10(B)(5). The legislature did not then define "competent medical authority," "bodily injury," or "caused by exposure to asbestos," nor has this Court ever definitively interpreted these terms. By 2004, when the legislature enacted Am. Sub. H.B. 292 ("HB 292"), there was an asbestos litigation crisis in Ohio — not an explosion of asbestos-related illness, but an explosion of asbestos lawsuits, most brought by plaintiffs who were not sick with an asbestos-related disease, or not sick at all. The bulk of these lawsuits were the product of lawyer-sponsored, mass x-ray screenings, conducted by questionable operators and read as "positive" by questionable readers, whose sole purpose was not to identify and treat illness, but to generate litigation for profit. As a result, an "elephantine mass" of litigation has clogged the dockets of Ohio's courts, competing with and delaying claims of real injuries, draining resources necessary to compensate the truly ill, burdening the courts, driving defendants into bankruptcy, and causing far-reaching economic havoc to Ohio's citizens.

In 2004, after more than a year of careful study and factfinding concerning the foregoing crisis, the General Assembly enacted HB 292 (codified in part at R.C. 2307.91-93). HB 292 did two fundamental things: (1) it defined the terms that were left undefined in 1980, articulating specific medical criteria for asserting asbestos claims, and (2) it created procedures for automatic early scrutiny of asserted asbestos claims, requiring plaintiffs to make a prima facie showing that the claims they assert are genuine. The newly-articulated medical criteria are to apply to cases filed before HB 292's effective date, unless that would violate the retroactivity provision of the Ohio Constitution, Ohio Const., Art. II, Section 28. In either case, the new *procedure* applies: plaintiffs must make a prima facie showing (under the new medical criteria if that is

constitutional, and otherwise under whatever standards existed before HB 292), or face administrative dismissal until they do.

In several decisions, the Twelfth District Court of Appeals has upheld application of HB 292, including its definitions, to pending cases, against plaintiffs' constitutional challenges. See *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 864 N.E.2d 682, 2006-Ohio-6704; *Stahlheber v. Lac d'Amiante du Quebec, Ltee* (Ohio App. 12th Dist.), 2006 WL 3833888, 2006-Ohio-7034; *Staley v. AC&S, Inc.* (Ohio App. 12th Dist.), 2006 WL 3833883, 2006-Ohio-7033, app. pending, 113 Ohio St.3d 1512, 866 N.E.2d 511, 2007-Ohio-2208. The Fourth District Court of Appeals, by contrast, has ruled that HB 292 may not be applied to pending cases. See *Ackison v. Anchor Packing Co.* (Ohio App. 4th Dist.), 2006 WL 3861073, 2006-Ohio-7099.

This Court accepted review in *Ackison* — both discretionary review (see *Ackison v. Anchor Packing Co.*, 113 Ohio St.3d 1465, 864 N.E.2d 652 (Table), 2007-Ohio-1722) and review of the conflict with the Twelfth District (see *Ackison v. Anchor Packing Co.*, 113 Ohio St.3d 1464, 864 N.E.2d 651 (Table), 2007-Ohio-1722). The Court directed the parties to brief this issue: "Can R.C. 2307.91, 2307.92, and 2307.93 be applied to cases already pending on September 2, 2004?" Id. Owens-Illinois respectfully submits that the answer is "yes:" both the newly articulated definitions and the prima facie showing procedure may constitutionally be applied in cases pending when HB 292 came into effect.

Statement of Facts

A. The Nationwide Asbestos Litigation Crisis.

Courts nationwide, including in Ohio, have been flooded with "asbestos" claims by plaintiffs with no asbestos-related impairment. As set forth below, the claims frequently spring from indiscriminate, mass x-ray screenings of workers (even those with no medical complaint), in a process now known to be scandalous. The x-rays are administered without prescription or,

often, license, by screening companies whose business is not diagnosis or treatment of illness, but only generation of litigation for profit. The x-rays are read in bulk by doctors who disclaim any doctor-patient relationship with the workers, who reap millions of dollars, who in many cases have virtually no other medical practice, whose methodologies fail to meet professional standards, and whose conclusions are overwhelmingly "positive," conclusions that independent readers frequently dispute. The bases for thousands of Ohio lawsuits are litigation screening reports concluding that x-ray images are merely "consistent with" asbestos causation, when the types of findings made are also consistent with dozens of other causes, and the reports make no pretense of having sought to rule out other, more probable causes. The screeners are under investigation, frequently invoke the Fifth Amendment when questioned about their practices, and have been rejected as a valid basis for claims by many asbestos bankruptcy trusts.

This process has been exposed as a monumental scandal by legal and medical researchers, professional organizations, governmental bodies, and courts. A growing consensus recognizes that this "screening scandal" is responsible for most asbestos litigation today. As one scholar has observed, "asbestos litigation, which had previously focused on malignancies and other debilitating injuries caused by asbestos exposure, underwent a radical shift in the mid to late 1980s from the traditional model of an injured person seeking a lawyer to a entrepreneurial model under which plaintiff lawyers and their agents actively recruited hundreds of thousands of potential litigants who could claim workplace exposure to asbestos containing products. [A] substantial percentage of these nonmalignant claimants had no disease caused by asbestos exposure as recognized by medical science and no loss of lung function. Moreover, their claims were often supported by specious medical evidence . . . ." Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation* (2006), 12 Conn. Ins. L.J. 35, 35-36 (also

available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916534#PaperDownload>).

These conclusions have powerful and detailed support.

1. Entrepreneurial Recruitment of Plaintiffs for Profit.

The ABA appointed a Commission on Asbestos Litigation in 2002, and after investigation it summarized the screening scandal:

> For-profit litigation "screening" companies have developed that actively solicit asymptomatic workers who may have been occupationally exposed to asbestos to have "free" testing done — usually only chest x rays. Promotional ads declare that "You May Have Million $ Lungs" and urge the workers to be screened even if they have no breathing problems because "you may be sick with no feeling of illness." The x-rays are usually taken in "x-ray mobiles" that are driven to union halls or hotel parking lots. There is evidence that many litigation screening companies commonly administer the x-rays in violation of state and federal safety regulations. In order to get an x-ray taken, workers are ordinarily required to sign a retainer agreement authorizing a lawsuit if the results are "positive."
>
> The x-rays are generally read by doctors who are not on site and who may not even be licensed to practice medicine in the state where the x-rays are taken or have malpractice insurance for these activities. . . . [N]o doctor/patient relationship is formed with the screened workers and no medical diagnoses are provided. Rather, the doctor purports only to be acting as a litigation consultant and only to be looking for x-ray evidence that is "consistent with" asbestos-related disease. Some x-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars — in some cases, millions — in the aggregate by the litigation screening companies due to the volume of films read.

Report of the ABA Commission on Asbestos Litigation (Feb. 2003) ("ABA Report") (available at <www.abanet.org/leadership/recommendations03/302.pdf>) at 9. The ABA Commission is only one in a chorus of voices that have reached similar conclusions. For example, in 2003 legal ethics scholar Lester Brickman published an exhaustive study of litigation screening abuses, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality* (2003), 31 Pepp. L. Rev. 33-170 ("*Theories of Asbestos Litigation*") (also available at

<http://www.lakesidepress.com/Asbestos/AdobeDocuments/Brickman.pdf>), and has continued to study and chronicle the exposure of this scandal. As Professor Brickman has summarized:

> Substantially all nonmalignant [asbestos] claimants are recruited by screening companies — entrepreneurial entities begun by individuals with no health care background that are hired by plaintiff lawyers to solicit potential "litigants." These enterprises arrange and publicize screenings aimed at former industrial and construction workers with pre-1972 occupational exposure to asbestos-containing products. At these screenings, x-rays are administered in an assembly line basis often using mobile x-ray equipment housed in truck trailers brought to union halls, hotel and motel sites and shopping center parking lots . . . . There are no material health benefits associated with these screenings. Rather, the sole purpose of asbestos screenings is to recruit "litigants" and generate supporting medical documentation.
>
> On the basis of my research, I have concluded that nonmalignant asbestos litigation today mostly consists of:
>
> (1) a massive client recruitment effort accounting for 90% of all claims currently being generated and resulting in the screening of over 750,000 and perhaps as many as 1,000,000 "litigants" in the past fifteen years;
>
> (2) generating claims of injury though most of these "litigants" have no medically cognizable asbestos-related injury and cannot demonstrate any statistically significant increased likelihood of contracting an asbestos-related disease in the future;
>
> (3) the claims of injury are often supported by specious medical evidence, including: . . . evidence generated by the entrepreneurial screening enterprises and B-readers — specially certified x-ray readers that the plaintiff lawyers select because they produce "diagnoses" which are not a product of good faith medical judgment but rather a function of the millions of dollars a year in income that they receive for these services . . . .
>
> [T]he quantum of specious claiming in asbestos litigation constitutes a massive civil justice system failure.

