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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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT 3

A. The Trial Court's Order Does Not Qualify as the Granting of a Provisional Remedy Under § 2505.02 (A)(3) 5

a. The Trial Court Did Not Make a Finding Pursuant to § 2307.93(A)(3) in Any Specific Case 5

b. Even if the Order Did Grant a Provisional Remedy, the Additional Requirements of R.C. 2505.02(B)(4) are Not Fulfilled 7

B. A Holding that Every Finding Under the Savings Clause is Always Appealable Would Conflict with the Text and Struct of R.C. § 2505.02 and Would Raise Avoidable Constitutional Issues 11

C. The Order is an Advisory Opinion and Not Ripe for Review 14

D. Appellate Review Absent Factual Determinations in Individual Cases Would Violate Due Process 16

CONCLUSION 18

CERTIFICATE OF SERVICE .....

TABLE OF AUTHORITIES

Cases

Ackison v. Anchor Packing Co., et al. (4th Dist.), 2006 WL 3861073, 2006-Ohio-7099..... 8

Ashwander v. Tennessee Valley Authority (1937), 297 U.S. 288..... 12

Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp. (10th Dist. 2001), 141 Ohio App.3d 777, 753 N.E.2d 864..... 10

Celebrezze v. Netzley (1990), 51 Ohio St.3d 89, 554 N.E.2d 1292..... 9

City of Cincinnati v. Ohio Council 8, AFL-CIO (1991), 61 Ohio St.3d 658, 576 N.E.2d 745..... 15

City v. North Olmstead Land Holdings (8th Dist. 2000), 137 Ohio App.3d 1, 738 N.E.2d 1. 12

Cleveland Gear Co. V. Lambach (1988), 35 Ohio St.3d 229, 520 N.E.2d 188..... 15

Eggers v. Morr (1955), 162 Ohio St. 521, 124 N.E.2d 115..... 10

Gibson-Myers & Associates v. Pearce (9th Dist. 1999), 1999 Ohio App. LEXIS 5010..... 10

In re Cuyahoga County Asbestos Cases (8th Dist. 1998), 127 Ohio App.3d 358, 713 N.E. 2d 20..... 8

In re: Silica Products Liability Litigation (S.D.Tex. 2005), 398 F.Supp.2d 563..... 13

Kintz v. Harriger (1919), 99 Ohio St. 240, 124 N.E. 168..... 17

LCP Holding Co. v. Taylor (11th Dist. 2004), 158 Ohio App.3d 546, 817 N.E.2d 439..... 10

Lorain v. Davidson (9th Dist. 1989), 65 Ohio App.3d 408, 584 N.E.2d 744..... 15

Mahaffey v. Blackwell (10th Dist.), 2006-Ohio-5319..... 10

OPBA v. McFaul (8th Dist. 2001), 144 Ohio App.3d 311, 760 N.E.2d 31..... 14

Ormet Aluminum Products Corp. v. United Steelworkers of America (7th Dist.), 2006-Ohio-3782..... 10

Overhead, Inc. v. Standen Contracting (6th Dist.), 2002 WL 398342..... 10

Palm Beach Mall, Inc. v. Cuyahoga County Board of Revision (8th Dist. 1994), 96 Ohio App.3d 549, 645 N.E.2d 667..... 15

Petrocon v. Kosydar (1974), 38 Ohio St.2d 264, 313 N.E.2d 373..... 15

Richardson-Merrell, Inc. v. Koller (1985), 472 U.S. 424..... 9

Salisbury v. Smouse (4th Dist.), 2005 WL 2812754..... 16

State ex rel. Casey Outdoor Advertising v. Ohio Department of Transportation (1991), 61 Ohio St.3d 429, 575 N.E.2d 181..... 9

State ex rel. Gillivan v. Board of Tax Appeals (1994), 70 Ohio St.3d 196, 638 N.E.2d 74.... 9

