

IN THE SUPREME COURT OF OHIO

In re: Special Docket No. 73958 : Case No. 06-1279
: :
: : On Appeal from the Cuyahoga
: : County Court of Appeals,
: : Eighth Appellate District
: :
: : Court of Appeals Case Nos: CA-87777
: : CA-87816
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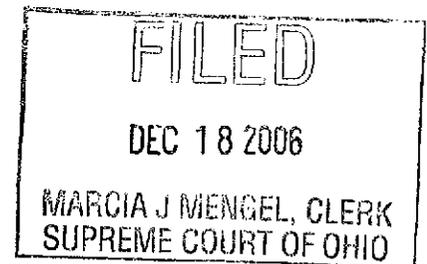
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STATEMENT OF FACTS

The relevant facts giving rise to the appeal pending before the Court are set forth in Appellants' Merit Brief filed in the Ohio Supreme Court. Those facts are adopted by reference and incorporated herein.

STATEMENT OF INTEREST OF *AMICI CURIAE*

In enacting H.B. 292, the General Assembly made clear that this law was intended to serve the interests of asbestos personal injury litigants, as well as Ohioans more broadly by deferring of claims of exposed individuals who are not sick in order to preserve, now and in 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.

A hallmark of H.B. 292 was the prioritization of claims, allowing plaintiffs with "actual physical harm or illness" caused by asbestos exposure to be compensated first, while those who have been exposed to asbestos but have no physical impairment are required to wait.

The General Assembly recognized that those who could not demonstrate "bodily injury" might challenge the new law by claiming that it is unconstitutionally retroactive. To ensure that any decision addressing retroactivity in this context is immediately appealable, the General Assembly also amended R.C. 2505.02 to permit immediate appeals of these determinations. Without the ability to take an immediate appeal of these determinations, prioritization of claims could not be preserved.

Even though the trial court's decision of January 6, 2006¹ -- finding the application of H.B. 292 unconstitutionally retroactive in approximately 39,000 cases -- was not in the context of a particular case, it is precisely the type of decision that warrants immediate appellate review

¹ See Trial Court's Entry and Opinion, *In re: Special Docket No. 73958* (C.P. Cuyahoga, January 6, 2006), a copy of which is attached as Appendix A ("trial court's decision" or "order").

as contemplated by the General Assembly. The trial court's decision was not an advisory opinion, but a decision foreclosing application of H.B. 292 to tens of thousands of cases.

Amici curiae supported H.B. 292 and the General Assembly's effort to bring fairness, efficiency, and some semblance of order to the asbestos litigation crisis facing Ohio. Now, *amici curiae* support reversal of the decision of the Eighth Appellate District Court of Appeals dismissing the appeal of the trial court's decision on the ground that it is not a final appealable order. The Eighth District's decision ignores the intent of the General Assembly, the public policy concerns that prompted H.B. 292's passage, and the plain text of the law. It should be reversed.

The Ohio Manufacturers' Association ("OMA") is a statewide association of nearly 2,000 manufacturing companies, which collectively employ the majority of the 800,000 men and women who work in the manufacturing sector in the State of Ohio. The OMA and its members have a substantial interest in H.B. 292 as dozens of manufacturers doing business in Ohio have been named as defendants in thousands of asbestos personal injury lawsuits. Several Ohio manufacturers have declared bankruptcy and/or have closed facilities as a direct result of asbestos litigation. The OMA has a strong interest in doing everything it can to create an environment where Ohio manufacturers, their employees, and the communities in which they are located can survive the onslaught of asbestos personal injury litigation. H.B. 292 is essential to this goal.

The National Federation of Independent Business/Ohio ("NFIB/Ohio") is an association with more than 36,000 members, making it the state's largest association dedicated exclusively to the interests of small and independent business owners. The NFIB/Ohio is committed to supporting a balanced civil justice system that treats individuals, businesses, corporations and

other entities fairly, on a statewide basis. It supports H.B. 292 because the Bill is designed to do just that.

Founded in 1893, the Ohio Chamber of Commerce (“Chamber”) is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Chamber is a respected participant in the public policy arena. The Chamber dedicates its advocacy efforts to the creation of a strong pro-jobs environment and, in turn, an Ohio business climate responsive to expansion and growth. The Chamber believes strongly that H.B. 292 is critical to meeting these goals.

The Ohio Chemistry Technology Council (“OCTC”) is a trade association representing over 80 chemical industry and related companies that do business in Ohio. OCTC members’ interests are aligned with those of the OMA with respect to H.B. 292.

The Ohio Alliance for Civil Justice (“OACJ”) is a group of over 200 small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. OACJ members, large and small, support a balanced civil justice system that will not only award fair compensation to injured persons, but also impose sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ also supports stability and predictability in the civil justice system in order that Ohio’s businesses and professions may know what risks they assume as they carry on commerce in this state.

ARGUMENT

PROPOSITION OF LAW:

Pursuant to R.C. 2505.02, a finding made by a trial court under R.C. 2307.93(A)(3) is a final order immediately subject to appellate review.