Lester Brickman, *Ethical Issues in Asbestos Litigation* (2005), 33 Hofstra L. Rev. 833, 836-37 (footnotes omitted). See also, e.g., the following:

- *In re Silica Prods. Liab. Litig.* (S.D. Tex. 2005), 398 F. Supp.2d 563-676 (exhaustive

opinion by Federal District Judge Janis Graham Jack after an evidentiary hearing concerning litigation screeners' methodology for generating cases on the court's docket). Judge Jack found that "mass misdiagnoses [were] dumped into the judicial system" and "these diagnoses were driven by neither health nor justice [but] were manufactured for money." Id. at 635. She found three fundamental flaws in the litigation screening process: (1) improper methodology in reading x-rays (including bias from being told to look for a particular condition), id. at 626-27, 634-35; (2) inadequacy and unreliability of occupational exposure histories, essential for diagnosis, id. at 622-25; and (3) failure to use differential diagnosis to rule out other, more probable causes of the x-ray findings, id. at 629. Further, Judge Jack found that screeners seek out those without medical complaints, and reach suspect conclusions by employing a "technique" of diagnosing occupational lung disease "without even attempting to rule out the myriad of other causes of [the] radiographic findings," which "is not generally accepted in the relevant scientific community." Id. at 638. See also Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation* (2006), 12 Conn. Ins. L.J. 35 (Judge Jack's findings about silica litigation apply equally to asbestos litigation).

- *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (E.D. Pa. 2002), 2002 WL 32151574 at *1 (opinion by late Judge Charles Weiner, the original transferee judge in MDL 875, which consolidated pretrial proceedings in all federal asbestos cases). Judge Weiner, like Judge Jack, held hearings on whether there was a common methodology behind the litigation screening reports (there was) and whether it was valid and reliable (it was not), and administratively dismissed some 17,000 asbestos claims because the screening process was medically unreliable and "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which

would otherwise be available for compensation to deserving Plaintiffs." Id.

- Association of Occupational and Environmental Clinics ("AOEC"), Guidance Document (2003) (<http://www.aoec.org/content/principles_1_3.htm#asbestos>) (concluding that "medically inadequate screening tests are being conducted to identify cases of asbestos-related disease for legal action," that "the standard of care and ethical practice in occupational medicine" prohibits diagnoses "on the basis of chest x-ray and work history alone" because such screening "does not by itself provide sufficient information to make a firm diagnosis, to assess impairment or to guide patient management," and that "ethical practice in occupational health" requires "properly chosen and interpreted chest films, reviewed within one week of screening; a complete exposure history; symptom review; standardized spirometry; and physical examination," "smoking cessation interventions, evaluation for other malignancies and evaluation for immunization against pneumococcal pneumonia," and "[t]imely physician disclosure of results to the patient, appropriate medical follow-up and patient education").

- National Institute of Occupational Safety & Health ("NIOSH"), draft "B Reader Code of Ethics" (2005) (<http://www.cdc.gov/niosh/topics/chestradiography/breader-ethics.html>) (similar conclusions).

2. <u>Chronically Inaccurate Results.</u>

Mass x-ray screenings are not only unorthodox in methodology, but grossly unreliable in their results. The x-ray results are routinely reported on "ILO" forms, explained as follows:

> The degree of asbestosis, as determined by X-ray reading, is usually evaluated according to a classification system developed by the International Labour Office (ILO). The system uses a scale that was developed to systematically record the radiographic abnormalities in the chest provoked by the inhalation of dusts. . . . A zero corresponds to no abnormalities, one to slight, two to moderate, and three to severe. Since this process is to some degree inherently subjective, readers give two classifications, the category

> that they think most likely and next most likely. The result is a twelve point scale, with results ranging from 0/0 (normal . . . appearance) to 3/3 (severe abnormalities). The vast majority of screening x-rays (for which asbestosis is claimed) are read as "1/0", which means the x-ray on first impression is abnormal ("1"), but may be normal ("0").

Lester Brickman, *Theories of Asbestos Litigation*, 31 Pepp. L. Rev. at 47-48 (citations and quotation marks omitted).[1] The ABA's panel of independent medical experts found the supposed evidence of asbestos-related x-ray changes systematically generated by litigation screenings to be chronically unreliable:

> [T]here have been numerous instances of probable bias and over-diagnosis, primarily based on x-ray readings from mass screenings. Most doctors interviewed had seen hundreds or even thousands of examples of over-reading of x-rays for litigation purposes. One doctor concluded after reviewing 15,000 cases of asbestos disease previously diagnosed on x-ray readings alone that only 10% of the persons could validly be diagnosed with asbestosis. Another doctor reported a 62% error rate on review of x-ray screening results previously read as "consistent with asbestosis." Another doctor's research of 22,000 asbestos-related bankruptcy claims found a presumptive x-ray review error rate of up to 86% among 5 readers, none of whose results matched the general patterns in epidemiological studies.

ABA Report at 14.

Courts', governmental entities', and medical researchers' independent audits of litigation-screening medical evidence have also found systematic over-reading of x-rays, unexplainable as normal inter-reader variability:

- A NIOSH audit evaluating the "positive" x-rays of 795 tire workers showed "only two

[1] See also *In re Silica Prods. Liab. Litig.* , 398 F. Supp.2d at 591, explaining that under the ILO system, the reader ranks the interstitial markings seen on the film on a scale of 0 to 3, in the form x/y, with the numerator indicating the classification the reader ultimately chose, and the denominator the classification the reader seriously considered. Thus, a film rated 1/0 means the reader concluded there is a mild abnormality, but seriously considered rating the x-ray as normal, and a rating of 0/1or 0/0 means the reader concluded the film is normal.

had any signs of parenchymal change and only 19 showed pleural abnormalities." *Raymark Indus. v. Stemple* (D. Kan. 1990), 1990 WL 72588, *16 (reporting a litigation screening "positive" rate of 94%).

- Court-appointed experts found that most plaintiffs whose x-rays were read as "positive" at a litigation screening did *not* have any evidence of any asbestos-related condition, and fewer than 20% had asbestosis. C. Rubin [Federal Judge Carl B. Rubin] & L. Ringenbach, *The Use of Court Experts in Asbestos Litigation* (1991), 137 F.R.D. 35.

- Radiologists from John Hopkins University "sounded an alarm with regard to the accuracy of 'B' readers in asbestos-related litigation." Murray L. Janower & Leonard Berlin, *"B" Readers' Radiographic Interpretations in Asbestos Litigation: Is Something Rotten in the Courtroom?* (2004), 11 Acad. Radiology 841. In their study, independent B-readers performed a blind review of 492 films read as "positive" by litigation screening doctors. Joseph N. Gitlin, et al., *Comparison of 'B' Readers' Interpretations of Chest Radiographs for Asbestos Related Changes* (2004), 11 Acad. Radiology 843. They found that a "small number" of the nation's 700 B-readers have "made reputations . . . by consistently interpreting chest radiographs of asbestos claimants as positive in 90-100% of cases." Id. at 844. The independent readers had "essentially no agreement" with the screening companies' readers: "Whereas the initial [asbestos litigation] readers interpreted 95.9% of the x-rays as positive for parenchymal abnormalities . . . the consultants interpreted the same set of cases as positive in only 4.5%." Id. at 852, 855.

3. Nondiagnostic Nature of X-Ray Screening Results.

Even when an x-ray is accurately evaluated as "positive," that finding does not mean that the worker has asbestosis. As Judge Jack found, screeners fail to use differential diagnosis to consider other, more probable causes of the x-ray findings. *In re Silica Prods. Liab. Litig.*, 398

F. Supp.2d at 629. And other, more probable causes than asbestosis do exist. The ILO form (which was designed as an administrative tool, not to make medical diagnoses) allows notation of "abnormalities consistent with pneumoconiosis," either "parenchymal" changes (i.e., "interstitial" changes within the lung tissue) or "pleural" changes (i.e., changes to the pleural membrane surrounding the lungs). Not only is "pneumoconiosis" a nonspecific term for *any* fibrosis caused by dust (whether coal, silica, beryllium, talc, asbestos, or other dusts), but changes that are "consistent with pneumoconiosis" also have many other possible causes.

It is recognized that parenchymal or interstitial changes have many causes other than asbestos:

> More than 100 known causes of interstitial lung disease are recognized. . . . [M]ost patients with advanced pulmonary fibrosis, whose tissue samples d[o] not meet the histological criteria for asbestosis . . . d[o] not have asbestos-induced fibrosis, even though there may have been a history of exposure to asbestos.

Pulmonary Pathology (D. Dail & S. Hammar, eds., 2d ed. 1994), 647, 649 (footnotes omitted).

> [T]here are more than 150 causes of fibrosis, other than exposure to asbestos, including obesity and old age, that present similarly to 1/0 asbestosis on X-rays. Nearly one-quarter of men "between the ages of 55 to 64 in the general population have lung abnormalities that register at least 1/0 on the ILO scale, and the prevalence of such X-ray readings continues to increase with age."

Lester Brickman, *Theories of Asbestos Litigation*, 31 Pepp. L. Rev. at 48-49 (quoting Anders J. Zitting, *Prevalence of Radiographic Small Lung Opacities and Pleural Abnormalities in a Representative Adult Population Sample* (1995), 107 Chest 126, 127).[2]

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[2] The Pulmonary Fibrosis Foundation states:

> Traditional theories have postulated that [pulmonary fibrosis] might be an autoimmune disorder, or the after effects of an infection, viral in nature. There is a growing body of evidence which points to a genetic predisposition. A mutation in the SP-C protein has been found to exist in families with a history of Pulmonary

(. . . continued)

> The clinical features of asbestosis are not unique to this entity, and are similar to those of other chronic pulmonary parenchymal fibrosing disorders.

Pathology of Asbestos-Associated Diseases (V. Roggli, T. Oury & T. Sporn, eds., 2d ed. 2004), 74.

