IN THE SUPREME COURT OF OHIO

ORIGINAL

Cheryl Boley, Executrix of the Estate of Mary Adams, and Clayton Adams	)	**Case No.: 2009-0542**
Appellants,	)	**On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**
-vs-	)	**Case No. CA-08-091404**
Goodyear Tire and Rubber Company,	)	
Appellees.	)	

MERIT BRIEF OF APPELLANTS CLAYTON ADAMS AND CHERYL BOLEY

Thomas W. Bevan (0054063)
Patrick M. Walsh (0075961)
John D. Mismas (0077434)
Bevan & Associates LPA, Inc.
6555 Dean Memorial Parkway
Boston Heights, OH 44236
Phone: 330-467-8571
Fax: 330-467-4493
mismas1@aol.com

Counsel for Appellants Cheryl Boley and Clayton Adams

Richard D. Schuster (0022813)
Nina I. Webb-Lawton (0066132)
Matthew M. Daiker (0077773)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Phone: (614) 464-6400
Fax: (614) 464-6350
rdschuster@vssp.com

Counsel for Appellee The Goodyear Tire and Rubber Company

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

INTRODUCTION.....1

STATEMENT OF THE CASE AND FACTS.....1

The Statute.....1

Asbestos Exposure, Mesothelioma and The Lawsuit.....2

The Trial Court's Ruling and the Appeal.....3

ARGUMENT.....5

Proposition of Law No. I.....5

Revised Code Section 2307.941(A) does not apply to "take home exposure" asbestos cases against a family member's employer who exposed the employee to asbestos and that family member brought asbestos home on their clothing causing other family members to become exposed to asbestos, and develop an asbestos related disease

Standard of Review.....5

R.C. 2307.941 Does Not Apply to Appellants' Claim for Relief.....5

CONCLUSION.....10

PROOF OF SERVICE.....11

APPENDIX.....12

APPENDIX

Document **Page**

Notice of Appeal to the Supreme Court of Ohio
(March 23, 2009).....1

Journal Entry and Opinion of the Eighth District Court of Appeals
(February 17, 2009).....4

Journal Entry of the Cuyahoga County Court of Common Please
(April 8, 2008).....15

R.C. 2307.941.....19

Ohio Constitution, Art I, Section 16.....20

TABLE OF AUTHORITIES

Cases **Page**

Board of Ed. of Pike-Delta-York Local School Dist. v. Fulton County (1975), 41 Ohio St.2d 147.....7

Brewer v. Cleveland City Schools (1997), 122 Ohio App.3d 378.....5

Doe v. First United Methodist Church (1994), 68 Ohio St.3d 531.....5

Dupler v. Mansfield Journal (1980), 64 Ohio St.2d 116.....5

Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St. 3d 312.....5

Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102.....5

Penn v. A-Best Prods. Co. (10th Dist. 2007), Slip Copy, 2007 WL 4564402.....7

Sears v. Weimer (1944), 143 Ohio St. 312.....7

Shump v. First Continental-Robinwood Assoc. (1994), 71 Ohio St. 3d 414.....5

Slingluff v. Weaver (1902), 66 Ohio St. 621.....7

State ex rel. Burrows v. Indus. Comm. (1997), 78 Ohio St.3d 78.....8, 9

Constitutional Provisions **Page**

Ohio Constitution, Art I, Section 16.....9

Statutes **Page**

R.C. 2307.941.....1, 2, 3, 4, 5, 6, 7, 8, 9, 10

I. INTRODUCTION

This is a take home asbestos exposure case. Appellants' decedent, Mary Adams, was exposed to asbestos via washing her husband's asbestos contaminated work clothes. Mary Adam's husband was Clayton Adams. Clayton Adams worked at Appellee Goodyear Tire & Rubber Company's facility in St. Marys, Ohio from 1973 until 1983. Clayton Adams was exposed to a myriad of asbestos-containing products while employed at the Goodyear Tire and Rubber Company in St. Mary's Ohio, and brought asbestos home on his clothes that his wife washed. From 1973 until 1983, Mary Adams was regularly exposed to asbestos from washing her husband's asbestos contaminated work clothes. Mary Adams was diagnosed with malignant mesothelioma on, or about, March 22, 2007. (Supp. 34). Mary Adams passed away from malignant mesothelioma on July 23, 2007. (Supp. 36). The trial court granted summary judgment based on R.C. 2307.941(A), the asbestos premised liability statute, even though Appellants asserted that their suit was a negligence suit, and not a premises liability suit. (Appx. 15 and 19). The Eighth District Court of Appeals affirmed the decision in an opinion and journal entry dated February 17, 2009. (Appx. 4). Appellants timely filed their Notice of Appeal to the Ohio Supreme Court. (Appx. 1).