State ex rel. Lyons v. Zaleski (1996), 75 Ohio St.3d 623, 665 N.E.2d 212 9

State ex rel. Park Investment Co. v. Board of Tax Appeal (1972), 31 Ohio St.2d 183, 285 N.E.2d 356..... 14

State ex rel. Williams v. Industrial Commission (1927), 116 Ohio St. 45, 156 N.E. 101..... 15

State ex rel. Willis v. Sheboy (1983), 6 Ohio St.3d 167, 451 N.E.2d 1200..... 9

State v. Greer, 1991 WL 21548, *2 (Ohio App. 1991)..... 16

State v. Kasnett (4th Dist. 1972), 30 Ohio App.2d 77, 283 N.E.2d 636..... 11

State v. Lester (1975), 41 Ohio St.2d 51, 322 N.E.2d 656..... 16, 17

State v. Muncie (2001), 91 Ohio St.3d 440, 746 N.E.2d 1092..... 10

Swearigen v. Waste Techs. Indus. (7th Dist. 2002), 134 Ohio App.3d 702, 731 N.E.2d 1229..... 10

Thomas v. City of Cleveland (8th Dist. 2000), 140 Ohio App.3d 136, 746 N.E.2d 1130..... 16

Van Cauwenberghe v. Biard (1988), 486 U.S. 517..... 9

Whitehall ex rel. Wolfe v. Ohio Civil Rights Commission (1995), 74 Ohio St.3d 120, 656 N.E.2d 684..... 9

Wilson v. A.C. & S., Inc. (12th Dist.), 2006 WL 3703350, 2006-Ohio-6704..... 8

Other Authorities

O.R.C. § 2307.91 1

O.R.C. § 2307.92 ..... 3, 4

O.R.C. § 2307.93(A)(3) 1, 3, 4, 5, 7, 11, 12

O.R.C. § 2307.93(A)(3)(a)(i) 6

O.R.C. § 2307.93(A)(3)(b) 6

O.R.C. § 2307.93(A)(3)(i) 4

O.R.C. § 2505.02 ..... 3, 6, 11

O.R.C. § 2505.02(A)(3) 2, 3, 4, 5

O.R.C. § 2505.02(B)(4) 2, 7, 11

O.R.C. §2505.02(B)(4)(a) 5, 14

O.R.C. §2505.02(B)(4)(b) 5, 8, 11, 14

Ohio Constitution I, § 16 17

Ohio Constitution II, § 28 ..... 4, 6, 12

Ohio Constitution IV, § 3(B)(2) 12

STATEMENT OF FACTS

This appeal arose from a pretrial procedural ruling in a group of personal injury cases. Plaintiffs/Appellees ("Appellees") claim in the underlying actions that their non-malignant lung diseases were proximately caused by exposure to asbestos products, including products for which Defendants/Appellants ("Appellants") are responsible. The non-malignant cases below lie dormant because the Court of Common Pleas of Cuyahoga County, pursuant to its inherent power to control its docket, has placed such cases on an inactive docket, favoring scheduling cancer and death cases for trial prior to scheduling the remaining non-malignant cases. The non-malignant cases that have not been placed on the inactive docket are not subject to any Case Management Order and have not been scheduled for trial. In short, nothing is happening on these cases. The Court of Common Pleas of Cuyahoga County is effectively controlling, managing and administering its docket. The only legal costs being generated by these cases are the costs of this unnecessary, ill-advised and premature appeal.

Despite the inactive status of these cases, certain Appellants filed a Motion to administratively dismiss these cases for failure to comply with a newly enacted asbestos "tort reform" bill, Am. Sub. H.B. 292, codified at O.R.C. §§ 2307.91 *et seq.* ("H.B. 292"). Appellees contended in response that H.B. 292 is unconstitutional, or in the alternative that it is inapplicable to these cases under a "savings clause" set forth in O.R.C. § 2307.93(A)(3). Following briefing and argument, the Honorable Judge Leo M. Spellacy, Judge Harry A. Hanna and Justice Francis E. Sweeney of the Court of Common Pleas of Cuyahoga County entered an Order on January 26, 2006 denying Appellants' Motion. In denying Appellants' Motion to apply H.B. 292 and presumably administratively dismiss all non-malignant asbestos actions filed prior to the effective date of the statute, the extent of the trial Court's

holding was, without making a particular finding in any specific case, that because H.B. 292 "can retroactively eliminate the claims", Order at 2 (Appendix to Appellants' Merit Brief), of some plaintiffs, not all non-malignant actions would be subject to the application of H.B. 292.

