

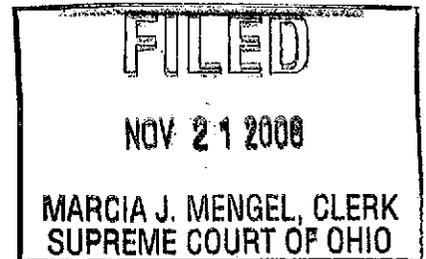
IN THE OHIO SUPREME COURT

MARY J. MANLEY, : S. Ct. Case No. 06-1263
 : C.A. Case No. CA2006-04-13
 Plaintiff, :
 v. : On Appeal from the 12th District
 : Court of Appeals, Clinton County
 NICHOLAS P. MARSICO, M.D., et al. :
 :
 Defendants. :

MERIT BRIEF OF DEFENDANT/APPELLANT EYE SPECIALISTS, INC.

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STATEMENT OF THE FACTS

Defendant Eye Specialists, Inc., is an Ohio corporation which was formed on March 5, 2001. The purpose of the corporation was to perform all types of medical care relating to the practice of ophthalmology. Defendants Eye Specialists, Inc., and Nicholas P. Marsico, M.D., were sued for medical malpractice on October 12, 2004 by Plaintiff Mary J. Manley. (See Compl., Case No. CVA20040642).¹ Eye Specialists, Inc., filed its Answer on November 20, 2004 and then began conducting paper discovery. Upon the completion of that discovery, Defendants requested and obtained a date for discovery depositions of Plaintiff and her witnesses. As a result of this agreement, Plaintiff and a daughter were noticed for discovery deposition on June 8, 2005 at 9:30 a.m. Unfortunately, neither Plaintiff nor her attorney ever made an appearance at this deposition. (See Defendant Eye Specialists, Inc.'s Motion to Compel Discovery and Motion for Sanctions). The Motion to Compel and Motion for Sanctions was filed on June 15, 2005.

On July 6, 2005, the trial court held a hearing on Defendant's Motion to Compel Discovery and for sanctions. The Court's entry indicates that no one appeared for either party at the hearing. However, the entry also reflects that "the court did receive a telephone call indicating the case had been settled according to the message relayed to the judge." (See entry filed July 12, 2005). The Court then continued the matter pending receipt of an agreed entry on the issue of settlement. The source of this message is unknown and the case was never settled.

On July 12, 2005, the Court found that the Plaintiff had filed a Notice of Voluntary Dismissal pursuant to Rule 41(A)(1)(a). Since no counterclaim was pending, the Court noted

¹ Plaintiff's middle initial J. was later corrected to C.

that that claim was now dismissed by entry dated July 12, 2005, and filed July 15, 2005.

Plaintiff retained new counsel who then re-filed Plaintiff's medical malpractice action on January 12, 2006 in Clinton County Common Pleas Court. This case was assigned case number CVA20060028. Importantly, the re-filed Complaint failed to contain an affidavit of merit as required by Ohio Rule of Civil Procedure 10(D).

On January 26, 2006, Eye Specialists, Inc., filed a Motion to Dismiss Plaintiff's Complaint for failing to attach the required affidavit of merit. Defendant Nicholas P. Marsico, M.D. joined in this motion on January 31, 2006.

Both Defendants then filed Answers and awaited the judgment of the trial court on the issue of the Motion to Dismiss. Additional litigation and briefing ensued and the trial court ultimately denied Defendant's various motions and granted Plaintiff's Motion for Leave to file an affidavit of merit *instanter* in an entry dated March 16, 2006 and filed on March 24, 2006. Defendants appealed and the appeals were ultimately dismissed by the court of appeals for lack of a final appealable order. This matter is now before The Ohio Supreme Court by virtue of its acceptance of the discretionary appeal of Defendant Nicholas P. Marsico, M.D.

ARGUMENT

PROPOSITION OF LAW NUMBER 1: A DECISION GRANTING OR DENYING A MOTION TO DISMISS FOR FAILURE TO COMPLY WITH CIVIL RULE 10(D)(2) IS A FINAL ORDER FOR PURPOSES OF R.C. 2505.02.