I. STATEMENT OF THE CASE AND FACTS

A. The Statute

R.C. 2307.941(A) became effective on September 2, 2004. (Appx. 19). R.C. 2307.941(A) was part of what was known as House Bill 292, the asbestos tort reform statute. (Appx. 19). It only applies to cases alleging exposure to asbestos. *Id.* R.C. 2307.941(A) is the asbestos premises liability statute. The statute states:

(A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(Appx. 19), emphasis added. According to the plain meaning of the statute, you cannot get to section (A)(1) if the exposure did not occur on the premises owner's property. (Appx. 19). Here, Appellants' decedent was never exposed to asbestos while on Appellee Goodyear Tire and Rubber Company's premises.

B. Asbestos Exposure, Mesothelioma and The Lawsuit

On or about June 13, 2007, Appellants filed their Complaint against numerous defendants including Appellee Goodyear Tire & Rubber Company (hereinafter referred to as "Appellee Goodyear"). (Supp. 1-33). The Complaint alleged causes of action for strict products liability, negligence, failure to warn, breach of warranties, premises liability and numerous other torts against numerous defendants related to Mary Adams exposure to asbestos. (Supp. 1-33). Included in this complaint was a cause of action for negligence asserted against Appelle Goodyear. Appellants' decedent, Mary Adams, was deposed by defense counsel and Plaintiffs' counsel on June 25, 2007. (Supp. 37). At her deposition, on her death bed, Mary Adams stated that she would shake out and wash Clayton Adams clothes when he worked at Goodyear. (Supp. 45 and 50). Clayton Adams work clothes were dusty when Mary Adams would shake them out. (Supp. 47). Mary Adams would breathe the dust when she was shaking out Clayton Adams clothes. (Supp. 51).

Mary Adams' husband, Clayton Adams was deposed over three days. (Supp. 56, 98 and 154). In Clayton Adams' depositions, he described being exposed to everything from asbestos containing pipe insulation to asbestos-containing packing while at Appellee Goodyear. (Supp. 146-147, 194, and 177). Michael Boley, a coworker of Clayton Adams while he worked at Appellee Goodyear was deposed in this matter on September 19, 2007. (Supp. 199). Mr. Boley described Clayton Adams being exposed to everything from asbestos-containing block insulation to asbestos cement pipe while Clayton Adams was employed at Appellee Goodyear. (Supp. 266-267 and 218-219). Mr. Boley described Clayton Adams clothes as being dusty while he worked at Appellee Goodyear, and described the whole operation at Appellee Goodyear's facility as being dusty. (Supp. 271). Mary Adams was diagnosed with malignant mesothelioma[1] on, or about, March 22, 2007. (Appx. 34-35). Mary Adams passed away from malignant mesothelioma on July 23, 2007. (Supp. 36).

Appellants are not claiming that Mary Adams was exposed to asbestos on Appellee Goodyear's premises, and there is no evidence to support that Mary Adams was exposed to asbestos at any Appellee Goodyear facility.

C. The Trial Court's Ruling and the Appeal.

On or about December 14, 2007, Appellee Goodyear filed their Motion for Summary Judgment. In their Motion for Summary Judgment, Appellee Goodyear mainly relied on R.C. 2307.941(A), a premises liability statute. (Appx. 19). R.C. 2307.941(A) is part of what is know as House Bill 292, Ohio's asbestos tort reform act. (Appx. 19). Appellants filed their brief in

---

[1] Mesothelioma is a rare form of cancer caused by asbestos exposure. There is no known cure for mesothelioma.

opposition to Appellee Goodyear's Motion for Summary Judgment on February 14, 2008, pointing out that this was a negligence cause of action against Appellee Goodyear and not a premises liability case. Appellee Goodyear filed their reply brief on February 29, 2008, again claiming that this case fell under R.C. 2307.941. (Appx. 19). On March 11, 2008, Appellants filed their sur-reply. Oral arguments were had on March 19, 2008. At the oral argument, counsel for Goodyear relied on R.C. 2307.941 to make his argument. (Appx. 19). On April 1, 2008, the trial court granted Appellee Goodyear's Motion for Summary Judgment. (Appx. 15). The trial court did not issue an opinion, and merely granted Appellee Goodyear's Motion for Summary Judgment. (Appx. 15). It is unknown what the trial court based its granting of summary judgment on, so Appellants will address the issue of R.C. 2307.941 immunity. (Appx. 15). On April 8, 2008, the trial court journalized the order granting Goodyear's Motion for Summary Judgment. (Appx. 15). Appellant timely filed her appeal on May 5, 2008, to the Eighth District Court of Appeals.