H.B. 292 provides for immediate appellate review of orders under R.C. 2307.93(A)(3) that declare unconstitutional the retroactive application of the law's prima facie requirements. That is precisely what the trial court's decision of January 6, 2006 did -- it made a determination under R.C. 2307.93(A)(3) regarding retroactivity of H.B. 292's prima facie requirements. Therefore, when the trial court issued its January 6, 2006 decision, it issued a final order subject to immediate appellate review. That the trial court's decision was not filed in a specific case, but rather applies to tens of thousands of cases, does not change the result that it is a final appealable order. The trial court's decision precludes application of an entire statutory scheme to not merely one case, but to a docket of tens of thousands of asbestos cases -- the very docket of cases that the legislation was designed to address. The broad application of the trial court's decision -- implicating the substantive rights of untold numbers of plaintiffs and defendants in tens of thousands of cases -- illustrates precisely why immediate review is proper and indeed necessary.

Considerations of public policy, the clear intentions of the General Assembly, and the text of the law all point to the conclusion that the trial court's decision is final and appealable.

A. Both The Purpose Of H.B. 292 And The Public Policy Concerns Underlying It Mandate That A Trial Court's Decision Under R.C. 2307.93(A)(3) Is A Final, Appealable Order.

1. Ohio Faces An Asbestos Litigation Crisis That Mirrors, But Is More Severe Than, The Asbestos Crisis Facing The Nation.

That Ohio is facing an asbestos litigation crisis is well documented and beyond dispute. Like the rest of the nation, Ohio has seen a tremendous surge in asbestos claims filed in its courts in recent years. But unlike the rest of the nation, Ohio has had to bear an unusually high

percentage of the claims filed throughout the country. In fact, over the last decade Ohio has emerged as one of “the top five state court venues” for asbestos claim filings. Between 1998 and 2000, Ohio shared with just four other states—Mississippi, New York, West Virginia, and Texas—the responsibility for sixty-six percent (66%) of all asbestos filings. H.B. 292, Section 3(A)(3)(b); see also RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report (“RAND”)*, p. vi. In Cuyahoga County alone—one of the most burdened state court jurisdictions in the country—the number of asbestos claims pending between 1999 and 2003 rose from approximately 12,800 to 39,000, with an estimated two hundred new cases filed every month. H.B. 292, Section 3(A)(3)(e). Simply put, Ohio’s courts have been drowning in a flood of asbestos litigation.

The General Assembly has recognized the devastating impact that this flood of litigation is having and will continue to have throughout Ohio and across the United States. In passing H.B. 292, the legislature saw that Ohio’s problems were a growing reflection of the nationwide asbestos litigation crisis. One of the most troubling aspects of the crisis is that an overwhelming majority of all asbestos claims asserted are filed on behalf of individuals who do not suffer from any injury or illness as a result of asbestos exposure. *Id.*, Section 3(A)(5). According to a Tillinghast-Towers Perrin study, of the fifty-two thousand nine hundred (52,900) new asbestos claims filed nationwide in 2000, an astonishing ninety-four percent (94%) “concerned claimants who [were] not sick.” *Id.* With such statistical disparities emerging from the claims data, it is little surprise that the healthy plaintiffs are, by and large, receiving the payouts from asbestos defendants. Indeed, “sixty-five percent of the compensation paid, thus far, has gone to claimants who are not sick.” *Id.*, Section 3(A)(2).

Sadly, this statistical nightmare appears to be the product of misdiagnoses procured exclusively for the purpose of litigation, a phenomenon that is repeating itself in the context of silicosis litigation around the country. Judge Janis Jack, presiding over federal multidistrict litigation of silicosis claims in Texas, concluded in 2005 that the unusually high number of pending cases, (approximately 10,000), and the outrageously high percentage of plaintiffs with dual asbestosis and silicosis diagnoses in particular—a medical rarity that proved anything but rare in the context of litigation—were the products of lawyers controlling the information between doctors and patients and tailoring diagnoses to their litigation needs. See *In re: Silica Prod. Liab. Litig.* (S.D. Tex. 2005), 398 F. Supp. 2d 563. Ultimately a small cadre of doctors and screening companies, originally set up for asbestos claims and used largely by the same handful of law firms substantially responsible for the exploding asbestos dockets throughout the country, were used once again to procure “diagnoses [that] were about litigation rather than health care.” *Id.* at 633-35.

Indeed, the costs of this asbestos litigation free-for-all have been and continue to be staggering. Some have estimated that the total nationwide costs in litigation expenses alone exceed fifty-four billion dollars (\$54,000,000,000), with total costs of claims throughout the United States estimated at approximately two hundred and fifty billion dollars (\$250,000,000,000). H.B. 292, Section 3(A)(2). During the first ten months of 2002 alone, fifteen companies nationwide filed for bankruptcy due to asbestos-related liabilities, the consequence of which was the loss of over sixty thousand (60,000) jobs. *Id.*, Section 3(A)(4)(a). Ohio has suffered more than its fair share of the consequences of this nationwide problem. The regions of the State that depend on defendant businesses for their economic health have suffered significantly. Indeed, prior to the enactment of H.B. 292, “at least five Ohio-based companies

[became] bankrupt because of the cost of paying people who are not sick.” *Id.*, Section 3(A)(4)(e). And in 2000, Ohio’s own Toledo-based Owens Corning laid off two-hundred seventy five employees in its Granville plant after declaring bankruptcy due to a flood of asbestos claims. The closing was estimated to cost the region fifteen to twenty million dollars in regional income. *Id.*, Section 3(A)(4)(d).