It is textbook knowledge that interstitial fibrosis is a non-specific finding with many possible causes, which cannot be diagnosed as asbestos-related without far more information than an x-ray:

> Diffuse interstitial diseases account for perhaps the greatest number of difficulties in diagnostic pathology of lung disease. This reflects, in part, the large number of etiologically diverse conditions included under this heading. . . . Usual interstitial pneumonia is a pattern of chronic lung injury that, in the appropriate clinical context, is synonymous with idiopathic pulmonary fibrosis. An identical pattern of interstitial inflammation and fibrosis can occur in patients with collagen vascular diseases (e.g., "rheumatoid lung"), asbestosis, radiation injury, and certain drug-induced lung diseases. Distinguishing an idiopathic form of usual interstitial pneumonia from lesions complicating collagen vascular diseases, thoracic irradiation, and certain drug toxicities is largely a matter of correlation with the clinical information. A histologic diagnosis of asbestosis requires not only an appropriate occupational history but also demonstration of asbestos bodies in the tissue specimen . . . . Therefore, a histopathologic diagnosis of usual interstitial

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Fibrosis. The most current thinking is that the fibrotic process is a reaction to microscopic injury to the lung. While the exact cause remains unknown, associations have been made with the following:

- Inhaled environmental and occupational pollutants
- Cigarette smoking
- Diseases such as Scleroderma, Rheumatoid Arthritis, Lupus and Sarcoidosis
- Certain medications
- Therapeutic radiation

See <http://www.pulmonaryfibrosis.org/ipf.htm>.

> pneumonia is relatively nonspecific until the diagnosis is correlated with clinical and radiographic data.

Pulmonary Pathology (D. Dail & S. Hammar, eds., 2d ed. 1994), 58, 65 (footnotes omitted).

It is also recognized that pleural thickening or plaques (which are almost always symptomless and benign findings without medical consequence) have many causes other than asbestos. See, e.g., Y. Lee, C. Runnion, S. Pang, N. de Klerk, A. Musk, *Increased body mass index is related to apparent circumscribed pleural thickening on plain chest radiographs* (2001), 39 Am. J. Indus. Med., 112-16; H. Ren, D. Lee, R. Hruban, J. Kuhlman, E. Fishman, P. Wheeler, G. Hutchins, *Pleural Plaques Do Not Predict Asbestosis: High Resolution Computed Tomography and Pathology Study*, 4 Modern Pathology 201 ("significant associations between pleural plaques and smoking, scar-related emphysema, and nonspecific forms of pulmonary fibrosis"); A. Churg, "Diseases of the Pleura," ch. 30 in *Pathology of the Lung* (W. Thurlbeck & A. Churg, eds., 2d ed. 1995), at 1074 ("Other causes of pleural plaques include trauma to the chest, organization of a hemothorax, and old empyema."). Indeed, sometimes anatomical conditions give the appearance of plaques on x-ray films when no plaques exist at all. See, e.g., T. Oury, "Benign Asbestos-Related Pleural Diseases," ch. 6 in *Pathology of Asbestos-Associated Diseases* (V. Roggli, T. Oury, & T. Sporn, eds., 2d ed. 1992), at 172 ("One must use caution to avoid overinterpretation of films as showing pleural plaques (i.e., false positives), which can occur secondary to shadows produced by the serratous anterior in particularly muscular individuals, or due to subpleural adipose tissue in the obese.").

4. <u>Investigation and Rejection of Screeners.</u>

A New York federal grand jury is investigating screening abuses. See, e.g., J. Glater, "Civil Suits Over Silica in Texas Become a Criminal Matter in New York," *New York Times* (May 18, 2005). Congress has summoned certain doctors and representatives of screening

companies to testify, and some have invoked the Fifth Amendment and refused to testify.[3]

Several bankruptcy trusts have refused to accept reports generated by certain screeners as a basis for making payments to asbestos claimants. See, e.g.:

- Claims Resolution Management Corp. (handling claims against Manville bankruptcy trust), "Suspension of Acceptance of Medical Reports," memo dated 09/12/05;[4]
- Eagle-Picher Personal Injury Settlement Trust, announcement dated 10/19/05;[5]
- Celotex Asbestos Settlement Trust, Notice dated 10/20/05;[6]
- Babcock & Wilcox Asbestos Trust, Policy on Doctors and Screening Companies.[7]

One prolific screener, Dr. Ray Harron, was recently barred from practicing medicine because of his screening activity. See *In re the Matter of the License of Raymond Anthony Harron, M.D.*, License No. C-9439 (Texas Medical Board, April 13, 2007) (barring Dr. Harron from practice of medicine in Texas).

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[3] E.g., Respiratory Testing Services was an Alabama screening company (founded by Charlie Foster, a high school dropout with no medical training) that conducted x-rays out of truck trailers driven throughout the country. The quality of RTS's services has been called into doubt, e.g., by Judge Jack in *In re Silica Prods. Liab. Litig.*, 398 F. Supp.2d at 596-603, 609-11, 625-29. RTS (through Mr. Foster) invoked the Fifth Amendment and refused to testify before Congress. See <http://republicans.energycommerce.house.gov/108/News/06142006_1944.htm>. One of the x-ray readers who worked with RTS was Dr. Robert Altmeyer (id.), who provided the ILO report submitted by Mrs. Ackison as part of her prima facie showing in the present case. See Record No. 115, Ex. B.

[4] See <http://www.claimsres.com/Home/html/documents.htm/>.

[5] See <http://www.cpf-inc.com/announcements.aspx>.

[6] See <http://www.celotextrust.com/news_details.asp?nid=22>.

[7] See <http://www.bwasbestostrust.com/files/Policy%20on%20Doctors%20and%20Screening%20Companies.pdf>.

B. The Ohio General Assembly's Findings.

The Ohio General Assembly also recognized the screening scandal/asbestos litigation crisis. HB 292 (codified in part at R.C. 2307. 91-98) was passed by the General Assembly on May 26, 2004, was signed into law by Governor Taft on June 2, 2004, and became effective on September 2, 2004. It was enacted after more than a year of hearings, analysis, and legislative factfinding, and was expressly prompted by the explosion of asbestos litigation by claimants who sued even though they were not sick with an asbestos-related illness.[8] The explosion occurred despite the 1980 Ohio statute, providing that a "cause of action for bodily injury caused by exposure to asbestos" accrues only when the plaintiff is "informed by competent medical authority [or should know] that the plaintiff has an injury related to the [asbestos] exposure." R.C. 2305.10(B)(5). HB 292 addressed the asbestos litigation crisis by providing definitions for terms in this existing Ohio law that had not been defined before, clarifying their meaning; by creating a new procedure, requiring plaintiffs to show the prima facie basis for their claims and requiring trial courts to scrutinize their sufficiency; and providing for administrative dismissal of claims that fall short, while preserving the right of such claimants to return to court (without paying another filing fee and with no statute of limitation threat) if and when they do have a colorable claim.

The 1980 accrual statute did not define "competent medical authority," "bodily injury," or "caused by asbestos exposure," but HB 292 clarifies the meaning of these terms: R.C. 2307.91 defines "competent medical authority;" R.C. 2307.92 defines "bodily injury caused by exposure to asbestos;" R.C. 2307.91 also defines other terms used in these definitions, such as "physical impairment" and "substantial contributing factor." HB 292 also creates a procedure

[8] See uncodified Section 3 of HB 292, discussed below.

for automatic evaluation, early in a case, whether the case asserts a colorable claim, by requiring the plaintiff to make a prima facie showing of the basis for the claim, or face administrative dismissal. R.C. 2307.93. The plaintiff's prima facie showing must meet the newly-defined medical criteria, unless (in a case filed before HB 292's effective date) that would violate the retroactivity provision of the Ohio Constitution, Ohio Const., Art. II, Section 28. In that case (under the so-called "savings clause"), the plaintiff must make a prima facie showing under pre-HB 292 law. R.C. 2307.93(A)(3).

These provisions were expressly prompted by the screening-scandal phenomenon of claims by those who are not sick with an asbestos-related illness. Section 3 of HB 292[9] states in detail the General Assembly's "findings and intent" underlying the statute. The General Assembly's findings identify the crisis:

- That asbestos litigation had become huge, inefficient, and an extraordinary strain on the courts — especially in Ohio, which had "become a haven for asbestos claims," one of five states handling 66% of all U.S. asbestos case filings, where it would require 233 Ohio trial judges to conduct at least 150 weeks of trials apiece to resolve the pending cases by trial, and where the rate of case filings had increased exponentially;

- That asbestos litigation has contributed to the bankruptcies of more than 70 companies nationwide and of at least five Ohio-based companies, causing losses of jobs, pensions, and wages, and severe impairment of Ohio's economy;[10]

[9] See <http://www.legislature.state.oh.us/bills.cfm?ID=125_HB_292> (text of HB 292, including the uncodified Section 3).

[10] The General Assembly found, for example, that such bankruptcies had already caused the loss of 60,000 jobs, a number that could be expected to reach 423,000 ultimately; that each displaced worker would lose, on average, $25,000 to $50,000 in wages and a quarter of his or her pension benefits; that such losses were occurring in Ohio, where five companies had gone bankrupt; and that the Owens-Corning bankruptcy would result in an estimated $15 million to $20 million reduction in regional income. It concluded that

(. . . continued)

- That the ability of individuals with asbestos-related cancer and other serious asbestos-related diseases to recover for their injuries is in jeopardy.[11]

The General Assembly also identified the *cause* of the crisis: lawsuits by individuals who are *not sick with asbestos-related disease.* As it found, 65% of the compensation so far paid to asbestos claimants "has gone to claimants who are not sick," and "[a]t 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." It found that

> the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who allege that they have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment. Eighty-nine percent of asbestos claims come from people who do not have cancer. Sixty-six to ninety percent of these non-cancer claimants

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. . . . 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.