Oral arguments were had in the Eighth District Court of Appeals, and an opinion affirming the trial court's decision was journalized on February 17, 2009. (Appx. 4-14). In its opinion, the Eighth District Court of Appeals found that, in applying R.C. 2307.941(A), "[T]he phrase 'on the premises owner's property' refers to the origin of the asbestos itself." (Appx. 11-12). Appellants then timely appealed to the Ohio Supreme Court. (Appx. 1-3).

II. ARGUMENT

Proposition of Law No. 1: Revised Code Section 2307.941(A) does not apply to "take home exposure" asbestos cases against a family member's employer who exposed the employee to asbestos and that family member brought asbestos home on their clothing causing other family members to become exposed to asbestos, and develop an asbestos related disease

A. Standard of Review

In ruling on a motion for summary judgment the court must construe the record and all inferences in the nonmoving party's favor. See, e.g., *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535. An appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378; citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120. Therefore, this Honorable Court must review the granting of summary judgment in the present case under de novo review.

B. R.C. 2307.941 Does Not Apply to Appellants' Claim for Relief.

In *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St. 3d 312, 315, the Ohio Supreme Court stated that "Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability." The Court went on to further state that "[i]n Ohio, the status of the person who enters upon the land of another (i.e., trespasser, licensee, or invitee) continues to define the scope of the legal duty that the landowner owes the entrant." *Id.*, citing *Shump v. First Continental-Robinwood Assoc.* (1994), 71 Ohio St. 3d 414, 417. A landowner owes a duty to an invitee to exercise ordinary care for the invitee's safety and

protection. *Id.* at 317. [A] landowner owes no duty to a licensee or trespasser except to refrain from willful, wanton or reckless conduct which is likely to injure him. Id.

Here Mrs. Adams is not a trespasser, licensee, or invitee. As stated by the Ohio Supreme Court, a premises liability claim is based on "the legal duty that the landowner owes the entrant." *Id.* at 315. Here, Mrs. Adams never entered upon the land of Appellee Goodyear. Quite to the contrary, this is a take home exposure case, where all of Mrs. Adams' exposure occurred at home while washing her husband's asbestos contaminated clothing. This basic, fundamental element of a premises liability claim, i.e. being on the premises, is missing in the current situation. Therefore, this is not a premises liability claim. This is a common law negligence claim.

A full reading of R.C. 2307.941 clearly indicates that the statute is not applicable to the case at bar. (Appx. 19). R.C. 2307.941 is a premises liability statute, and is titled as such. (Appx. 19). As Appellants have already demonstrated, this is not a premises liability case. Further, the very language of R.C. 2307.941 makes it abundantly clear that the statute does not apply in this case. (Appx. 19). R.C. 2307.941 states in pertinent part:

> (A) **The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for *exposure to asbestos on the premises owner's property*:**
>
> (1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(Appx. 19), emphasis added. Section A of R.C. 2307.941 makes it abundantly clear that the statute only applies "**to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's**

property." (Appx. 19), emphasis added. All other sections of the statute are sub servant to this overriding section of the statute. Here, the injured party, Mrs. Adams, was never exposed to asbestos on Appellee Goodyear's premises. Therefore, R.C. 2307.941 cannot apply where a person was never on the premises owner's property. (Appx. 19).

When interpreting a statute, "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1944), 143 Ohio St. 312, 312. As stated by the Ohio Supreme Court in *Slingluff*:

> [T]he intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.

Slingluff v. Weaver (1902), 66 Ohio St. 621, Syllabus. In this case, the trial court and the Eighth District Court of Appeals ignored the plain meaning of R.C. 2307.941(A). (Appx. 19).

The Ohio Supreme Court has further stated that "Courts do not have the authority to ignore, in guise of statutory interpretation, the plain and unambiguous language in a statute." *Board of Ed. of Pike-Delta-York Local School Dist. v. Fulton County* (1975), 41 Ohio St.2d 147, 156. This means that "[U]nambiguous statutes are to be applied according to plain meaning of words used, and courts are not free to delete or insert other words." *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81. Finally, "it must be presumed that the legislature

was aware of the rules of grammar when the statute was promulgated." *Penn v. A-Best Prods. Co.* (10th Dist. 2007), Slip Copy, 2007 WL 4564402.