But businesses have not been alone in bearing the costs of asbestos lawsuits brought by individuals who have no asbestos-related injury. “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.” *Id.*, Section 3(A)(6). As claims are paid out to plaintiffs who are not sick, the limited resources of defendant businesses dwindle while claimants with real and serious health problems are forced to the back of the line. Bankruptcy in particular has a devastating effect on the ability of ill patients to secure compensation, since during bankruptcy no claims are paid and afterward “significantly fewer dollars are available for claims and thus claimants are paid less.” RAND, p. 67. When healthy plaintiffs drain the funds available for compensation, there’s nothing left for the truly sick.

Asbestos claims, like any claim for product liability, are in principle supposed to be about compensating victims who actually have been injured by the goods produced by another. But the evidence reveals a very different picture in Ohio and throughout the nation. The high costs of defending against and paying plaintiffs who are not sick are wreaking havoc on the economy and the judicial system. And the consequences not only devastate Ohio businesses, jobs, and economic growth, but also sick individuals who are forced to compete with healthy plaintiffs for the scarce resources of companies throughout Ohio that have been forced under by schemes designed to benefit the healthy plaintiffs and their attorneys.

2. The General Assembly Intended Immediate Appellate Review As An Integral Part Of The Statutory Scheme Designed To Address Ohio's Asbestos Litigation Crisis.

The General Assembly passed H.B. 292 in an effort to address these very problems. The goal was to bring Ohio's exploding asbestos litigation docket under control by putting into place, among other things, the common sense requirement that a plaintiff make a minimum showing that he or she is sick as the result of asbestos exposure *before* being permitted to prosecute an asbestos claim against a defendant. Broadly, the provisions now codified at R.C. 2307.91 through 2307.98 were designed 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 impairment in the future.

H.B. 292, Section 3(B). In essence, H.B. 292 was designed as a prioritization mechanism so that courts would be better able to manage the litany of asbestos claims filed and to do so in a manner that is consistent with the rights of all parties.

Though H.B. 292 is comprised of numerous statutory enactments, none is more important than the requirements for a "prima facie" showing of asbestos-related injury, now codified in R.C. 2307.92 and R.C. 2307.93. Those provisions clarify the already existing minimum medical requirements for a tort action alleging an asbestos claim by setting forth explicit and objective standards for what constitutes "bodily injury caused by exposure to asbestos" and the evidence necessary to establish its existence. See R.C. 2307.92-93. Specifically, R.C. 2307.92 provides the particular evidentiary showings necessary to sustain a claim for asbestos exposure when the

claimant alleges physical impairment, cancer, or wrongful death as the result of asbestos exposure, and R.C. 2307.93 provides the manner by and time within which each showing must be made.

The result of the statutory scheme is a system whereby claimants with a genuine injury or illness caused by asbestos exposure have the best and first opportunity to receive compensation for any liability found to exist against asbestos defendants—defendants that otherwise would have been forced to pay billions of dollars to plaintiffs who may not have had any asbestos-related impairment. See H.B. 292, Sections 3(A)(2), 3(A)(5), 3(A)(6). If a plaintiff cannot demonstrate that a competent medical authority has properly reviewed the plaintiff's relevant history—occupational, medical, smoking, etc.—and concluded that the plaintiff suffers from a real and objectively defined physical injury caused by exposure to asbestos, then the plaintiff's claim will be administratively dismissed. R.C. 2307.93(A)(3)(c). The claim will then be preserved with an opportunity for reinstatement if and when prima facie evidence of asbestos-related injury is available. *Id.*

Because the General Assembly foresaw that some plaintiffs might argue that the prima facie clarifications in H.B. 292 stand in violation of the Retroactivity Clause of the Ohio Constitution (Section 28, Article II), the General Assembly also provided a “Savings Clause” in H.B. 292 (R.C. 2307.93(A)(3)). The clause provides that if a court with jurisdiction makes a finding that the minimum medical requirements of R.C. 2307.92 impair the substantive rights of a party and do so in violation of Section 28, Article II of the Ohio Constitution, then the court should revert back to an application of the prior law governing assertion of asbestos claims and apply the administrative dismissal accordingly, rather than render a wholesale invalidation of the statutory requirements of a prima facie showing of injury.

However, given the importance of a decision as to whether the court will apply the minimum medical standards set forth in H.B. 292, the General Assembly also provided that orders issued with respect to a R.C. 2307.93(A)(3) finding of unconstitutionality are decisions with respect to provisional remedies that are final orders subject to appellate review upon issuance. In this regard, the legislature specifically amended R.C. 2505.02, which defines a final order for purposes of appeal, to include as a provisional remedy “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.” R.C. 2505.02(A)(3). If a court decides that the provisions of R.C. 2307.92 or 93 cannot be applied, that decision is immediately reviewable.