Appellants filed a Notice of Appeal to the Cuyahoga County Court of Appeals, Eighth Appellate District from the trial court's January 26, 2006 Order. In their appellate docketing statement, Appellants asserted that the trial court's Order is an appealable final order under R.C. § 2505.02(B)(4), which provides that an order may be considered a final order if it grants or denies a provisional remedy, as that term is newly defined in § 2505.02(A)(3), as amended by H.B. 292. Appellees moved to dismiss the appeal on the grounds that the January 26, 2006 Order did not grant or deny a provisional remedy and thus is not a final order. The Eighth District Court granted Appellees' Motion to Dismiss on May 8, 2006. Appellants thereafter filed for leave to appeal to this Honorable Court, which was accepted on October 18, 2006.

ARGUMENT

Introduction

The only issue before this Honorable Court is whether Appellants have a right to immediate appellate review of an abstract procedural ruling in an uncertain number of dormant cases without bringing one of those cases through to final judgment. Because of the limited nature of this issue, Appellees will not address herein the merits of the constitutionality of the retroactive application of H.B. 292.

R.C. § 2505.02, Ohio's statute setting forth the requirements for a final order, provides:

> (A) (3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, . . . a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.[1]
>
> (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 this Court's consideration of whether the trial Court's January 26, 2006 Order is final and appealable, R.C. § 2505.02 first requires a determination as to whether the trial Court made a finding pursuant to R.C. § 2307.93(A)(3).

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[1] R.C. § 2505.02(A)(3) also provides that a provisional remedy includes "a prima-facie showing pursuant to section 2307.92". There has been no argument in the instant appeal that the provisional remedy at issue is anything other than under R.C. § 2307.93(A)(3).

R.C. § 2307.93(A)(3) states:

> (3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92[2] of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:
>
> (i) A substantive right of a party to the case ***has been impaired.***
>
> (ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(emphasis added).

In its January 26, 2006 Order, the trial Court explained that

> 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.

Order at 2 (Appendix to Appellants' Merit Brief) (emphasis added). The trial Court made no determination of an impairment of a substantive right of any specific plaintiff pursuant to § 2307.93(A)(3)(i) and thus, the two-step[3] finding contemplated under § 2307.93(A)(3) was not made. The only issue the Court determined is that the substantive rights of some plaintiffs *could* be impaired, and that in such a case that impairment would constitute a violation of Section 28, Article II to the Ohio Constitution. Such determination was the Court's basis

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[2] R.C. § 2307.92 sets forth the requirements for a prima facie showing of a physical impairment for an asbestos claim based on nonmalignant disease, lung cancer in a person who is a smoker, or wrongful death, respectively.

[3] For purposes of the provisional remedy definition in R.C. § 2505.02(A)(3), a "finding made pursuant to [R.C. § 2307.93(A)(3)]" necessarily involves a determination of both elements – impairment of a substantive right and unconstitutionality – set forth in R.C. § 2307.93(A)(3). In the absence of a determination of the impairment of a substantive right, an assessment of unconstitutionality cannot be made as to "[t]hat impairment".

for the denial of Appellants' sweeping motion to apply H.B. 292 to all non-malignant cases filed prior to its effective date.