In the case *sub judice*, Appellee Goodyear would have R.C. 2307.941(A)(1) exist in a vacuum. (Appx. 19). In their reply brief of their motion for summary judgment, Appellee Goodyear never once fully quoted the statute or even mentions R.C. 2307.941(A). (Appx. 19). It is easy to see why. This previous section of R.C. 2307.941 completely undermines the assertions made in moving for summary judgment. (Appx. 19). R.C. 2307.941(A) clearly states: The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos ***on* the premises owner's property**. (Appx. 19), emphasis added. Here, the plain language of the statute is clear and unambiguous. For R.C. 2307.941(A)(1) to apply in this case, the asbestos injury must have occurred from "exposure to asbestos on the premises owner's property." (Appx. 19). That is clearly not the situation in this case. Mary Adams was never exposed to asbestos *on* Appellee Goodyear's property. Mary Adams was exposed to asbestos from washing her husband's clothing. Some of the asbestos on her husband's clothes was the result of his employment at Appellee Goodyear. However, this case is not about Clayton Adams' exposure at Appellee Goodyear (in which case the statute may apply), but about Mary Adams' exposure at home. Therefore, R.C. 2307.941(A)(1) can not act as a bar to Plaintiff's claims against Appellee Goodyear in this case. (Appx. 19).

Furthermore, the case law makes it clear that a court is to apply a statute as it is written, not how a defendant wishes it were written. If Appellee Goodyear wished this statute to apply in the current case, then R.C. 2307.941(A) should state: The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure

to asbestos *from* the premises owner's property. (Appx. 19), emphasis added. However, that is not what the statute says. R.C. 2307.941(A) clearly and unequivocally states: "The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos *on* the premises owner's property." (Appx. 19), emphasis added. As this Honorable Court has stated, "[u]nambiguous statutes are to be applied according to plain meaning of words used, and courts are not free to delete or insert other words." *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81. Regardless of the words Appellee Goodyear may wish the legislature would have chosen when writing this statute, it is clear from the plain meaning of the words used that the statute does not apply in this case.

Finally, the application of R.C. 2307.941 effectively slams the courthouse door on take home exposure cases against a family member's employer. (Appx. 19). If Clayton Adams, instead of Mary Adams was diagnosed, and died from mesothelioma as a result of exposure to asbestos from working at Appellee Goodyear's facility, he would have recourse against Appellee Goodyear. Clayton Adams could file an intentional tort claim and a workers' compensation claim. Furthermore, Mary Adams could file a workers' compensation death claim against Appellee Goodyear. Hence, R.C. 2307.941 violates Appellants' right to due process of the law, because neither Mary Adams nor her estate has any legal recourse against Appellee Goodyear. (Appx. 19) and Ohio Constitution, Art I, Section 16, (Appx. 21). Here, Appellants' claims against Appellee Goodyear are for negligently exposing Mary Adams to asbestos via Clayton Adams contaminated work clothes, and not based on premises liability.

Therefore, the trial court erred in applying R.C. 2307.941(A)(1) in this case in granting summary judgment, and summary judgment should be reversed. (Appx. 19).

III. CONCLUSION

For 2307.941(A) to apply, Appellant's decedent must have had asbestos exposure on the premises of Goodyear. (Appx. 19). Furthermore, the statute is unconstitutional. Therefore, the granting of summary judgment against Appellants should be reversed, and the case remanded to the trial court for trial.

Respectfully submitted,

Thomas W. Bevan (0054063)
Patrick M. Walsh (0075961)
John Mismas (0077434)
BEVAN AND ASSOCIATES
6555 Dean Memorial Parkway
Boston Heights, OH 44236
Phone: 330-467-8571
Fax: 330-467-4493
mismas1@aol.com

Counsel for Appellants

PROOF OF SERVICE

A copy of the foregoing document was sent to the following by regular U.S. Mail, postage prepaid this 21st day of August, 2009:

Richard D. Schuster (0022813)
Nina I. Webb-Lawton (0066132)
Matthew M. Daiker (0077773)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Phone: (614) 464-6400
Fax: (614) 464-6350

Counsel for Appellee

John D. Mismas (0077434)