That the General Assembly intended this result could not be clearer. Amending the final order statute to include R.C. 2307.93(A)(3) decisions among the provisional remedies warranting immediate appellate review cannot be ignored. “Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.” *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496. Disregarding the legislature’s clear expression of intent would render the amendment to R.C. 2505.02 superfluous in violation of basic statutory interpretation principles.

The importance of this principle is particularly apparent here, where a departure from the intent of the legislature has nonsensical implications for the statutory scheme. Requiring a case to proceed to final judgment before review is permitted produces the absurd result that the prioritization scheme set up by the General Assembly for asbestos cases is rendered permanently impotent as soon as a single trial court makes a R.C. 2307.93(A)(3) finding that H.B. 292 is

unconstitutional. It is certain that the General Assembly did not intend a system whereby a case must reach final judgment in order to determine if the case should have been permitted to proceed in the first place.

Even more, the provisional remedy at issue is the right of defendants to be free from the obligation to defend against claims that have not been adequately substantiated. A denial of that remedy by declaring the minimum medical requirements provisions of H.B. 292 unconstitutional permits a plaintiff to proceed with a claim even if asbestos-related injury has not been demonstrated. Yet, if a defendant is forced to take a case to final judgment in order to have the R.C. 2307.93(A)(3) finding reviewed, then the remedy of administrative dismissal already will have been lost forever. It cannot be the case that the General Assembly amended R.C. 2505.02 to include such decisions as warranting a provisional remedy but then also precluded the provisional remedy of administrative dismissal from being enforceable on behalf of the defendants for whom it was established.

3. Public Policy Considerations Mandate That An Order Under R.C. 2307.93(A)(3) Is Immediately Subject To Appellate Review As A Final Order Of The Court.

The public policy implications of refusing immediate appellate review are even more troubling. At a minimum, the Eighth District's decision effectively forces defendants to defend against even frivolous claims and to bring them to final judgment before having the opportunity to present an argument before a reviewing court that might have prevented the plaintiff from bringing the case at all. But even more, the reality is that any meaningful review of the trial court's decision is nearly impossible after final judgment of a given case because of the nature of the underlying determination at issue. As a result, and as the General Assembly recognized, immediate appellate review of the administrative order is clearly the proper course.

Appellees have taken a position that, at a minimum, requires at least one defendant on the docket to take a bet-the-farm posture in order to secure review of the trial court's decision. According to Mealey's Litigation Report on asbestos, between 1993 and 2001, only 527 asbestos trials throughout the entire country reached verdict. RAND, p. 56. And even though "civil trial verdicts are becoming increasingly rare nationwide, the asbestos trial rate seems substantially lower than the norm." *Id.* The uniquely high settlement rate of asbestos claims is in part a function of the bundling of claims that are not always equally meritorious. Under some circumstances, cases involving serious injury are used as leverage for the resolution of other, less serious claims with which they are bundled, and defendants are then forced to choose between settling all of the bundled claims or risking a large verdict that gets extrapolated to unmeritorious claims. See, e.g., Michigan Supreme Court, Admin. Order No. 2006-6, a copy of which is attached as Appendix B. Understandably, most defendants choose settlement.

The problem is that, under Appellee's position, a defendant desiring review of a trial court's R.C. 2307.93(A)(3) determination would not obtain any meaningful review. That is, a defendant would be required to defend the case to a final judgment in order to argue on appeal that the plaintiff should not have been allowed to proceed with his claim (of course, this would be after the plaintiff has already proceeded with his claim to judgment). In essence, a defendant must pay a premium—in litigation costs and in risk—simply for the right to be heard on appeal as to the constitutionality of H.B. 292's minimum medical evidence requirements; requirements which may have kept the plaintiff's claim out in the first place. The difficulty is not that defendants may have to defend their cases, but rather that they have no choice other than to bear the risk associated with trial if they want appellate review of the very order that is responsible for allowing the plaintiff's case to proceed in the first place.

In addition, even if a defendant were to take a case to final judgment, appeal the decision under R.C. 2307.93(A)(3), and prevail, the costs in time and money expended in not just that case, but in each case pending on the special docket would be enormous. Appellees argue that the administrative nature of the order renders it less in need of immediate appeal, since the order was not issued with respect to any specific case. *But it is precisely because the order has such breadth in application that the need for immediate review arises.* Defense costs alone, multiplied by 39,000, will grow very quickly unless the constitutionality of H.B. 292 can be resolved with some degree of finality before all, some, or even one of the special docket cases gets to final judgment.

Appellees have argued for a construction of the law that effectively precludes review of the important determination of whether unimpaired plaintiffs may proceed with their claims without meeting the prima facie requirements of H.B. 292. The General Assembly contemplated this scenario in 2004 and passed H.B. 292 with the intention of providing for immediate review of court decisions that effectively bar application of H.B. 292's most significant provisions. No reading of the law or justification in policy can support the conclusion that the trial court's decision is anything other than final and reviewable.

B. The Plain Text Of R.C. 2505.02 Mandates That A Decision Under R.C. 2307.93(A)(3) Is A Final Order Immediately Subject To Appellate Review.