I. THE FACTS OF THIS CASE MEET THE DEFINITION OF A FINAL APPEALABLE ORDER

This Court should find that an order denying a Motion to Dismiss for failure to attach an affidavit of merit as required by Ohio law constitutes a final appealable order. Ohio law provides

that an order which (1) denies a provisional remedy, (2) determines the action with respect to that remedy, and (3) prevents meaningful relief upon final judgment, does constitute a final appealable order. See Ohio Rev. Code Ann. §2505.02 (Anderson 2006). This Court has previously found a final appealable order under facts analogous to the facts in the case at bar. See State v. Upshaw 10 Ohio St.3d 189, 2006-Ohio-4253. Since the facts of the instant case meet the elements laid out by Ohio law as interpreted by the Upshaw Court, Defendant Eye Specialists respectfully requests that this Court find a final appealable order is present.

Ohio law provides:

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:

* * *

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(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.

(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.

Ohio Rev. Code Ann. §2505.02 (Anderson 2006).

This Court has specifically found that pursuant to the terms of Ohio Revised Code §2505.02(B)(4), “for an order to qualify as a final appealable order, the following conditions must be met: (a) the order must grant or deny a provisional remedy, as defined in R.C. 2505.02(A)(3), (b) the order must determine the action with respect to the provisional remedy so as to prevent judgment in favor of the party prosecuting the appeal, and (c) a delay in review of

the order until after final judgment would deprive the appellant of any meaningful or effective relief.” Upshaw, 110 Ohio St.3d at 192, ¶15, citing State v. Muncie (2001), 91 Ohio St.3d 440, 446.

A. The trial court’s order denied a provisional remedy.

The threshold requirement for a final appealable order is the granting or denying of a provisional remedy. The Ohio legislature has defined provisional remedy to mean “a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence or a prima facie showing pursuant to Section 2307.85 or 2307.86 of the Revised Code.” Ohio Rev. Code Ann. §2505.02 (Anderson 2006). This Court has defined an ancillary proceeding as “one that is attendant upon or aids another proceeding.” State v. Muncie (2001), 91 Ohio St. 3d 440, 449, quoting Bishop v. Dresser Industries, Inc. (1999), 134 Ohio App. 3d 321, 324. In Upshaw, 110 Ohio St. 3d at 190, this Court was confronted with a decision by a trial court which found that the defendant was incompetent to stand trial. Id. at ¶4. The Court subsequently found that the competency proceeding held by the trial court met the definition of an ancillary proceeding, which, in turn, met the definition of provisional remedy. Id. at ¶16.

In the instant case, the trial court’s proceeding on Defendants’ Motion to Dismiss for failure to attach the necessary affidavit of merit constitutes an ancillary proceeding. This proceeding aids the main proceeding, the medical malpractice lawsuit, by determining whether there is sufficient evidence to go forward. Given this, the trial court order denied a provisional remedy.

B. The trial court's order determined the action and prevented judgment in favor of Defendants/Appellants.

The second element which must be established in order to have a final appealable order is “the order must determine the action with respect to the provisional remedy so as to prevent judgment in favor of the party prosecuting the appeal* * *.” Upshaw at ¶15. Again, this Court’s decision in Upshaw is instructive. This Court found that “the trial court’s order in finding Upshaw incompetent has determined the competency proceeding.” Id. at ¶17. Importantly, this Court also noted “[a]lthough it is possible that Upshaw could be released eventually upon a finding of competency and the criminal action then could recommence, it is important to recognize that Upshaw’s liberty is affected by the order of commitment because of the finding of incompetency. Whether later rulings may be made are irrelevant to the fact of Upshaw’s commitment to an institution by the Court. That is the final determination adverse to Upshaw.” Id.

Likewise, in the instant case, the trial court’s decision that this case should proceed on the merits even though Plaintiff failed to properly attach an affidavit of merit is the final determination adverse to Defendant. The trial court’s ruling requires Defendants to expend resources in defending this medical malpractice action, which resources would not need to be spent had the trial court enforced Ohio Rule Civil Procedure 10(D). The fact that Defendants might prevail on the merits of this medical malpractice is irrelevant. What is relevant is that the trial court has permitted this action to go forward even though Plaintiff never complied with the necessary rules. Therefore, Defendants have established that the trial court’s order has determined the action with respect to the remedy being requested by Defendants, namely, that the

Plaintiff's Complaint should be dismissed.

- C. Forcing Defendants to take this case to trial before the trial court's order can be reviewed denies Defendants any relief in the event the trial court's decision was in error.