APPENDIX

Document	Page
Notice of Appeal to the Supreme Court of Ohio (March 23, 2009)	1
Journal Entry and Opinion of the Eighth District Court of Appeals (February 17, 2009)	4
Journal Entry of the Cuyahoga County Court of Common Please (April 8, 2008)	15
R.C. 2307.941	19
Ohio Constitution, Art I, Section 16	20

IN THE SUPREME COURT OF OHIO

Cheryl Boley, Executrix of the Estate of Mary Adams, and Clayton Adams	)	**Case No.: 09-0542**
Plaintiff-Appellant,	)	**On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**
-vs-	)	
Goodyear Tire and Rubber Company,	)	**Court of Appeals Case No. CA-08-091404**
Defendant-Appellees.	)	

NOTICE OF APPEAL OF APPELLANTS CHERYL BOLEY AND CLAYTON ADAMS

Thomas W. Bevan (0054063) (COUNSEL OF RECORD)
Patrick M. Walsh (0075961)
John D. Mismas (0077434)
Bevan and Associates LPA, Inc.
10360 Northfield Road
Northfield, Ohio 44067
Phone: (330) 650-0088
Fax: (330) 467-4493

COUNSEL FOR APPELLANTS, CHERYL BOLEY AND CLAYTON ADAMS

Richard D. Schuster (0022813)
Nina I. Webb-Lawton (0066132)
Matthew M. Daiker (0077773)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Phone: (614) 464-6400
Fax: (614) 464-6350

COUNSEL FOR APPELLEE, THE GOODYEAR TIRE AND RUBBER COMPANY

Notice of Appeal of Appellants Cheryl Boley and Clayton Adams

Appellants Cheryl Boley and Clayton Adams hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. CA-08-091404 on February 17, 2009.

The case raises an issue that is one of public or great general interest.

Respectfully submitted,

Bevan and Associates, LPA, Inc.
Thomas W. Bevan (0054063)
Patrick M. Walsh (0075966)
John D. Mismas (0077434)
10360 Northfield Rd.
Northfield, Ohio 44067
Phone: (330) 467-8571
Fax: (330) 467-4493

COUNSEL FOR APPELLANTS,
CHERYL BOLEY AND CLAYTON ADAMS

PROOF OF SERVICE

I certify that a copy of this Notice of Appeal was sent to all parties of record by U.S. Mail, postage prepaid this 23rd day of March, 2009:

John D. Mismas (0077434)

COUNSEL FOR APPELLANTS,
CHERYL BOLEY AND CLAYTON ADAMS

SERVICE LIST

Richard D. Schuster (0022813)
Nina I. Webb-Lawton (0066132)
Matthew M. Daiker (0077773)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Phone: (614) 464-6400
Fax: (614) 464-6350

COUNSEL FOR APPELLEE,
THE GOODYEAR TIRE AND RUBBER COMPANY

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91404

CLAYTON ADAMS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

GOODYEAR TIRE AND RUBBER CO., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-627038

BEFORE: Cooney, A.J., Gallagher, J., and Boyle, J.

RELEASED: February 5, 2009

JOURNALIZED: FEB 17 2009

ATTORNEYS FOR APPELLANT CHERYL BOLEY

John D. Mismas
Thomas W. Bevan
Patrick M. Walsh
Bevan & Associates, LPA
10360 Northfield Road
Northfield, Ohio 44067

ATTORNEYS FOR APPELLEE GOODYEAR TIRE & RUBBER CO.

Richard D. Schuster
Matthew M. Daiker
Timothy B. McGranor
Gary J. Saalman
Nina I. Webb-Lawton
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

CA08091404 55839635

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

Plaintiff-appellant, Cheryl Boley ("Boley"), as the Executrix of the Estate of Mary and Clayton Adams, appeals the trial court's granting summary judgment in favor of defendant-appellee, Goodyear Tire & Rubber Company ("Goodyear"). Finding no merit to the appeal, we affirm.

In June 2007, Mary and Clayton filed suit against Goodyear and numerous other defendants alleging causes of action for negligence, strict liability, breach of warranties, loss of consortium, statutory products liability, punitive damages, and fraudulent concealment that related to Mary's asbestos exposure.[1]

Clayton (Mary's husband) worked at Goodyear from 1973 to 1983. While at Goodyear, Clayton was exposed to asbestos-containing products and brought asbestos home on his clothing that Mary washed. Clayton's clothing was dusty so Mary would shake it out before washing. She would breathe in the dust while shaking out the clothing. She was diagnosed with mesothelioma in March 2007 and died in July 2007.[2]

---

[1]Boley was substituted as the personal representative of Clayton and Mary's estate. In May 2008, Boley amended the complaint naming her as the Executrix of Clayton and Mary's estate and added wrongful death as the ninth claim for relief.