When a trial court renders a decision under R.C. 2307.93(A)(3) declaring portions of H.B. 292 unconstitutional, it has issued an order with respect to a provisional remedy of which there can be no meaningful adjudication after a final judgment in the case. This, according to R.C. 2505.02, is the very definition of a final order:

(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:

- (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.

In addition, according to the Revised Code, a provisional remedy is an ancillary proceeding that expressly includes “a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.” *See* R.C. 2505.02(A)(3). The order issued by the Cuyahoga County Court of Common Pleas falls squarely within the definitions of “provisional remedy” and “final order” set forth in the Revised Code.

The trial court’s order is unequivocally a provisional remedy. The fact that the order applies to 39,000 or more cases on the special docket does nothing to change this. Appellees argue that because the court never found that the substantive right of a particular party was impaired, the provisional remedy definition in R.C. 2505.02(A)(3) doesn’t apply. This argument misses the mark. According to R.C. 2307.93(A)(3), the provisions of R.C. 2307.92 are to be applied in every case unless the court finds *both* (i) that a substantive right has been impaired and (ii) that the impairment is in violation of the Ohio Constitution’s ban on retroactive laws. Had the Court found no impairment of a substantive right, then it would have had no choice but to make a finding pursuant to R.C. 2307.03(A)(3) that the prima-facie evidence provisions under R.C. 2307.92 must be applied—and such an order would have been immediately appealable under R.C. 2505.02. But instead the court ordered that H.B. 292’s provisions may *not* be applied in any of the 39,000 cases currently pending. Such a decision necessarily entails, pursuant to the

requirements of the R.C. 2307.93(A)(3), a finding that a substantive right is impaired and that the impairment violates Ohio's constitutional ban against retroactive laws.

Indeed, the trial court's decision below made clear that it "will adjudicate substantive issues in asbestos cases filed before September 2, 2004 according to the law as it existed prior to the bill's enactment..." See Trial Court's Entry and Opinion, *supra*, at 2-3. This means that the order has been put into effect and will govern all cases on Cuyahoga County's special docket. It means that the provisions of R.C. 2307.92 will not be applied as the General Assembly intended. But it also means that the court must have concluded, pursuant to the terms of the statute under which the order was issued, that application of R.C. 2307.92's provisions is not only unconstitutional, but that it is unconstitutional because it impairs the substantive rights of at least some plaintiffs under the court's jurisdiction. As a result, the order constitutes a finding under R.C. 2307.93(A)(3), and the definition of provisional remedy attaches.

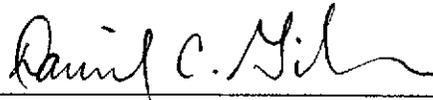
Further, since the administrative order is a determinative decision with respect to a provisional remedy that cannot be adjudicated adequately upon appeal, it is a final order and subject to immediate review. It is beyond dispute that the order "determines the action with respect to the provisional remedy 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). Under H.B. 292 as enacted, defendants in asbestos cases have the right to a provisional remedy of administrative dismissal when a plaintiff fails to make a prima-facie showing of asbestos-related injury. The trial court's order purports to invalidate H.B. 292's provisions that clarify what constitutes a prima-facie showing of injury. It thereby renders a determination of the provisional remedy that precludes a grant of administrative dismissal on behalf of a defendant.

Once that decision has been made, an appeal that must wait until after final judgment cannot be adequate. The entire purpose of the prioritization scheme, including the provisional remedy of administrative dismissal, is to prevent plaintiffs that cannot show injury from proceeding with their claims in the first place. If a defendant is forced to bring an action to final judgment before challenging a decision as to whether the claim should be permitted at the outset, then the Court will have put into place a system whereby a defendant must forego the right to a provisional remedy in order to win meaningless vindication of that right on appeal. That the General Assembly intended no such thing requires no elaboration. The trial court's decision is a final order, subject to immediate appellate review. The decision of the Eighth District should be reversed.

CONCLUSION

The law states that a finding under R.C. 2307.93(A)(3) is a final order immediately subject to appellate review. The General Assembly intended a finding under R.C. 2307.93(A)(3) to be a final order, immediately subject to appellate review. Public policy concerns lead inexorably to the conclusion that immediate appellate review of a finding under R.C. 2307.93(A)(3) is the proper remedy. When the Cuyahoga County Court of Common Pleas issued its order declaring unconstitutional substantive provisions of H.B. 292, it issued a final order that the Eighth District was obligated to hear and should have reversed. Instead, the Eighth District summarily dismissed the appeal. The costs of preserving the Eighth District's decision will be significant in terms of time, money, and justice. Ohio's business community, employees throughout the State, and plaintiffs with a genuine asbestos-related illness or injury are bearing the costs of subsidizing healthy claimants and their attorneys, and the decision of the Eighth District serves their cause. It should be reversed.