Therefore, the trial Court's January 26, 2006 Order does not grant or deny a provisional remedy as defined in § 2505.02(A)(3) and thus does not constitute a final order. Similarly, because there was no requisite determination of impairment in any individual case, the Order does not "in effect determine[ ] the action" and "prevent[ ] a judgment" in favor of Appellants with respect to a finding under 2307.93(A)(3), as required by § 2505.02(B)(4)(a). Finally, and most tellingly, Appellants will be afforded "a meaningful and effective remedy by an appeal following final judgment" in any one of the instant actions, which renders the Order non-final pursuant to § 2505.02(B)(4)(b). Therefore, Appellees submit that the trial Court's Order is not final and appealable and that the decision of the Court of Appeals for the 8th District should be affirmed.

A. The Trial Court's Order Does Not Qualify as the Granting of a Provisional Remedy Under § 2505.02(A)(3).

a. The Trial Court Did Not Make a Finding Pursuant to § 2307.93(A)(3) in Any Specific Case.

A provisional remedy is defined in § 2505.02(A)(3), in part, as "a proceeding ancillary to an action, including, but not limited to, . . . a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code." However, Appellees submit that because the trial Court's Order only addresses generally the constitutionality of the retroactive application of H.B. 292 and is devoid of a finding as to the substantive rights of a particular plaintiff, the Order does not constitute the grant or denial of a provisional remedy to any party, and thus is not an appealable final order.

§ 2307.93(A)(3) is essentially a savings clause, providing for the retroactive application of H.B. 292 unless "the court that has jurisdiction over the case" determines that

a substantive right of a party to the case has been impaired in violation of Section 28, Article II of the Ohio Constitution. The trial Court's Order generally addresses the issue of the retroactive application of H.B. 292 to asbestos cases for non-malignant lung disease filed before the effective date of the statute. While the trial Court observes that "Am. Sub. H.B. 292 ***can*** retroactively eliminate the claims", Order at 2 (emphasis added), of plaintiffs who filed their claims before the effective date of the statute, a plaintiff who can meet the prima facie requirements of H.B. 292 would not suffer such retroactive elimination of his claim. There was thus no specific finding made as to whether any individual plaintiff would suffer an impairment of substantive rights due to the retroactive application of H.B. 292. Indeed, quite the contrary -- the trial Court expressly stated its intent to postpone adjudication as to the sufficiency of individual plaintiffs' evidence:

> 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.***

Order at 2-3 (emphasis added) (Appendix to Appellants' Merit Brief).

In order to make a finding of impairment under § 2307.93(A)(3)(a)(i), and thus, grant or deny a provisional remedy for purposes of § 2505.02, a court must determine based upon the particular facts of each action whether the plaintiff can meet the common law requirements to sustain an asbestos-related action and whether the plaintiff can meet the more stringent requirements of H.B. 292. Thus, because the Order clearly makes no finding

regarding the application of its legal analysis to the individual facts of any specific plaintiff's action, there is no finding lending itself to appellate review.

Moreover, on March 22, 2006, the trial Court entered two Orders that apply to many of the cases apparently subsumed within the instant appeal. In one Order, the Court placed on an inactive docket non-malignant cases that did not meet certain medical criteria. This Order specifically indicated that it was not final and appealable. In the second Order, the Court administratively dismissed cases where it appeared that the doctor providing expert testimony regarding the plaintiff's diagnosis was unlikely to appear to testify. These two Orders have resulted in thousands of cases being placed either on an inactive docket pursuant to an Order that is expressly not final and appealable or on an administrative dismissal docket.

The lack of identifying information regarding the plaintiffs' actions involved in the instant appeal, in conjunction with the subsequent actions by the trial Court, foreshadow an administrative nightmare should this Court's decision result in an overly broad judicial interpretation of the final judgment rule. For example, if certain cases presumably subject to the instant appeal were also considered administratively dismissed under the trial Court's subsequent March 22, 2006 Order, would a decision by this Court holding the January 26, 2006 Order final and appealable potentially subject some of those same cases to a second administrative dismissal under *different* criteria? This is one example of myriad scenarios that could unfold following a ruling on the abstract issues Appellants wish to present. The potential for an enormous waste of time, money, effort and judicial resources looms.

b. Even if the Order Did Grant a Provisional Remedy, the Additional Requirements of R.C. 2505.02(B)(4) are not Fulfilled.