[2]These types of "secondhand" exposure or "take home" cases involve claims by members of a worker's household for mesothelioma or other asbestos-related diseases where the cause of the disease is alleged to have been exposure to asbestos dust that

In December 2007, Goodyear moved for summary judgment, arguing that the Adams' claims are barred by R.C. 2307.941(A)(1) and that their negligence claim fails because Goodyear did not owe Mary a duty of care. In February 2008, Clayton opposed Goodyear's motion, individually and as the Executor of Mary's Estate, arguing that their claim against Goodyear was for negligence and not premises liability. After a hearing, the trial court granted Goodyear's motion. The trial court also certified that there was no just reason for delay.

Boley now appeals, raising two assignments of error for our review. In the first assignment of error, Boley argues that the trial court erred in granting Goodyear's motion for summary judgment based on R.C. 2307.941(A)(1). In the second assignment of error, she argues that the trial court erred in granting summary judgment on Mary's negligence claim.

Standard of Review

Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

---

the worker brought home.

"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

R.C. 2307.941–Liability of Premises Owner

As the Ohio Supreme Court stated in *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596, the General Assembly enacted Amended Substitute House Bill 292 ("H.B. 292") in response to the asbestos litigation crisis in Ohio.[3] The key provisions are codified in R.C. 2307.91

[3]H.B. 292 became effective on September 2, 2004.

through 2307.98 and clarify when a plaintiff has an accrued cause of action for asbestos injury and specifies what medical evidence entitles a plaintiff to the trial court's immediate attention. See, also, *In re Special Docket No. 73958*, Cuyahoga App. Nos. 87777 and 87816, 2008-Ohio-4444.

With respect to premises defendants, R.C. 2307.941 was enacted to address claims against a premises owner for exposure to asbestos on the premises owner's property and states in pertinent part:

"(A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property."

In the first assignment of error, Boley does not challenge the constitutionality of R.C. 2307.941. Rather, she argues that R.C. 2307.941 does not apply to Mary's case. She contends that R.C. 2307.941(A) "makes it abundantly clear" that the statute only applies to damages resulting from asbestos exposure while the individual is on the premises owner's property. Because Mary was never exposed to asbestos on Goodyear's property, Boley contends that R.C. 2307.941 cannot apply to Mary's case. We find this argument unpersuasive.

When interpreting a statute, "a court's paramount concern is the legislative intent in enacting the statute. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. Words used in a statute must be taken in their usual, normal or customary meaning. It is the duty of the court to give effect to the words used and not to insert words not used. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation." *State ex rel. Richard v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund*, 69 Ohio St.3d 409, 411-412, 1994-Ohio-126, 632 N.E.2d 1292. (Internal citations and quotations omitted.)

Furthermore, "[t]he presumption always is, that every word in a statute is designed to have some effect, and hence the rule that, 'in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to *every part of it*.'" *Turley v. Turley* (1860), 11 Ohio St. 173, 179, citing *Commonwealth v. Alger* (Mass. 1851), 7 Cush. 53, 89. (Emphasis in original.) See, also, R.C. 1.47(B), which provides that: "[i]n enacting a statute, it is presumed that *** [t]he entire statute is intended to be effective."

We find that Boley's interpretation of R.C. 2307.941 would render the statute meaningless. That is, R.C. 2307.941(A)(1) could never apply in any case because the very fact that would trigger the application of subdivision (A)(1), exposure somewhere other than the defendant's premises, would also render the statute inapplicable under Boley's interpretation of R.C. 2307.941(A).

When R.C. 2307.941(A) is read as a whole, it is clear that the focus is on the presence of asbestos on the premises, not the presence of the individual on the premises: "[t]he following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for *exposure to asbestos on the premises owner's property*[.]" (Emphasis added.)

The individual's presence is not discussed until R.C. 2307.941(A)(1), where it states that: "[a] premises owner is not liable for any injury to any *individual* resulting from asbestos exposure unless that *individual's alleged exposure occurred while the individual was at the premises owner's property.*" (Emphasis added.)