Finally, the third element which establishes a final appealable order is where "a delay in review of the order until after final judgment would deprive the appellant of any meaningful or effective relief." *Id.* at ¶15. Again, *Upshaw* is instructive. As this Court recognized "[i]f he is correct that his confinement was mistaken, without immediate judicial review, that mistake is uncorrectable. * * *If he is acquitted at trial, the lack of remedy is even clearer. * * * 'probably no one could be held liable to him in damages for the loss of his liberty.'" *Id.* at ¶18, quoting *United States v. Gold* (C.A.2, 1986), 790 F.2d 235, 239.

Again, in the instant case, if Defendants are correct that the trial court erred in determining that Plaintiff was not required to attach an affidavit of merit when filing their medical malpractice complaint, without immediate judicial review, that error cannot be corrected. Defendants would be forced defend this medical malpractice action to its conclusion, compelling Defendants to expend valuable resources which could be better spent elsewhere. Of course, Defendants would not be able to hold anyone liable for damages suffered by Defendants being forced to defend a lawsuit which should have been dismissed. Thus, the third element of a final appealable order is present as well.

II. STANDARD RULES OF STATUTORY CONSTRUCTION ALSO SUPPORT DEFENDANTS' POSITION THAT THE TRIAL COURT'S DECISION IS A FINAL APPEALABLE ORDER.

It is important to note that the definition of provisional remedy includes the phrase "including, but not limited to* * *." Ohio Rev. Code Ann. §2505.02(A)(3) (Anderson 2006).

This Court has held that when such a phrase appears in a statute, the canon of ejusdem generis applies. That legal canon states “that the general or unstated terms in the definition should be determined with reference to the terms expressly included. Henley v. Youngstown Bd. of Zoning Appeals (2000), 90 Ohio State 3d 142-151, 2000-Ohio-493. In Henley, the Youngstown Board of Zoning Appeals was attempting to prevent a society of Catholic nuns from converting a convent into transitional housing for homeless women. Id. at 143. In determining whether the trial court correctly interpreted the zoning rules relative to the issues raised by this case, the Supreme Court pointed out that the phrase accessory building “expressly refers to ‘sheds, garages, and greenhouses.’ This list of structurally similar storage-workshop-type building shows that the drafters of the zoning code had a particular type of structure in mind when they desired to prohibit dwelling units in ‘accessory buildings’ and residential zones.” Id. at 150. The Court also noted that this specific definition of accessory building included the phrase “including but not limited to.” Id. Since the convent could not be accurately described as either a shed, a garage, or a greenhouse, the Supreme Court concluded that the trial court correctly interpreted this regulation as permitting the use of the convent as proposed by the sisters. Id. at 151.

In the instant case, a decision granting or denying a motion to dismiss for failure to attach an affidavit of merit as required by Ohio Rules of Civil Procedure 10(D) is analogous to the prima facie showing required by Ohio Rev. Code §2307.85 and/or 2307.86. A review of R.C. 2307.85² indicates that a plaintiff who files a silicosis or mixed dust claim is obligated to produce evidence “that the exposed person has a physical impairment, that the physical impairment is a

² R.C. 2307.86 is identical in all relevant respects.

result of a medical condition, and that the person's exposure to silica is a substantial contributing factor to the medical condition. That prima facie showing shall include all of the following minimal requirements: * * *." Ohio Rev. Code Ann. §2307.85(D) (Anderson 2006). The statute then lists various evidentiary requirements. Id. In essence, a plaintiff with a silicosis or mixed dust disease claim is required, at the outset, to lay out all of the evidence which is statutorily required to prevail on such a claim; and a trial court's decision as to the sufficiency of this prima facie evidence is a final appealable order.

Likewise, a plaintiff who is bringing a medical malpractice action is required to make what is, in essence, a prima facie showing of medical negligence. Just as the evidence in a silicosis claim must be sufficiently complete so as to allow the case to proceed to trial, a plaintiff alleging a medical malpractice claim is required to attach an affidavit of merit to the complaint. In both cases, the failure to produce the appropriate evidence at the time and place required by law results in a dismissal of the complaint. Thus, since the failure to attach an affidavit of merit is similar to the failure of a plaintiff to establish a prima facie case as required by R.C. 2307.85, a decision granting or denying a motion which attacks the sufficiency of a complaint for medical malpractice meets the definition of a provisional remedy and constitutes a final appealable order.