[11] As the General Assembly concluded:

In enacting [HB 292], 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.

> are not sick. According to a Tillinghast-Towers Perrin study, ninety-four percent of the fifty-two thousand nine hundred asbestos claims filed in 2000 concerned claimants who are not sick.

In short, the General Assembly found not only that current asbestos litigation is huge and burdensome (an "elephant[ine] mass" (quoting *Ortiz v. Fibreboard Corp.* (1999), 527 U.S. 815, 821)), but that the crisis is largely caused by an influx of lawsuits by those who are not sick with asbestos-related illness.

C. The Present Plaintiff's Prima Facie Submission.

Danny and Linda Ackison originally filed a claim for asbestos-related injury on November 21, 2001, as part of a 51-plaintiff complaint against 80 named defendants and 100 Doe defendants. *Ferguson, et al. v. A-Best Products Co., et al.*, No. 01 PI 850 (Lawrence C.P.). That complaint was voluntarily dismissed on May 6, 2003. The claim of plaintiff-appellee, Linda Ackison (Administratrix of the Estate of Danny Ackison), was re-filed on May 5, 2004 (when HB 292 was about to be passed), as part of a multi-plaintiff complaint against 51 named defendants and 100 Doe defendants. *Ackison, et al. v. Anchor Packing Co., et al.*, No. 04 PI 371 (Lawrence C.P.) (Record No. 1, OI Supp. 1-78). The complaint did not precisely identify the nature of the claim, but contained only generic asbestos-claim assertions:

> Plaintiffs' decedents have suffered injuries, illnesses, damages, disabilities and death proximately caused by their exposure to asbestos, asbestos-containing products, and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products designed, manufactured, installed, assembled, and/or sold by Defendants.
>
> . . . Plaintiffs' decedents have developed asbestos-related lung diseases (asbestos-related lung diseases include, but are not limited to, one or more of the following: mesothelioma, lung cancer, asbestosis and pleural disease), and other related physical conditions which ultimately lead [sic] to their death.

(Id. at 16-17, ¶6-7 (OI Supp. 16-17).)

On November 3, 2005 Ms. Ackison submitted to the trial court the materials she claimed were a prima facie showing entitling her asbestos claim to proceed. (Record No. 115, OI Supp. 79-119.) Those materials included only four things:

1. Mr. Ackison's form fill-in-the-blanks affidavit, dated September 26, 2000, stating that he worked as a steelworker at Dayton Malleable during 1965-98, including a preprinted boilerplate paragraph stating that he worked with or near unspecified asbestos products. (Id., Ex. C (OI Supp. 86-87).)

2. A chest x-ray ILO form by Dr. Altmeyer, dated September 26, 2000, with boxes checked for "parenchymal changes consistent with pneumoconiosis," for small opacities with a profusion of 0/1 (i.e., *normal*), and for circumscribed pleural thickening. There is no mention of asbestos. (Id., Ex. B (OI Supp. 84-85).)[12]

3. An upper GI radiology report, dated May 1, 2003, diagnosing ulcerated distal esophagus cancer.[13] There is no mention of asbestos. (Id., Ex. A (OI Supp. 81-83).)

4. A certificate of Mr. Ackison's death on September 3, 2003, showing the cause of death as congestive heart failure and aortic stenosis, and showing as other significant conditions type 2 diabetes and esophageal mass. There is no mention of asbestos. (Id., Ex. D (OI Supp. 88-89).)

D. The Appellate Court's Ruling.

The court below held that applying HB 292 to cases that were pending when HB 292 took effect would violate the Ohio Constitution's retroactivity clause, Article II, section 28. The court began with the legal principle that a statute is impermissibly retroactive if it is substantive rather than remedial, and "impairs vested rights." *Ackison*, 2006 WL 3861073, 2006-Ohio-7099 at ¶12, 16. It noted that, before HB 292's enactment, the terms used in the accrual statute had not been defined (in particular, the term "competent medical authority" was not defined in the

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[12] The report also notes "granuloma" (benign calcifications, not associated with asbestos). In 2001, the Industrial Commission denied Danny Ackison's workers' compensation claim for asbestos-related lung disease.

[13] Cancer of the distal esophagus (near its junction with the stomach) is associated with gastroesophageal reflux. See, e.g., <http://www.webgerd.com/Barretts.htm>; <http://www.mayoclinic.com/health/barretts-esophagus/HQ00312>.

statute, and "no definition exists in the case law"), and plaintiffs were "not required to set forth a prima-facie case." Id. at ¶23-26, 28. The court concluded that HB 292 substantively altered an existing Ohio "common law standard," and impaired plaintiffs' "vested right" to pursue asbestos claims unburdened by HB 292's definitions and procedures. Id. at ¶26, 28.

Argument

Proposition of Law: HB 292 applies to cases pending on September 4, 2004.

This appeal presents a question of law, reviewable *de novo*: was it constitutional for the legislature to enact a remedial statute applicable to pending cases that (1) clarified existing law by providing express definitions for previously-undefined statutory terms, and (2) established a procedure requiring plaintiffs to make a prima facie showing of a colorable claim early in their case?

I. Legal Standards Regarding Retroactivity.

Article II, section 28 of the Ohio Constitution states that "[t]he general assembly shall have no power to pass retroactive laws . . . ." But not every law with retrospective effect is unconstitutional. As this Court has explained,

> retroactivity 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.

Bielat v. Bielat (2000), 87 Ohio St.3d 350, 353, 721 N.E.2d 28, 32.

To evaluate whether a statute is unconstitutionally retroactive, the Court must consider (1) whether the legislature intended it to apply retrospectively, and (2) if so, whether such retrospective application is proper. Id. at 353, 721 N.E.2d at 33. Here, it is undisputed that the legislature intended HB 292 to apply retrospectively, so only the second question is posed. That

question turns on "whether the statute is substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial." Id. (holding that "the retroactivity of [a statute excluding from a decedent's testamentary estate property for which the decedent made a beneficiary-on-death designation] comports with the Ohio Constitution because these provisions are remedial and curative rather than substantive").

Retroactive legislation therefore violates Article II, section 28 only if it is substantive rather than remedial. *State v. Walls*, 96 Ohio St.3d 437, 443, 2002-Ohio-5059 at ¶15. Remedial laws affect "the methods by which rights are recognized and enforced," rather than "the rights themselves." Id. Contrast *Smith v. Smith*, 109 Ohio St.3d 285, 286-87, 2006-Ohio-2419 (legislation could not retroactively vacate a prior judgment). If legislation has a remedial purpose, it must be construed liberally in order to allow its widest application: by statute, "remedial laws and all proceedings under them shall be liberally construed" and "the rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws." R.C. 1.11.

Legislation that clarifies or defines existing law is considered remedial rather than substantive. This was the case, for example, in *Bielat*. Prior to the statute at issue in *Bielat*, if a person made a pay-on-death beneficiary designation (for, e.g., a bank account), there was a conflict whether the designation would be honored, since it lacked testamentary formality. The statute "resolv[ed] a conflict between the relatively informal beneficiary designation found in an IRA and the more rigid formalities required by the Statute of Wills for testamentary dispositions" by excluding beneficiary-designated property from the testamentary estate. 87 Ohio St.3d at 355, 721 N.E.2d at 34. The Court upheld the statute's retrospective application (with the effect that the beneficiary of the decedent's will was denied the property), because it did not impair a

"vested right" or an "accrued substantive right." Id. at 357, 721 N.E.2d at 35 ("not just any asserted 'right' will suffice"). The Court held that "curative acts are a valid form of retrospective, remedial legislation," and that the legislature has the power to "cure and render valid, by remedial retrospective statutes, that which it could have authorized in the first instance." Id. at 355-56, 721 N.E.2d at 35, quoting *Burgett v. Norris* (1874), 25 Ohio St. 308, 317. Many other authorities also recognize that remedial legislation, such as legislation clarifying or defining unclear existing law, is properly applied retrospectively. See, e.g.:

- *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, at ¶19-20 (amendment, expanding the definition of circumstances that toll a worker's compensation claim and prevent its lapse, applied retroactively to pending claims because the definitional change was remedial);

- *Scott v. Spearman* (5th Dist. 1996), 115 Ohio App.3d 52, 56, 684 N.E.2d 708, 710 (new definition of term "next of kin" was remedial rather than substantive, and could be applied retroactively);

- *Nationwide Mut. Ins. Co. v. Kidwell* (4th Dist. 1996), 117 Ohio App.3d 633, 642, 691 N.E.2d 309, 315 ("Ohio General Assembly has the authority to clarify its prior acts");

- *Martin v. Martin* (1993), 66 Ohio St.3d 110, 115 n.2, 609 N.E.2d 537, 541 n.2 (revision of child support guidelines "clarified the intent of the General Assembly");

- *Ohio Hosp. Assoc. v. Ohio Dept. of Hum. Serv.* (1991), 62 Ohio St.3d 97, 104 n.4, 579 N.E. 2d 695, 700 n.4 (amendment clarified legislative intent regarding waiver of sovereign immunity);

- *Collister v. Kovanda* (8th Dist. 1935), 51 Ohio App. 43, 48-51, 199 N.E. 477, 479-81 (statute authorizing special public assessments against a property, with lien priority over a pre-

existing mortgage, was remedial and therefore permissibly retroactive).