Even if the Order were construed to make a finding under R.C. § 2307.93(A)(3), and thus to grant a provisional remedy, § 2505.02(B)(4) still does not authorize Appellants'

appeal because the additional requirements of subsections (a) ("determines the action . . . and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy") and (b) ("appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment") are not fulfilled. First, the Order does not effectively determine any particular action with respect to ultimate applicability of the savings clause; nor does it prevent a judgment in favor of Appellants thereon.[4] On the contrary, the Court expressly reserved adjudication as to the sufficiency of evidence in individual plaintiffs' actions. The Order quite plainly does not foreclose the prospect that any particular plaintiff may ultimately be found not to suffer any impairment of rights through application of H.B. 292, either because he can meet the Act's new standards or because he cannot meet the standards of the prior law.

Second, Appellants will have an adequate remedy as contemplated in R.C. § 2505.02(B)(4)(b) by appeal from final judgments in the various underlying actions. If Appellees prevail at trial, Appellants may then assert on appeal their contentions concerning the applicability and effect of H.B. 292. Indeed, recent conflicting opinions from the Fourth District and the Twelfth District regarding the retroactive application of H.B. 292 in individual asbestos actions will likely result in requests for leave to appeal to this Court. *See Wilson v. A.C. & S, Inc.* (12th Dist.), 2006 WL 3703350, 2006-Ohio-6704; *Ackison v. Anchor Packing Co., et al.* (4th Dist.), 2006 WL 3861073, 2006-Ohio-7099. Should this Court elect to hear to those appeals, it will have an opportunity make a determination regarding the constitutionality of the retroactive application of H.B. 292 in specific factual circumstances.

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[4] In this regard, this appeal is similar to *In re Cuyahoga County Asbestos Cases* (8th Dist. 1998), 127 Ohio App.3d 358, 365, 713 N.E.2d 20, in which the Court held that an order establishing a voluntary registry for unimpaired asbestos claims was not final and appealable because it "does not determine the underlying personal injury action of any claimant nor does the order adjudicate any issue in the case. The order does not determine the action nor does it prevent a judgment."

Such a determination, of course, would have precedential value in thousands of cases in the trial courts.

Appellants contend that a post-judgment appeal would be meaningless because one of the purposes of H.B. 292 is to relieve Defendants of the burdens of trial. However, the inconvenience to Appellants of proceeding to a trial they wish to avoid is not different in kind from that faced by every disappointed movant in a case of asserted error, and is not sufficient to render the remedy by appeal meaningless or ineffective. Accordingly, this Court has concluded that, "contentions that appeal from any subsequent adverse final judgment would be inadequate due to time and expense are without merit." *State ex rel. Lyons v. Zaleski* (1996), 75 Ohio St.3d 623, 626, 665 N.E.2d 212 (*citing Whiteheall ex rel. Wolfe v. Ohio Civil Rights Commission* (1995), 74 Ohio St.3d 120, 124, 656 N.E.2d 684). As this Court has explained,

> The critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial. . . . This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal, litigants must abide by the . . . court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.

Celebrezze v. Netzley (1990), 51 Ohio St. 3d 89, 554 N.E.2d 1292 (1990) (*quoting Richardson-Merrell, Inc. v. Koller* (1985), 472 U.S. 424, 431 and *Van Cauwenberghe* v. *Biard* (1988), 486 U.S. 517, 524).[5] The "irretrievable loss" standard entails that an appeal from a final judgment is