Respectfully submitted,



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I hereby certify that a true copy of the foregoing Brief of *Amici Curiae* was sent via regular U.S. mail, postage prepaid this 18th day of December 2006, to the following:

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APPENDIX

APPENDIX

Trial Court's Entry and Opinion, *In re: Special Docket No. 73958*
(C.P. Cuyahoga, January 6, 2006),Appendix A

Michigan Supreme Court, Admin. Order No. 2006-6 Appendix B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IN RE: Special Docket No. 73958

ENTRY AND OPINION

This Court is charged with determining whether the retrospective application of Amended Substitute House Bill 292 unconstitutionally impairs the substantive rights of plaintiffs who filed their claims before the effective date of the statute. In order to determine the constitutionality of the retrospective application of a statute, this Court must employ the two-pronged analysis set forth in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100. See *Vogel v. Wells* (1991), 57 Ohio St.3d 91 at 98.

The first prong of the analysis asks whether the General Assembly intended for the statute to apply retrospectively. Am. Sub. H.B. 292 specifically requires a plaintiff with an asbestos claim pending on the effective date of the statute to comply with the new prima-facie evidence filing requirements established by the act. See Ohio R.C. §§ 2307.93(A)(2) and (A)(3)(a) (codifying those sections of Am. Sub. H.B. 292 that mandate retrospective application). Thus, it is clear on the bill's face that the legislature intended for the retrospective application of Am. Sub. H.B. 292.

The second prong of the *Van Fossen* analysis requires this Court to determine whether the statute is substantive in nature, rather than merely remedial. A statute is substantive in nature when it impairs or takes away vested rights, *Van Fossen*, 36 Ohio St.3d at 107, and Ohio law has long recognized that a cause of action that has already arisen is a vested right. See *Faller v. Mass Bonding & Ins. Co.* (8th Dist. 1929), 168 N.E. 394. Am. Sub. H.B. 292 requires a plaintiff seeking compensation for injuries resulting from asbestos exposure to provide the court with

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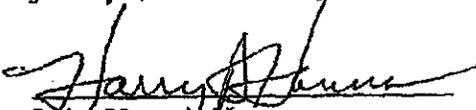
specific medical records, from specifically qualified individuals, which must detail specific medical observations. See Ohio R.C. § 2307.92. Ohio common law, developed long before passage of H.B. 292, established a much different standard: a plaintiff seeking redress for asbestos-related injuries had a compensable claim where he could show that asbestos had caused an alteration of the lining of the lung, without any requirement that he meet certain medical criteria before filing his claim. See *In re Cuyahoga County Asbestos Cases* (8th Dist. 1998), 127 Ohio App.3d 358, 364. Thus, by requiring 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 plaintiff filed his claim – Am. Sub. H.B. 292 can retroactively eliminate the claims of those plaintiffs whose right to bring suit not only vested, but also was exercised. It is then clear that the retrospective application of Am. Sub. H.B. 292 is substantive rather than merely remedial in its effect and, insofar as it impairs the substantive rights of plaintiffs who filed their claims before the effective date of the statute, violates Section 28, Article II of the Ohio Constitution.

The Ohio General Assembly anticipated a judicial finding that the retrospective application of Am. Sub. H.B. 292 is unconstitutional and provided a mechanism for courts to protect the rights of plaintiffs while upholding the constitutionality of the act. Ohio R.C. § 2307.93(A)(3)(b) 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.” Should a plaintiff fail to meet the evidentiary standard that existed prior to the act’s passage, Section 2307.93(A)(3)(c) requires those claims to be administratively dismissed. Therefore, in accordance with Am. Sub. H.B. 292, this Court will

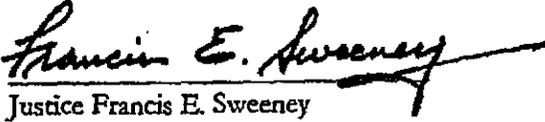
adjudicate substantive issues in asbestos cases filed before September 2, 2004 according to the law as it existed prior to the bill's enactment, and will administratively dismiss, without prejudice, any claim that fails to meet the requisite evidentiary threshold.

IT IS SO ORDERED.

January 6, 2006


Judge Harry A. Hanna


Judge Leo M. Spillacy


Justice Francis E. Sweeney

RECEIVED FOR FILING

JAN 26 2006

GERALD E. FUERST, CLERK

BY  DEF.

THE STATE OF OHIO Cuyahoga County	SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL	
NOW ON FILE IN MY OFFICE	
WITNESS MY HAND AND SEAL OF SAID COURT THIS	27
DAY OF	A.D. 20
GERALD E. FUERST, Clerk	
By 	Deputy

VIL3479 P00923

Order

Michigan Supreme Court
Lansing, Michigan

August 9, 2006

Clifford W. Taylor,
Chief Justice

ADM File No. 2003-47

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

Administrative Order No. 2006-6
Prohibition on “Bundling” Cases

On order of the Court, the need for immediate action having been found, the following Administrative Order is adopted, effective immediately. Public comments on this administrative order, however, may be submitted to the Supreme Court Clerk in writing or electronically until December 1, 2006, at: P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-47. Your comments will be posted, along with the comments of others, at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

The Court has determined that trial courts should be precluded from “bundling” asbestos-related cases for settlement or trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery. This order in no way precludes or diminishes the ability of a court to consolidate asbestos-related disease personal injury actions for discovery purposes only.