Only if the legislature *redefines* a *previously defined* term is the legislation considered substantive and non-retroactive. See *Hearing v. Wylie* (1962), 173 Ohio St. 221, 223-24, 180 N.E.2d 921, 922-23 (after Supreme Court had defined the term "injury" in workers' compensation statute, legislature could not redefine it retroactively) (overruled on other grounds); *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 109, 522 N.E.2d 489, 498 (after Supreme Court had defined the term "substantial certainty" in workers' compensation statute, legislature could not redefine it retroactively).

To the extent legislation creates procedures, it is of course not "substantive," and may be applied retroactively to pending cases. See, e.g., *State v. Walls*, 96 Ohio St.3d 437, 443, 775 N.E.2d 829, 838, 2002-Ohio-5059 at ¶17 ("Even though they may have an occasional substantive effect on past conduct, 'it is generally true that laws that relate to procedures are ordinarily remedial in nature.'"), quoting *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; *Van Fossen*, 36 Ohio St.3d at 108, 522 N.E.2d at 497 (same); *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258, 259, 2001-Ohio-34 (workers' compensation settlement hearing provisions "were remedial in nature and may be changed or revoked by the legislature without offending the Constitution"); *Lewis v. Connor* (1985), 21 Ohio St.3d 1, 3, 487 N.E.2d 285 ("'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.'"), quoting *Miami v. Dayton* (1915), 92 Ohio St. 215, 219, 110 N.E. 726; *Sweeney v. Sweeney* (10th Dist.), 2006-Ohio-6988, at ¶30-31 (change in method for calculating attorney's fee awards in divorce actions applied retroactively to pending cases because it was procedural).

As the Court has recognized, "[t]he General Assembly is the policy-making body in our

state." *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335 at ¶26. As a result, "all legislative enactments must be afforded a strong presumption of constitutionality." Id. at ¶3, quoting *State v. Collier* (1991), 62 Ohio St.3d 267, 581 N.E.2d 552. The Court must strive to interpret legislation as constitutional, for "statutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision." *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 61, 676 N.E.2d 506, 507. See also *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 926, 928; *Williams v. Scudder* (1921), 102 Ohio St. 305, 307, 131 N.E. 481, 482 ("before any legislative power, as expressed in a statute, can be held invalid, it must appear that such power is clearly denied by some constitutional provision"). The Court must strive to find legislation constitutional because "[t]he legislature is the primary judge of the needs of public welfare, and this court will not nullify the decision of the legislature except in the case of a clear violation of a state or federal constitutional provision." *Beagle*, 78 Ohio St.3d at 61, 676 N.E.2d at 507.

II. It is Constitutional to Apply HB 292's Definitions to Pending Cases.

As noted above, HB 292 did two fundamental things: (1) it defined and clarified existing statutory terms that were previously undefined, and (2) it established certain prima-facie-showing procedures.[14] Both aspects may be applied to pending cases.

Insofar as HB 292 defined the previously undefined, it is remedial and may be applied retrospectively. Since 1980, when the Ohio legislature amended R.C. 2305.10 to explain and codify when a cause of action for an asbestos-related personal injury accrues under Ohio law,

[14] HB 292 also addressed certain other matters, not at issue here. See R.C. 2307.941 (regarding lawsuits against premises owners); R.C. 2307.96 (adopting a "substantial factor" causation test for proving liability of individual defendants, expressly made *prospective only*: see R.C. 2307.96(C) and uncodified Section 5 of HB 292); R.C. 2307.98 (regarding corporate veil piercing); R.C. 2505.02 (regarding appealability).

Ohio's statutory law has provided that "a cause of action for *bodily injury caused by exposure to asbestos* . . . arises upon the date on which the plaintiff is informed *by competent medical authority* [or should know] that the plaintiff has been *injured by such exposure.*" R.C. 2305.10(B)(5) (emphasis added). These statutory terms must have meaning.[15] But the terms were not expressly defined by the statute, and this Court has not discussed what they mean in the context of R.C. 2305.10. The Ohio legislature was therefore free to clarify its prior legislation by defining these terms (unlike *Hearing v. Wylie* and *Van Fossen v. Babcock & Wilcox Co.*, where this Court had previously defined a term, and the legislature was held unable to redefine it retroactively).

A. **HB 292's Definitions.**

HB 292 expressly defines and clarifies the terms that were undefined in the 1980 accrual statute, R.C. 2305.10(B)(5). It does so with a series of linked definitions, beginning with "bodily injury caused by exposure to asbestos." First, HB 292 provides that "[f]or purposes of section 2305.10 . . . '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*." R.C. 2307.92(A) (emphasis added). Next, "substantial contributing factor" is defined as requiring both that asbestos exposure was the predominant cause of the physical impairment, and that a "*competent medical authority* has determined . . . that without the asbestos exposures the physical impairment of the exposed person would not have occurred." R.C. 2307.91(FF)

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[15] See *State v. Wilson* (1977), 77 Ohio St.3d 334, 336, 673 N.E.2d 1347, 1349 ("It is a basic tenet of statutory construction that the General Assembly is not presumed to do a vain or useless thing, and when language is inserted in a statute it is inserted to accomplish some definite purpose."); *Taber v. Ohio Dept. of Human Servs.* (10th Dist. 1998), 125 Ohio App.3d 742, 747, 709 N.E.2d 574, 577 ("It is presumed that the entire statute in intended to have effect and meaning.").

(emphasis added). Finally, "competent medical authority" is defined as a medical professional with a specified relevant specialty, who is a treating doctor with a doctor-patient relationship with the claimant, who has not relied on certain kinds of materials (characteristic of mass screenings), and whose practice is not dominated by litigation consulting. R.C. 2307.91(Z). This chain of definitions, expressly linked to the accrual statute, therefore provides that accrual of an asbestos claim occurs only if a "competent medical authority" avers that asbestos was a "substantial contributing factor" in causing a "bodily injury."[16]

B. The New Definitions Clarify Existing but Previously Undefined Law.

1. The Fourth District's Analysis was Erroneous.

The plaintiff argued, and the Appellate Court below agreed, that these definitions cannot constitutionally be applied to pending cases, on the ground that they would impair "vested rights." The court focused in particular on the term "competent medical authority." It stated,

> 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. . . . [N]o 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."
>
> . . . [A]pplying [HB 292] 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

[16] HB 292 contains many other definitions, for terms such as "asbestos," "asbestos claim," "exposed person," "tort action," "physical impairment," and many other terms used in the statute.

> 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.

Ackison, 2006 WL 3861073 at *8, 2006-Ohio-7099 at ¶25-26.

This analysis is at war with itself. First, the court concluded that HB 292 changed the "common law" (to which plaintiffs assertedly had a vested right), even as it acknowledged that "no definition exists in the case law" for the disputed term. But if "no definition exists in the case law," then no common law filled the statutory definitional gap. Instead, there was a definitional vacuum that the legislature was free to clarify. Plaintiffs can have no "vested right" to the *absence* of any definition.

Second, the court asserted that before HB 292, "courts generally accepted medical authority that complied with the Rules of Evidence." Id.; see also id., 2006 WL 3861073 at *9, 2006-Ohio-7099 at ¶28 ("Before the legislation's effective date, . . . 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' . . . the legislation effects a substantive change in the meaning of that phrase."). But if defining "competent medical authority" is an evidentiary rule, then it is procedural, not substantive, and may be changed retrospectively. See, e.g., *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115, 117-18, 387 N.E.2d 231, 233 (change in law concerning competency of witness was "procedural and not substantive," and properly applied "to any proceeding conducted after the adoption of [the] law").

Third, the court's statement that HB 292 would require plaintiffs and their experts to "jump additional hurdles" and would "impos[e] a new, more difficult statutory standard upon their ability to maintain the[ir] asbestos-related claims" (*Ackison*, 2006 WL 3861073 at *8, 2006-

Ohio-7099 at ¶25-26) assumes that before HB 292 there was a defined body of law setting lower hurdles and a more lenient standard. This premise was mistaken. As the court itself acknowledged, no case-law definition of the term "competent medical authority" existed before HB 292: case law defined no hurdles at all. At most, in the absence of specific definitions, lower courts simply allowed claims to proceed, without any gatekeeping. But lower courts' lenience in allowing even poor claims to proceed in the face of this lack of definition does not mean that the plaintiffs had a vested right to that lenience. To contend that plaintiffs had a vested right to an open gate — simply by virtue of having filed a complaint before HB 292 was enacted — is startling, especially in light of the General Assembly's unchallenged finding that most asbestos complaints are by claimants who are "not sick." It cannot be true that someone who is not sick, or is not sick from exposure to asbestos, has a *vested right* to sue for "bodily injury caused by exposure to asbestos," just because of lower courts' past lenience in the absence of definitive guidance from the legislature or this Court.