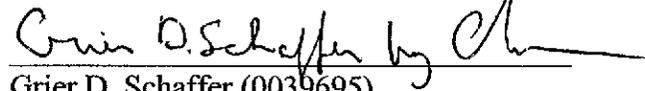
CONCLUSION

The trial court's order denying Defendant's Motion to Dismiss for failure to attach an affidavit of merit to Plaintiff's medical malpractice Complaint constitutes a final appealable order. The order denied a provisional remedy, determined the action with respect to this provisional remedy, and prevented judgment in favor of the appealing Defendants. Waiting until this case has gone to trial would deny Defendants any meaningful or effective relief as they

would have already been required to defend a case which should never have been accepted by the trial court in the first instance. Therefore, Defendant Eye Specialists, Inc., respectfully requests that this Court find that the denial of a Motion to Dismiss, where the Motion to Dismiss was based on a failure to attach an affidavit of merit as required by Ohio Rules of Civil Procedure 10(D), constitutes a final appealable order.

Respectfully submitted,

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APPENDIX A

Notice of Appeal filed in the Ohio Supreme Court, 30 June 2006

IN THE SUPREME COURT OF OHIO

MARY J. MANLEY
Plaintiff-Appellee

v.

NICHOLAS P. MARSICO, M.D., at al.
Defendant-Appellant

and

EYE SPECIALISTS, INC.
Defendant

Case No.

06-1263

Discretionary Appeal from the
Clinton County Court of Appeals,
Twelfth Appellate District

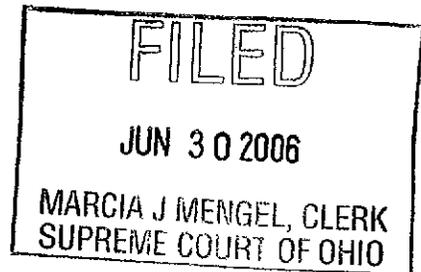
(Court of Appeals No. CA2006-04-013)

DEFENDANT-APPELLANT NICHOLAS P. MARSICO, M.D.'S
NOTICE OF APPEAL

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Notice of Appeal of Defendant-Appellant Nicholas P. Marsico, M.D.

Defendant-Appellant Nicholas P. Marsico, M.D. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clinton County Court of Appeals, Twelfth Appellate District, entered in the Court of Appeals Case *Mary J. Manley v. Nicholas P. Marsico, M.D. et al.*, Clinton App. CA2006-04-014 (entered on May 17, 2006). A copy is attached.

This case raises issues of public and great general interest.

Respectfully submitted,



G. Michael Romanello (0003583)
(Counsel of Record)

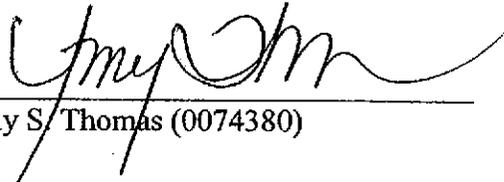
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PROOF OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail, postage pre-paid, on June 30, 2006 to:

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APPENDIX B

Entry of dismissal filed by the 12th District Court of Appeals, Clinton County, Ohio

IN THE COURT OF APPEALS FOR CLINTON COUNTY, OHIO

MARY J. MANLEY, : CASE NO. CA2006-04-013
Appellee, :
vs. : ENTRY OF DISMISSAL
NICHOLAS P. MARSICO, M.D., :
et al., :
Appellants. :

FILED: CT. OF APPEALS
2006 MAY 17 PM 12:23
CLINTON COUNTY
JOAN M. CHAMBERLIN, CLERK

The above cause is before the court pursuant to a notice of appeal filed by counsel for appellant, Nicholas P. Marsico, M.D., on April 19, 2006.

The language contained in the judgment entry appealed from indicates that there are outstanding issues remaining in this matter. The record does not indicate that the outstanding issues have ever been resolved.

An order of a court is a final, appealable order only if the requirements of Civ.R. 54(B), if applicable, and R.C. 2505.02 are met. Chef Italiano Corp. v. Kent State University (1989), 44 Ohio St.3d 86. If an order is not a final appealable order, a court of appeals has no subject matter jurisdiction to consider the appeal. Logue v. Wilson (1975), 45 Ohio App.2d 132.

As there are outstanding issues in this action and there is no Civ.R. 54(B) language contained in the order appealed from, the court concludes that the order is not a final appealable order, and that the court is without jurisdiction to consider this appeal.