Thus, in order to read R.C. 2307.941(A)(1) in a manner that gives effect to the intent of the General Assembly and does not lead to an absurd result (such as only applying when the individual is exposed to asbestos on defendant's premises), we find that the phrase "on the premises owner's

property" in subsection (A) refers to the origin of the asbestos itself and, pursuant R.C. 2307.941(A)(1), unless the individual's exposure occurred on the premises, all tort claims against the premises owner are barred. See *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶28, where the Ohio Supreme Court stated that: "[w]e must construe the applicable statute and rule to avoid such unreasonable or absurd results."

In the instant case, it is clear that Mary's asbestos exposure did not occur on Goodyear's premises. Rather, her exposure occurred at home when she shook out the dust from her husband's clothing before washing it. The dust came from her husband's workplace. Because R.C. 2307.941(A)(1) bars recovery for injury where the individual was not exposed to asbestos on the defendant's property, we find that Mary's claims fail as a matter of law.

Negligence

In the second assignment of error, Boley argues that the trial court erred in granting summary judgment on Mary and Clayton's negligence claim.

In Ohio, to establish an actionable negligence claim, one must establish (1) the existence of a duty; (2) a breach of that duty; and (3) injury resulting proximately therefrom. *Mussivand v. David* (1989), 45 Ohio St. 3d 314,

318-319, 544 N.E.2d 265, citing *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125, 247 N.E. 2d 732. The existence of a duty of care is a question of law for the court to determine. Id.

"Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff." *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98, 543 N.E.2d 1188.

Furthermore, the existence of a duty also depends on the foreseeability of injury. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E. 2d 707; *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335, 190 N.E. 924. "The test for foreseeability is whether a reasonably prudent person, under the same or similar circumstances as the defendant, should have anticipated that injury to the plaintiff or to those in like situations is the probable result of the performance or nonperformance of an act." *Commerce & Industry Ins.*

However, based on our analysis of R.C. 2307.941(A)(1), Goodyear does not owe Mary a duty of care since her exposure did not occur on Goodyear's premises. Thus, the negligence claim must also fail as a matter of law.

Because Mary's claims are barred by R.C. 2307.941(A)(1) and Goodyear does not owe Mary a duty of care, we find that the trial court did not err in granting Goodyear summary judgment.

Therefore, the first and second assignments of error are overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution.

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

Colleen Conway Cooney

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR

1922479

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARY ADAMS (ESTATE),	)	Case No. 627038
	)	
Plaintiff,	)	
	)	
v.	)	Judge Leo M. Spellacy
	)	Judge Harry Hanna
The Goodyear Tire & Rubber Company, et al.,	)	
	)	**Bevan Group 14**
Defendants.	)	

ORDER AND FINAL JUDGMENT ENTRY GRANTING DEFENDANT GOODYEAR TIRE & RUBBER COMPANY'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on for consideration of Defendant GOODYEAR TIRE & RUBBER COMPANY'S Motion for Summary Judgment, and the Court having been duly advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant GOODYEAR TIRE & RUBBER COMPANY'S Motion for Summary Judgment, which was filed on December 14, 2007 (see F&S No. 17666740), is **GRANTED** (see F&S No. 19223725);

2. Defendant THE GOODYEAR TIRE & RUBBER COMPANY is DISMISSED WITH PREJUDICE on the merits. Costs to Plaintiffs; and

3. There is no just reason for delay pursuant to Ohio Rule of Civil Procedure 54(B). The Clerk is to notify all parties of record.

DONE AND ORDERED in Cleveland, Cuyahoga County, Ohio, this 7 day of April, 2008.

Judge Leo M. Spellacy

RECEIVED FOR FILING

APR 08 2008

GERALD E. FUERST, DEPUTY

By

15

2307.941 Asbestos claim against premises owner.

(A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(2) If exposure to asbestos is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that this state had adopted safe levels of exposure for asbestos and that products containing asbestos were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of asbestos in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state and that the premises owner allowed that condition to persist.