Indeed, if there were any guidance from this Court, it was that "injury" requires something more than an assertion of exposure to asbestos. See *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 87, 447 N.E.2d 727, 730 (under predecessor of R.C. 2305.10(B)(5), "a cause of action does not arise until actual injury or damage ensues;" "bodily injury does not occur contemporaneously with exposure").[17] The Court's decisions were suggestive that "bodily

[17] Other decisions of this Court also suggest that concrete injury, beyond exposure, is required before any claim accrues. See, e.g., *Liddell v. SCA Servs. of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 13, 635 N.E.2d 1233, 1239 (plaintiff exposed to toxic gas in 1981 could sue after injury resulted in 1987; "had [he] attempted to bring a cause of action for negligence in 1981, any specification of damages [would have been] speculative"); *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 62, 609 N.E.2d 140, 142-43 (DES-exposed plaintiffs may not sue for potential injury, nor assert a claim until injury occurs; filing prematurely based only on exposure would violate Rule 11).

(. . . continued)

injury" required something more than "exposure," but the Court never expressly interpreted the term "bodily injury" as used in R.C. 2305.10. In the absence of an interpretation by this Court of R.C. 2305.10's terms, the legislature was free to clarify their meaning by adding the express definitions in HB 292 (unlike *Hearing v. Wylie,* 173 Ohio St. at 223-24, 180 N.E.2d at 922-23, and *Van Fossen v. Babcock & Wilcox Co.* 36 Ohio St.3d at 109, 522 N.E.2d at 498, where the legislature was held unable to retroactively redefine a term this Court had previously defined).

These decisions are consistent with the law in other jurisdictions that a plaintiff may not assert a claim based on exposure, when no manifest impairment has yet occurred (or may ever occur). See, e.g., *Metro-North Commuter R.R. v. Buckley* (1997), 521 U.S. 424, 432 ("with only a few exceptions, common-law courts have denied recovery to those who . . . are disease and symptom free") (collecting cases). *Metro-North* denied FELA recovery for emotional distress to a plaintiff with admittedly massive asbestos exposure, because

> the physical contact at issue here — a simple (though extensive) contact with a carcinogenic substance — does not seem to offer much help in separating valid from invalid . . . claims. That is because contacts, even extensive contacts, with serious carcinogens are common. . . . [H]ow can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an increased mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated — particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? The evaluation problem seems a serious one.
>
> The large number of those exposed and the uncertainties that may surround recovery also suggest . . . the problem of "unlimited and unpredictable liability."
>
> . . . .
>
> It would not be easy to redefine "physical impact" in terms of a rule that turned on, say, the "massive, lengthy, [or] tangible" nature of a contact that amounted to an exposure, whether to contaminated water, or to germ-laden air, or to carcinogen-containing substances, such as insulation dust containing asbestos.

Id. at 434-37.

The court below also doubted whether HB 292's definition of "competent medical authority" even applies to the accrual statute, R.C. 2305.10(B)(5). See *Ackison*, 2006 WL 3861073 at *9 n.5, 2006-Ohio-7099 at ¶28 n.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."). But there is no question that by defining this term in HB 292, the legislature was clarifying R.C. 2305.10(B)(5). As discussed above, HB 292's definitions *expressly* apply to the accrual statute, R.C. 2305.10, defining its previously-undefined terms. They begin with a definition of "bodily injury caused by exposure to asbestos" that is expressly "[f]or purposes of section 2305.10." This first definition turns on other terms, which are also defined, and the chain of definitions includes "competent medical authority."

Indeed, the phrase "competent medical authority" cannot mean one thing in R.C. 2305.10 and something else in R.C. 2307.91 et seq. That would be not just exceptionally odd, but contrary to Ohio's rules of statutory construction. The first chapter of Ohio's Revised Code, prescribing rules of statutory construction, specifically provides that when a phrase is given a particular meaning by legislative definition, it must be so construed. See R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").

2. The Twelfth District's Analysis was Correct.

The first Ohio appellate court to consider whether HB 292's definitions may be applied to pending claims was *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 864 N.E.2d 682, 2006-Ohio-

6704. It answered "yes," in an analysis that is thorough, powerful, and persuasive. Among other things, it stated:

> Prior to September 2, 2004, the General Assembly had never defined the terms "bodily injury caused by exposure to asbestos" or "competent medical authority."
>
> . . . .
>
> 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."
>
> . . . .
>
> "[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)).
>
> . . . .
>
> 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. . . .
>
> . . . R.C. 2307.91(Z) defines the term "competent medical authority" . . . . Appellee cites the new definition of this term to demonstrate that her vested right in her accrued cause of action has been unconstitutionally impaired.
>
> However, because this statute "pertains to the competency of a witness to testify * * * it is of a remedial or procedural [rather than substantive] nature." . . . Since the provision is procedural or remedial rather than substantive, it does not offend the Ohio Constitution. . . .
>
> [Appellee argues] 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." . . . We find this reasoning unpersuasive.

While a vested right may be created by the common law, . . . 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." . . .

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." . . .

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. . . .

The term "accrued substantive rights" has often been used synonymously with the term "vested rights." . . .

. . . .

Prior to H.B. 292, neither the General Assembly nor the Ohio Supreme Court had defined the phrase ["competent medical authority"], 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 substantive, act. See *Denicola* [*v. Providence Hospital* (1979)], 57 Ohio St.2d [115,] 117. . . .

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. . . . 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."

. . . .

Burgett v. Norris (1874), 25 Ohio St. 308, [355-56] . . . 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.' . . .
>
> 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. . . . 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."
>
> 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. . . .
>
> 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.

Id. at ¶17, 51-52, 56, 75, 78-82, 84, 86, 105, 123, 125-27 (citations omitted). See also *Stahlheber v. Lac d'Amiante du Quebec, Ltee* (Ohio App. 12th Dist.), 2006 WL 3833888, 2006-Ohio-7034 (same); *Staley v. AC&S, Inc.* (Ohio App. 12th Dist.), 2006 WL 3833883, 2006-Ohio-7033 (same).

3. <u>The Other Cited Decisions Change Nothing.</u>

The court below cited two Ohio trial court decisions from Cuyahoga Co., *In Re Special Docket No. 73958* (Cuyahoga C.P., Jan. 6, 2006) and *Thornton v. A-Best Products* (Cuyahoga C.P., Nos. CV-99-395724 etc., Jan. 10, 2005), as "conclud[ing] that H.B. 292 constitutes unconstitutional retroactive legislation when applied to cases pending before the legislation's effective date." *Ackison*, 2006 WL 3861073 at *7, 2006-Ohio-7099 at ¶23. Like the appellate court decision here, however, these trial court decisions rested on the erroneous premise that a

"common law standard" fleshed out the meaning of R.C. 2305.10(B)(5), and was displaced by HB 292.

These decisions suggested that prior cases had established, as a definitive common law standard creating vested rights, that a plaintiff states an asbestos claim if "asbestos had caused an alteration of the lining of the lung," even without any impairment. Id. at *7 & n.4, 2006-Ohio-7099 at ¶23 & n.4. That suggestion is not correct.

Before the enactment of HB 292, two lower courts (cited by the Cuyahoga decisions and in turn by the court below) had discussed similar concepts, but did not discuss R.C. 2305.10. In the first, *Verbryke v. Owens-Corning Fiberglas Corp.* (6th Dist. 1992), 84 Ohio App.3d 388, 616 N.E.2d 1162, the court did not discuss accrual or cite R.C. 2305.10, but construed the Restatement (Second) of Torts, which did not use the term "bodily injury." The plaintiff claimed he had pleural plaques (benign thickening of the membrane surrounding the lungs[18]) caused by asbestos exposure, but no resulting impairment. The court stated that under the Restatement (Second) of Torts §§ 388 and 402A, a plaintiff may assert a claim for "physical harm," and that sections 7 and 15 of the Restatement define the subspecies of "bodily harm" as "physical impairment," which may include "an alteration to the structure of the body even though no other harm is caused." The court concluded that a jury should be allowed to determine the extent to which the plaintiff's asymptomatic pleural plaques harmed him. Id. at 394-96, 616 N.E.2d at

[18] Pleural thickening or plaque (when caused by asbestos; there are many other causes too) is a marker of asbestos exposure. Ordinarily it causes no symptoms or impairment of any bodily function, and has no medical significance. Nor does it physically progress into any other condition, such as asbestosis or cancer. When caused by asbestos, it simply confirms the asbestos exposure. Any risk of asbestosis or cancer results from the asbestos exposure and not from the pleural thickening. To sue for asymptomatic pleural thickening would therefore be the same as suing for exposure without injury. This Court's decisions in *O'Stricker, Liddell,* and *Burgess* suggest that this would be improper.

1166-67. In doing so, *Verbryke* rejected the analyses of other courts, including a Maryland court that had construed the same Restatement sections the opposite way,[19] and Hawaii and Arizona courts that similarly concluded a plaintiff has no claim for asbestos-related injuries based on pleural plaques with no functional impairment (purportedly distinguished by *Verbryke* on the ground that the other States "required bodily injury" — though of course Ohio also so required, in R.C. 2305.10(B)(5)). Id. at 393-94, 616 N.E.2d at 1165-66.

In the second lower court decision, *In re Cuyahoga County Asbestos Cases* (8th Dist. 1998), 127 Ohio App.3d 358, 364, 713 N.E.2d 20, 24, the court also did not discuss or cite R.C. 2305.10, but held that plaintiffs with asymptomatic pleural plaques could place their claims on a Voluntary Registry for Unimpaired Asbestos Claims, relying on *Verbryke* for the idea that "pleural plaque, which is an alteration to the lining of the lung, constitutes physical harm."