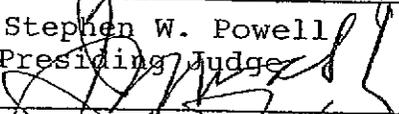
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Accordingly, this appeal is hereby DISMISSED, costs to appellant.

IT IS SO ORDERED.



Stephen W. Powell
Presiding Judge



James E. Walsh, Judge



William W. Young, Judge

APPENDIX C

Entry filed by Court of Common Pleas, Clinton County, Ohio, denying Defendants' motion to dismiss

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO

JOHN M. CHAMBERLIN, CLERK

06 MAR 24 PM 2:44

FILED-COMM. PLEAS

Mary J. Manley,
Plaintiff,

CASE NO. CVA 20060028

-vs-

ENTRY

Nicholas P. Marisco, M.D.,
Defendants.

After careful review of all briefs and memoranda the following motions are denied.

- 1) Defendant Eye Specialists, Inc.'s January 26, 2006 Motion to Dismiss Plaintiff's Complaint for Failure to Comply with Civ. R. 10(D);
- 2) Defendant Nicholas P. Marisco, M.D.'s February 1, 2006 Motion to Dismiss Plaintiff's Complaint.
- 3) Defendant Nicholas P. Marisco, M.D.'s March 9, 2006 Motion to Strike Plaintiff's Notice of Filing Affidavit of Merit and Tendered Affidavit of Merit.
- 4) Defendant Eye Specialists, Inc.'s March 13, 2006 Motion to Strike Plaintiff's Tendered Affidavit of Merit.

After careful review of all briefs and memoranda the following Motion is granted.

- 1) Plaintiff's February 21, 2006 Motion for Leave to File Affidavits of Merit Instantly.

ENTER this 16th day of March 2006.



Judge John W. Rudduck

APPENDIX D

Ohio Revised Code §2307.85 and §2505.02

§ 2307.85**Statutes & Session Law****TITLE [23] XXIII COURTS -- COMMON PLEAS****CHAPTER 2307: CIVIL ACTIONS****2307.85 Silicosis claim - prima facie showing - evidence of physical impairment - effect of decision.**

2307.85 Silicosis claim - prima facie showing - evidence of physical impairment - effect of decision.

(A) Physical impairment of the exposed person, to which the person's exposure to silica is a substantial contributing factor, shall be an essential element of a silicosis claim in any tort action.

(B) No person shall bring or maintain a tort action alleging a silicosis claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 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 silica 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 silicosis 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, silica 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 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 both 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) The exposed person has silicosis based at a minimum on radiological or pathological evidence of silicosis.

(C) No person shall bring or maintain a tort action alleging that silica caused that person to contract lung cancer if the exposed person is or was also a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 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 silica is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to silica is a substantial contributing factor to that cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to silica 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.

(3) Both of the following:

(a) Radiological or pathological evidence of silicosis;

(b) Evidence of the exposed person's substantial occupational exposure to silica.

(D)(1) No person shall bring or maintain a tort action alleging a silicosis claim based on 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 2307.87 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 the result of a medical condition, and that the person's exposure to silica 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 silica 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 exposed person's first exposure to silica until the date of diagnosis under division (D)(1)(a) of this section or death of the 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) Both of the following:

(i) Radiological or pathological evidence of silicosis;

(ii) Evidence of the exposed person's substantial occupational exposure to silica.

(2) If a person files a tort action that alleges a silicosis claim based on wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person and further alleges in the action 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 that the exposed person lived with the other person for the period of time specified in division (CC) of section 2307.84 of the Revised Code, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(E) 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.

(F) 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 a silica-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 decision 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.

Effective Date: 09-01-2004

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§ 2505.02**Statutes & Session Law****TITLE [25] XXV COURTS -- APPELLATE****CHAPTER 2505: PROCEDURE ON APPEAL****2505.02 Final orders.**

2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, or a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code.

(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:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(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.

(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.

(5) An order that determines that an action may or may not be maintained as a class action.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005

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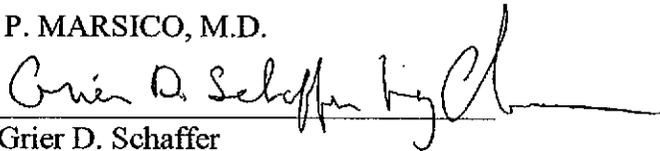
CERTIFICATE OF SERVICE

This is to certify that the foregoing was served regular U.S. mail on this 21st day of

November 2006 to the following:

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