For purposes of this Administrative Order, “asbestos-related disease personal injury actions” include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery.

Staff Comment: This Administrative Order prohibits the practice of “bundling,” or joining, asbestos-related personal injury actions in order to maximize the number of cases settled. The order does not, however, preclude consolidation for discovery purposes.

The purpose of this order is to ensure that cases filed by plaintiffs who exhibit physical symptoms as a result of exposure to asbestos are settled or tried on the merits of that case alone. Bundling can result in seriously ill plaintiffs receiving less for their claim in settlement than they might otherwise have received if their case was not joined with another case or other cases.

The order is designed to preclude both the practice of settling cases in which plaintiffs with symptoms and plaintiffs without symptoms are settled together, as well as the practice of settling cases in which the plaintiffs are similarly situated (either with or without symptoms allegedly related to asbestos exposure.)

The staff comment is not an authoritative construction by the Court.

MARKMAN, J. (*concurring*). This Court, having conducted two public administrative hearings on asbestos litigation, and having considered for more than three years whether, and how, to respond to such litigation, I join fully in this administrative order for the following reasons: (1) unlike other remedial proposals, such as the establishment of an inactive asbestos docket, I believe that this “antibundling” administrative order indisputably falls within the scope of our judicial powers; (2) this administrative order will, in my judgment, help to restore traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit, and that they do not serve merely as “leverage” for the resolution of other cases; (3) this administrative order will, I believe, advance the interests of the most seriously ill asbestos plaintiffs whose interests have not always been well served by the present system, where available funds for compensation have been diminished or exhausted by payments for claims made by less seriously ill claimants, *Behrens & Lopez, Unimpaired asbestos dockets*, 24 Rev Litig 253, 259-260 (2005); (4) at our most recent public administrative hearing on May 6 of this year, all who spoke agreed that each claim should be decided on its own merits and that serious claims should not be used to leverage settlements in less serious cases; and (5) this administrative order will better enable the Legislature, which is considering asbestos litigation, to undertake an assessment of the true costs of asbestos litigation. At present, these costs have been camouflaged by the “bundling” process, at the expense of fundamental due process rights.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). For some time this Court has had on its administrative agenda consideration of the adoption of a docket-management system for asbestos-related litigation. We are also well aware that the Legislature is considering legislation in connection with this area. Today, before knowing what long-range plan or system, if any, is appropriate for this area of litigation, the Court, putting the cart before the horse, reaches out and meddles with the settlement practices currently in place. The comments the Court has thus far received do not evidence any crisis-proportion problems¹ and the true resulting costs to the system of today's order remain unknown. Accordingly, I cannot agree with this order.

¹ Just two months ago, the Court received the following comment from an assistant general counsel for Consumers Energy Company:

I write in response to the Proposed Administrative Order regarding Asbestos-Related Disease Litigation that was published in the Michigan Bar Journal I received in today's mail. I am an Assistant General Counsel of Consumers Energy Company in charge of litigation. I have personally handled more than 180 asbestos cases on behalf of Consumers Energy Company. We do not support either alternative in the proposed Administrative Order. There are already sufficient safeguards in place to avoid fraudulent claims based on the information that a plaintiff is required to produce in

WEAVER, J. (*dissenting*). I dissent from the precipitous adoption of this “antibundling” order, which precludes “bundling” of asbestos-related cases for settlement and trial purposes. This haste, without sufficient information, is unrestrained and unwise.

“Bundling” refers to the trial court procedure of grouping asbestos cases together for trial and settlement purposes, using stronger cases as leverage to settle cases grouped together.

The Court does not know enough about how this “antibundling” order will affect current trial court operations, particularly in Wayne County and other counties from which asbestos-related cases originate. The Court needs to be certain that the attempted solution to due process concerns does not create even greater due process concerns and other problems.

It is undisputed that adopting this “antibundling” order will increase the number of asbestos cases that are litigated, as opposed to settled. Judge Robert J. Colombo, currently the only circuit judge in Michigan who hears asbestos-related cases, has informed this Court that, in his opinion, adopting any “antibundling” order will require 10 additional judges to handle the increased caseload.

If the “antibundling” order does require 10 additional judges, it would represent a significant financial burden on the state and on Wayne County. The majority has not addressed how the increased caseload will be financed, or who will bear the increased financial burden.

Further, the majority has not addressed how the increased caseload will be managed. Judge Colombo has asserted that 10 new judgeships would be needed. The majority has not addressed how 10 new judgeships would be created and funded. Even if the 10 new judgeships are created, the majority has not addressed how the increased caseload would be managed during the minimum of at least one year that it would take to create and implement new judgeships. Finally, the majority has not addressed how the increased caseload will be managed if those new judgeships are not created.

discovery in every case (social security records, medical diagnosis, standard interrogatory answers etc.). The proposed Administrative Order would in our view create a quagmire and accomplish little. In slang terms, this is an example of “if it ain’t broke—don’t fix it”. I also find the Proposed Administrative Order to be quite surprising from this Michigan Supreme Court. It strikes me as going way beyond a procedural matter and looks an awful lot like judicial legislating.