These lower court decisions did not constitute the "common law" of Ohio regarding R.C. 2305.10. As noted, neither case addressed the "bodily injury" requirement of R.C. 2305.10, but only the Restatement; they disagreed with other courts' interpretation of the Restatement; and they distinguished the law of other States as "requir[ing] bodily injury" (overlooking that Ohio's statute did too). But even if they had addressed R.C. 2305.10, these lower court decisions could not constitute a definitive statement of Ohio's common law, for other lower courts could reach different conclusions (like the decisions in other states), none of which would be authoritative

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[19] Restatement (Second) of Torts § 15 ("What Constitutes Bodily Harm") states that "Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness," and Comment a states that "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." The Maryland court held that asymptomatic pleural thickening did not constitute "bodily harm" under these guidelines because there was no impairment or functional change. *Owens-Illinois, Inc. v. Armstrong* (1991), 87 Md. App. 699, 591 A.2d 544, *reversed on other grounds* (1992), 326 Md. 107, 604 A.2d 47.

until such time as the Ohio Supreme Court issued a definitive construction. See *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 738, 864 N.E.2d 682, 696, 2006-Ohio-6704 at ¶82 (quoting the Amicus Curiae Attorney General's observation that one cannot have "'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'").

III. It is Constitutional to Apply HB 292's New Procedures to Pending Cases.

In addition to defining previously-undefined terms, HB 292 also establishes a new procedure. The procedure requires plaintiffs who assert asbestos claims to make a prima facie showing of a colorable claim, early in the case, and requires courts to scrutinize the showings and administratively dismiss without prejudice those that fall short. If and when the plaintiffs can make a prima facie showing, they may return.

If the legislature had not created the prima-facie-showing procedure, but only defined the previously-undefined terms of the accrual statute, the courts still would have the power to dismiss complaints that fall short of the accrual statute's standards. If an asserted claim does not meet the terms of the accrual statute — e.g., if no "competent medical authority" (as now defined) verifies that the plaintiff has a "bodily injury" (as now defined) that was "caused by exposure to asbestos" (as now defined) — then no claim has accrued and the complaint is subject to outright dismissal. See, e.g., *Goodyear Tire & Rubber Co. v. Brocker* (Ohio App. 7th Dist.), 1999 WL 476078 at *4-5 (affirming Civ. R. 12(B)(6) dismissal of claim that had "yet to accrue").

But the prima facie showing procedure creates an automatic occasion for this kind of scrutiny to occur, which serves the legislature's goal to relieve Ohio's congested dockets by setting aside the great numbers of insufficient claims. The procedure also benefits plaintiffs who might otherwise be subject to outright dismissal, for administrative dismissal allows plaintiffs to

return if and when they do develop a colorable claim, without incurring another filing fee and without any risk of being time-barred.

The court below suggested that the prima facie procedure is itself unconstitutionally retroactive, because "[b]efore the legislation, a plaintiff was not required to set forth a prima-facie case." *Ackison*, 2006 WL 3861073 at *9, 2006-Ohio-7099 at ¶28. This suggestion is wrong. The prima facie showing procedure is a *procedure,* and, as discussed in Section I above, laws that relate to procedures are by definition remedial and not substantive. See, e.g., *State v. Walls*, 96 Ohio St.3d 437, 443, 775 N.E.2d 829, 838, 2002-Ohio-5059 at ¶17. Even courts that have found HB 292's definitions impermissibly retroactive have found that the prima facie showing *procedure* is procedural and constitutionally permissible. See, e.g., *Aldridge v. AC&S, Inc.* (Butler C.P. No. CV2001-12-2936, June 9, 2006) ("The Court further finds that the prima facie proceeding required by R.C. 2307.92 is procedural and may be applied retroactively in cases pending prior to September 4, 2004, the effective date of H.B. 292."). There is no basis to hold that plaintiffs whose claims were pending on HB 292's effective date are constitutionally exempt from the prima facie showing procedure.

IV. The Plaintiff Has Not Shown a Colorable Claim.

The issue before the Court is the narrow one whether HB 292 may constitutionally be applied to cases pending when the statute came into effect, and not how the present plaintiff would fare under HB 292. But the purposes underlying HB 292, which prompted the legislature to act, are well illustrated by this case. The problem the legislature studied and addressed was an influx of "asbestos" claims lacking reasonable basis, and the present claim is such a case.

The plaintiff submitted four documents as a prima facie showing in 2005 (two dated 2000 and two dated 2003). It appears that when this case was first filed in 2001, the only bases were a mass screening x-ray read by Dr. Altmeyer in September 2000, and Mr. Ackison's boilerplate

exposure affidavit of the same date. Record No. 115, Exs. B-C (OI Supp. 84-87). Dr. Altmeyer is a prolific screener. As Professor Brickman recently wrote,

> The reliance on a comparative handful of B Readers and diagnosing doctors is a defining characteristic of the entrepreneurial model. . . . The Manville Personal Injury Trust . . . recently reported that as of August 30, 2005, it had received 691,910 claims, of which 499,766 included the name of a physician. The fifteen physicians whom the Trust has most frequently identified as the "primary physician" providing medical reports in support of claims, accounted for 200,107 or 40% of the 499,766 claims.

On the Applicability of the Silica MDL Proceeding to Asbestos Litigation, 12 Conn. Ins. L.J. at 39. Dr. Altmeyer is among the top fifteen screeners. *Id.* at 40. He is based in West Virginia, but reads x-rays of workers all over the country. His ILO forms state that he is not a board-certified radiologist, nor even a board-eligible radiologist. Record No. 115, Ex. B (OI Supp. 84-85). He has elsewhere admitted that he has no doctor-patient relationship with the workers whose x-rays he reads, and that he reads screening x-rays in volume — far from Ohio's requirements that x-rays be administered only upon a prescription by an Ohio-licensed doctor and under the direction of a licensed professional.[20]

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[20] Ohio law limits the use of x-rays to producing medical diagnoses by licensed physicians: "No person shall permit or arrange for the intentional irradiation of a human being except for the purpose of dental, veterinary or medical diagnosis and as authorized by a licensed practitioner within his or her scope of practice." Ohio Admin. Code § 3701:1-66-02 (8). It is illegal to x-ray a person in Ohio unless "a licensed practitioner of the healing arts shall direct or order that application of radiation." Ohio Admin. Code § 3691-38-04. "Any person proposing to conduct a self-referral screening program using radiation-generating equipment shall not initiate such a program without prior approval of the Department." Ohio Admin. Code § 3701:1-66-02 (c).

Ohio also requires a physician to supervise the administration of x-rays taken in the state by, at a minimum, being "readily available for purposes of consulting with and directing the [radiographer] while performing the procedures." R.C. 4773.06(B). If the x-ray machine operator is not licensed by the state under Chapter 4723 of the Revised Code, the doctor must "be present at the location where the operator is performing radiologic procedures for purposes
(. . . continued)

But in the present case, even Dr. Altmeyer did not find appreciable x-ray abnormality. His ILO report for Mr. Ackison noted lung profusion of 0/1 (i.e., *normal*), the appearance of small circumscribed pleural plaques that may have had any of numerous causes, and not even a mention of asbestos. Record No. 115, Ex. B (OI Supp. 84-85)

Nor did the plaintiff even proffer competent evidence of asbestos exposure. Mr. Ackison's affidavit (Record No. 115, Ex. C (OI Supp. 86-87)) did not do so. It showed that he was not an asbestos worker, but a steelworker at a plant where asbestos-containing products may have been used. The form affidavit (containing a formulaic recitation that he "worked with or in the vicinity of asbestos containing products" and that "cutting, handling and application" of the products "produced visible dust") lacks evidentiary value because it does not state that it was based on personal knowledge or that the affiant was competent to testify about the content of products used at his workplace. See Civ. R. 56(E) (personal knowledge requirement); *Wall v. Firelands Radiology, Inc.* (6th Dist. 1995), 106 Ohio App. 3d 313, 335 ("personal knowledge" cannot depend on outside information or hearsay; affidavit must aver or show personal knowledge specifically); *Cassels v. Dayton City School Dist. Bd. of Educ.* (1994), 69 Ohio St. 3d 217, 224 (affidavits without personal knowledge indication should have been excluded). Indeed, lay testimony regarding the chemical composition of a product is generally inadmissible under Ohio R. Evid. 701. *E.g.*, *McGuire v. Mayfield* (Ohio App. 3d Dist. 1991), 1991 WL 261831 at *6 (testimony of co-workers regarding plaintiff's exposure to asbestos was inadmissible because it was not based on witnesses' perceptions).

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of consulting with and directing the operator while performing the procedures." R.C. 4773.06(A). General x-ray machine operators may perform "only standard, diagnostic radiologic procedures." Such procedures "do *not* include . . . the use of radiation-generating equipment for mobile imaging" (i.e., litigation screening x-ray vans). Ohio Admin. Code § 3701-72-04(c); § 3701-72-01 (emphasis added).

Nor do the two additional records submitted as the plaintiff's prima facie showing (an upper GI scan dated May 2003 and the death certificate dated September 2003, Record No. 115, Exs. A, D (OI Supp. 81-83, 88-89)) even suggest injury caused by asbestos. The GI scan diagnosed distal esophageal cancer, with no mention of asbestos, much less a suggestion of asbestos causation. Nor does the death certificate — which lists the causes of death as heart disease (congestive heart failure and aortic stenosis) and other significant conditions as type 2 diabetes and esophageal mass — either mention asbestos or suggest it as a cause.