(3)(a) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove asbestos products on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that at the time of the exposure to asbestos that is alleged the premises owner had actual knowledge of the potential dangers of the asbestos products at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

(b) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from asbestos exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(c) If exposure to asbestos is alleged to have occurred on or after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an established safety standard that was in effect at the time of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

(B) As used in this section:

(1) "Threshold limit values" means that, for the years 1946 through 1971, the concentration of asbestos in a worker's breathing zone did not exceed the following maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration:

(a) Asbestos: five million particles per cubic foot;

16

(b) Cadmium: 0.10 milligrams per cubic meter;

(c) Chromic acid and chromates (calculated as chromic oxide): 0.10 milligrams per cubic meter;

(d) Lead: 0.15 milligrams per cubic meter;

(e) Manganese: 6.0 milligrams per cubic meter;

(f) Mercury: 0.10 milligrams per cubic meter;

(g) Zinc oxide: 15.0 milligrams per cubic meter;

(h) Chlorinated diphenyls: 1.0 milligram per cubic meter;

(i) Chlorinated naphthalenes (trichlornaphthalene): 5.0 milligrams per cubic meter;

(j) Chlorinated naphthalenes (pentachlornaphthalene): 0.50 milligrams per cubic meter.

(2) "Established safety standard" means that, for the years after 1971, the concentration of asbestos in the breathing zone of a worker does not exceed the maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration as promulgated by the occupational safety and health administration (OSHA) in effect at the time of the alleged exposure.

(3) "Employee" means an individual who performs labor or provides construction services pursuant to a construction contract as defined in section 4123.79 of the Revised Code, or a remodeling or repair contract, whether written or oral, if at least ten of the following criteria apply:

(a) The individual is required to comply with instructions from the other contracting party regarding the manner or method of performing services.

(b) The individual is required by the other contracting party to have particular training.

(c) The individual's services are integrated into the regular functioning of the other contracting party.

(d) The individual is required to perform the work personally.

(e) The individual is hired, supervised, or paid by the other contracting party.

(f) A continuing relationship exists between the individual and the other contracting party that contemplates continuing or recurring work even if the work is not full time.

(g) The individual's hours of work are established by the other contracting party.

(h) The individual is required to devote full time to the business of the other contracting party.

(i) The person is required to perform the work on the premises of the other contracting party.

(j) The individual is required to follow the order of work set by the other contracting party.

(k) The individual is required to make oral or written reports of progress to the other contracting party.

(l) The individual is paid for services on a regular basis, including hourly, weekly, or monthly.

(m) The individual's expenses are paid for by the other contracting party.

(n) The individual's tools and materials are furnished by the other contracting party.

(o) The individual is provided with the facilities used to perform services.

(p) The individual does not realize a profit or suffer a loss as a result of the services provided.

(q) The individual is not performing services for a number of employers at the same time.

(r) The individual does not make the same services available to the general public.

(s) The other contracting party has a right to discharge the individual.

(t) The individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Effective Date: 09-02-2004

18

ing the place to be searched and the person and things to be seized.

(1851)

NO IMPRISONMENT FOR DEBT.

§15 No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

(1851)

REDRESS FOR INJURY; DUE PROCESS.

§16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(1851, am. 1912)

NO HEREDITARY PRIVILEGES.

§17 No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

(1851)

SUSPENSION OF LAWS.

§18 No power of suspending laws shall ever be exercised, except by the General Assembly.

(1851)

EMINENT DOMAIN.

§19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851)

DAMAGES FOR WRONGFUL DEATH.

§19a The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

(1912)

PROTECT PRIVATE PROPERTY RIGHTS IN GROUND WATER, LAKES AND OTHER WATERCOURSES.

§19b. (A) The protection of the rights of Ohio's property owners, the protection of Ohio's natural resources, and the maintenance of the stability of Ohio's economy require the recognition and protection of property interests in ground water, lakes, and watercourses.

(B) The preservation of private property interests recognized under divisions (C) and (D) of this section shall be held inviolate, but subservient to the public welfare as provided in Section 19 of Article I of the Constitution.

(C) A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land.

(D) An owner of riparian land has a property interest in the reasonable use of the water in a lake or watercourse located on or flowing through the owner's riparian land.

(E) Ground water underlying privately owned land and nonnavigable waters located on or flowing through privately owned land shall not be held in trust by any governmental body. The state, and a political subdivision to the extent authorized by state law, may provide for the regulation of such waters. An owner of land voluntarily may convey to a governmental body the owner's property interest held in the ground water underlying the land or nonnavigable waters located on or flowing through the land.

(F) Nothing in this section affects the application of the public trust doctrine as it applies to Lake Erie or the navigable waters of the state.

(G) Nothing in Section 1e of Article II, Section 36 of Article II, Article VIII, Section 1 of Article X, Section 3 of Article XVIII, or Section 7 of Article XVIII of the Constitution shall impair or limit the rights established in this section.

(2008)

POWERS RESERVED TO THE PEOPLE.

§20 This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

(1851)