Currently, the asbestos docket represents one quarter of one judge's docket. The dockets of the other 68 judges in Wayne Circuit Court and Wayne County Probate Court handle the civil, criminal, and child and family cases.

The majority order cites "fundamental due process rights" in asbestos cases as a reason to immediately implement the "antibundling" order. But determining whether asbestos litigants' due process rights have been violated requires a complex and in-depth analysis, rather than simply stating, as the majority does, that rights have been violated.

Further, the immediate increase in the asbestos docket will affect the distribution of court resources, including the trial judges' time spent on all other cases. There will be fewer resources available for civil, criminal, and child and family cases, because the resources will be diverted to manage the new increased asbestos docket. Depriving civil, criminal, and child and family cases the proper resources to adjudicate them could create its own new set of due process problems.

It is true that this Court has had an administrative file on the asbestos docket open for more than three years. However, the information submitted by Judge Colombo, that, in his opinion, precluding bundling would increase the caseload so as to require ten additional judges, was only recently made available.

This Court should have further investigated the issues surrounding, and the potential effects of, any "antibundling" order before issuing this order.

Even though this Court has had the file on asbestos issues open for over three years, by immediately adopting this "antibundling" order, this Court is acting precipitously, without restraint, and therefore unwisely.

KELLY, J. (*dissenting*). Today's decision to outlaw the bundling of asbestos-diseases cases in Michigan courts is both ill-advised and indefensible. The decision purports to restore due process to litigants. It does not. Instead, it makes a mockery of due process and creates serious problems. It virtually ensures that justice will be so delayed for many diseased plaintiffs that they will never live to see their case resolved. It promises to force a sizable and needless increase in the funds required to operate the circuit courts at a time when the state's economy is far from robust. And, until new funds have been raised, unbundled asbestos-diseases cases will clog our courts' dockets. The congestion will bring with it years of delay to individuals sick and dying of work-related lung diseases.

It is not merely plaintiffs who will be burdened by the newly created problems. Unbundling will increase the cost to Michigan businesses of defending asbestos-diseases claims that they believe to be baseless. Reliable expert information and unrebutted statements to this Court project that unbundling in Michigan will require the addition of

at least ten new circuit court judges. The cost to taxpayers will be in the millions of dollars. And delays of four to six years will occur in resolving asbestos-diseases cases pending the addition of these new judges. Given the benefits of the current system to both sides and to the taxpayers of the state, I would retain it.

The current system functions in this manner: A judge groups asbestos-diseases cases on the basis of a commonality among them. For instance, cases in which the plaintiffs claim harmful exposure to asbestos in one workplace are grouped together. The judge then tries one claim that is representative of the group. The results of the trial are extrapolated to the rest of the claimants. The extrapolation provides a remedy for all deserving claimants in the group, not just the most seriously ill. The effect is that almost all claims in the group are settled without the time and expenses engendered if each were to receive a full trial. It efficiently allows the court to resolve large numbers of cases in a short time. Claimants obtain a recovery more quickly than traditionally, and defendants save the expense of numerous trials.

Critics of this system claim that bundling can result in seriously ill plaintiffs receiving less for their claims in settlement than they might have received in an individual trial. Proponents of the system respond that, in traditional settlements or trials, most plaintiffs, especially those suffering from serious injuries, recover only a fraction of their actual losses.¹ Critics insist that the current system permits part of the finite amount of funds available for diseased claimants to go to the less seriously injured. Proponents respond that the amount of settlement monies going, perhaps needlessly, to those less seriously injured is more than offset by the savings in litigation expenses occasioned by bundling.

¹ Hensler, *Symposium: Conflict of laws and complex litigation issues in mass tort litigation: Resolving mass toxic torts: Myths and realities*, 1989 U Ill L R, 89, 101 (1989).

Critics also assert that bundling violates due process requirements. But the Ninth Circuit Court of Appeals has reached the opposite conclusion. It approved bundling, finding that it complies with due process requirements.² In fact, some legal scholars believe that, in the handling of these cases, claimants will lose, not regain, their due process rights if judges are unable to bundle them.³ Nonetheless, today the Michigan Supreme Court has apparently rejected the Ninth Circuit's reasoning. Justice Markman explicitly concludes that this administrative order helps to restore "traditional principles of due process."

One can only express dismay at the majority's decision to prohibit the bundling of asbestos-diseases cases in Michigan. Rather than restore due process as it pretends, the order seems designed to precipitate a crisis. The existing system has functioned reasonably well for years. And there is no indication that future problems will arise with it. Asbestos-diseases cases are not increasing in number and are not expected to increase in our state. But today's Supreme Court order will create an inability of the courts to resolve them expeditiously. For what purpose?

² *Hilao v Estate of Marcos*, 103 F3d 767, 786-787 (CA 9, 2004).

³ See Saks and Blanck, *Justice improved: The unrecognized benefits of aggregation and sampling in the trial of mass torts*, 44 Stan L Rev 815, 839 (April, 1992).



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 9, 2006

Corbin R. Davis

Clerk