By any standard, the plaintiff failed to make a prima facie showing of "bodily injury *caused by asbestos*."

Conclusion

HB 292 was enacted in response to Ohio's asbestos litigation crisis. The legislature's prior asbestos-accrual statute, which tied accrual of a claim to "bodily injury," "competent medical authority," and "asbestos causation," did not control the flood of filings, because these terms were undefined and carried no practical weight. In HB 292, the legislature adopted detailed definitions that remedied the definitional vacuum, as well as a procedure requiring plaintiffs to show the prima facie basis of their claims, or else come back if and when they can. These provisions may be applied to cases that were pending when HB 292 took effect, and are not unconstitutionally retroactive. The legislature was free to adopt the definitions and apply them to pending cases, because the definitions did not override any existing law creating vested rights, but rather remedially filled a void. The legislature was free to adopt the prima-facie-showing procedure and apply it to pending cases, because it was procedural and not substantive. For all of these reasons, Owens-Illinois respectfully requests that the Court hold that it is constitutional to apply HB 292 to cases that were pending when it came into effect.

Dated: June 8, 2007

Respectfully submitted,

Rebecca C. Sechrist by Barbara Mayhew per consent

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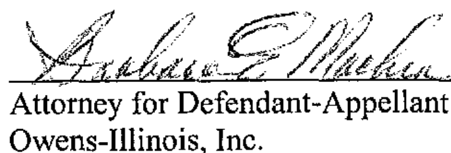

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Owens-Illinois, Inc.

CHI\ 5001696.1

Appendix to Brief of Defendant-Appellant Owens-Illinois, Inc.

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IN THE SUPREME COURT OF OHIO

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

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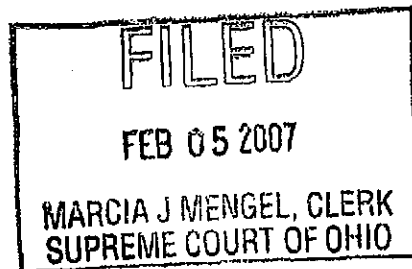

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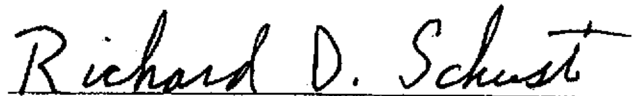
Notice of Appeal of Appellants

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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I certify that a copy of this Notice of Appeal was sent by first-class U.S. mail, postage prepaid, this 5th day of February, 2007 to:

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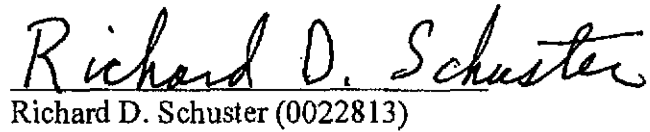

Richard D. Schuster (0022813)

COURT OF APPEALS

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

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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.

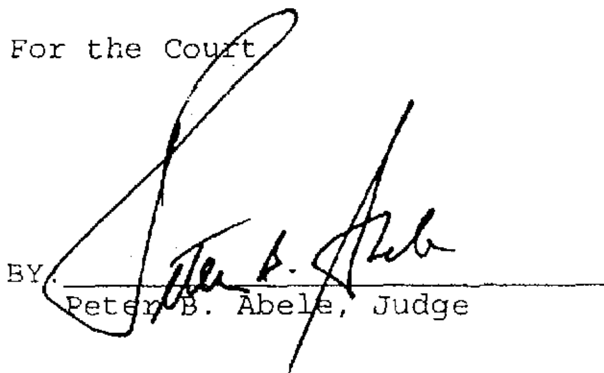
> "First, the certifying court must find that its judgment is in Conflict with the judgment of a court of appeals of another district and the asserted Conflict must be 'upon the same question.' Second, the alleged Conflict must be on a rule of law--not facts. Third, the journal entry or opinion must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

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DATE: ______________

ROUTE: ______________

FILE: ______________

COURT OF APPEALS

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. :

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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

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[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.

COURT OF APPEALS

JUDGMENT ENTRY

2006 DEC 20 PM 3:02

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

Counsel for Appellees H.B. Fuller Co., Industrial Holdings Corp., 3M Company, Union Carbide Corp., Amchem Products, Inc. and Certainteed Corp.: Richard D. Schuster, Nina I. Webb-Lawton, and John N. Boyer, 52 East Gay Street, Columbus, Ohio 43216-1008

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IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

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

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

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Defense Liaison Counsel and Counsel for Defendant Georgia-Pacific Corp.

Ohio Constitution, Article II, Section 28

§ 2.28 Retroactive laws

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.

Amended Substitute H.B. 292 (selected sections)

AN ACT

To amend section 2505.02 and to enact sections 2307.91 to 2307.94, 2307.941, 2307.95, 2307.96, and 2307.98 of the Revised Code to establish minimum medical requirements for filing certain asbestos claims, to specify a plaintiff's burden of proof in tort actions involving exposure to asbestos, to establish premises liability in relation to asbestos claims, and to prescribe the requirements for shareholder liability for asbestos claims under the doctrine of piercing the corporate veil.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1.

That section 2505.02 be amended and sections 2307.91, 2307.92, 2307.93, 2307.94, 2307.941, 2307.95, 2307.96, and 2307.98 of the Revised Code be enacted to read as follows:

Sec. 2307.91.

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 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.

Sec. 2307.92.

(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.

Sec. 2307.93.

(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.

(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.

Sec. 2307.94.

(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.

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Sec. 2307.96.

(A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

(1) The manner in which the plaintiff was exposed to the defendant's asbestos;

(2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

(3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

(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.

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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.

(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.

SECTION 5.

It is the intent of the General Assembly in enacting section 2307.96 of the Revised Code in this act to establish specific factors to be considered when determining whether a particular plaintiff's exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. The consideration of these factors involving the plaintiff's proximity to the asbestos exposure, frequency of the exposure, or regularity of the exposure in tort actions involving exposure to asbestos is consistent with the factors listed by the court in *Lohrmann v. Pittsburgh Corning Corp.* (4th Cir. 1986), 782 F.2d 1156. The General Assembly by its enactment of those factors intends to clarify and define for judges and juries that evidence which is relevant to the common law requirement that plaintiff must prove proximate causation. It recognizes this section's language is contrary to the language contained in paragraph 2 of the Syllabus of the Ohio Supreme Court in *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679. However, the General Assembly also recognizes that the courts of Ohio prior to the Horton decision generally followed the rationale of the *Lohrmann* decision in determining whether plaintiff had submitted any evidence that a particular defendant's product was a substantial cause of the plaintiff's injury in tort actions involving exposure to certain hazardous or toxic substances, and that the *Lohrmann* factors were of great assistance to the trial courts in the consideration of summary judgment motions and to juries when deciding issues of proximate causation. The General Assembly further recognizes that a large number of states have adopted this standard. It has also held hearings where medical evidence has been submitted indicating such a standard is medically appropriate and is scientifically sound public policy. The *Lohrmann* standard provides litigants, juries, and the courts of Ohio an objective and easily applied standard for determining whether a plaintiff has submitted evidence sufficient to sustain plaintiff's burden of proof as to proximate causation. Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an

essential element necessary to prevail. To submit a legal concept such as a "substantial factor" to a jury in these complex cases without such scientifically valid defining factors would be to invite speculation on the part of juries, something that the General Assembly has determined not to be in the best interests of Ohio and its courts.

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.

***

CHI\4392302.1

IN THE SUPREME COURT OF OHIO

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

APPELLANTS' NOTICE OF CERTIFIED CONFLICT

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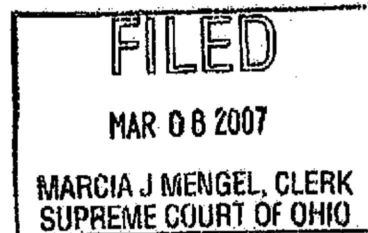

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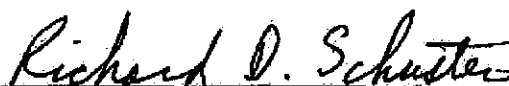
NOTICE

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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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by first-class U.S. mail, postage prepaid, this 8th day of March, 2007 to:

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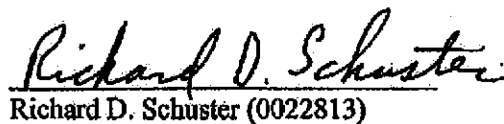

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APPENDIX

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

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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

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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

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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

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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.*

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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

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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.

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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

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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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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

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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,

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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

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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

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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

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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

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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(B), 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

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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

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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.

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*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

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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

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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,

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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

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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

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*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"

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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

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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, those 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."

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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

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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

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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

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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*

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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.

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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.
Bvanchan & Palmisano, Nicholas L. Bvanchan, 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

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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,

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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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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

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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

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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

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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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COURT OF APPEALS

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CLERK OF COURTS
LAWRENCE COUNTY

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

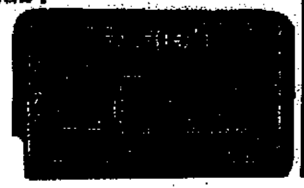
Defendants-Appellees. :

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