[5] This Court's reasoning in rejecting the same argument in analogous contexts is equally applicable to the instant situation. *See State ex rel. Casey Outdoor Advertising v. Ohio Department of Transportation* (1991), 61 Ohio St.3d 429, 432, 575 N.E.2d 181 (*quoting State ex rel. Willis v. Sheboy* (1983), 6 Ohio St.3d 167, 451 N.E.2d 1200 (syllabus, paragraph 1)) ("Where a constitutional process of appeal has been legislatively provided, the sole fact that pursuing such process would encompass more delay and inconvenience than seeking a writ of mandamus is insufficient to prevent the process from constituting a plain and adequate remedy in the ordinary course of the law."); *State ex rel. Gillivan v. Board of Tax Appeals* (1994), 70 Ohio St.3d 196, 200, 638 N.E.2d 74 (argument that "appeal is

an inadequate remedy only when the effects of an interlocutory order cannot be undone. The cases cited by Appellants in the attempt to argue that "[o]nce a case goes to trial, the opportunity is lost forever[,]" Merit Brief at 11, provide an illustration of such narrow circumstances and are clearly distinct from the underlying order in the instant appeal. *See Mahaffey v. Blackwell* (10th Dist.), 2006-Ohio-5319 (preliminary injunction due to insufficiency of referendum petition is appealable because by law result could not be invalidated after submission to voters); *Ormet Aluminum Products Corp. v. United Steelworkers of America* (7th Dist.), 2006-Ohio-3782 (preliminary injunction against picketing is appealable due to effect on picketers' time-sensitive message); *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.* (10th Dist. 2001), 141 Ohio App.3d 777, 753 N.E.2d 864 (order considered final and appealable because court would be unable to create remedy to repair loss of business goodwill and damage to business relationships following final judgment).[6] Here, any detriment to Appellants based on the trial Court's Order is not of a type that cannot be remedied through traditional appellate channels following final judgment.

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inadequate because it is too time-consuming and expensive to pursue. . . . is generally insufficient"); *Eggers v. Morr* (1955), 162 Ohio St. 521, 124 N.E.2d 115 ("Mere inconvenience in complying with the necessary steps in taking [an appeal authorized by law] does not constitute an excuse for resorting to an independent action for an injunction in lieu of taking the appeal").

[6] *See also e.g., LCP Holding Co. v. Taylor* (11th Dist. 2004), 158 Ohio App.3d 546, 817 N.E.2d 439 (court will be unable to devise remedy to restore dissemination of trade secrets, loss of business or repair business relationships); *Swearigen v. Waste Techs. Indus.* (7th Dist. 2002), 134 Ohio App.3d 702, 731 N.E.2d 1229 (order denying *pro hac vice* appearance of desired counsel could not be effectively reviewed after final judgment because party would have burden of demonstrating that desired counsel would have resulted in different outcome); *Overhead, Inc. v. Standen Contracting* (6th Dist.), 2002 WL 398342 (order permitting action to be brought in Massachusetts and dismissed in Ohio could not be reviewed by Ohio appellate court following final judgment because there would no longer be an Ohio case in existence); *State v. Muncie* (2001), 91 Ohio St.3d 440, 746 N.E.2d 1092 (order compelling administration of psychotropic medication was a final order because the person compelled to endure the side effects of the medications during the proceedings would have no effective remedy following final judgment); *Gibson-Myers & Associates v. Pearce* (9th Dist. 1999), 1999 Ohio App. LEXIS 5010 (order compelling production of documents containing trade secrets was a final order because party would have no ability to restore "cloak of secrecy" after final judgment).

B. A Holding that Every Finding Under the Savings Clause is Always Appealable Would Conflict with the Text and Structure of R.C. § 2505.02 and Would Raise Avoidable Constitutional Issues.

Appellants assert that the Order is appealable as the grant of a provisional remedy under R.C. § 2505.02(B)(4), despite the absence of factual adjudication in any specific case. Hence, Appellants are necessarily arguing that the opportunity for "meaningful or effective remedy by an appeal following final judgment" is *never* possible under any facts or circumstances after a finding is made pursuant to R.C. § 2307.93(A)(3). To interpret H.B. 292's change to R.C. § 2505.02 in such a manner would be tantamount to eliminating the express additional requirement of lack of a "meaningful or effective remedy by an appeal following final judgment" from R.C. § 2505.02(B)(4)(b). In the ambit of statutory interpretation, however, "a cardinal rule is that the legislature will be presumed to have inserted every part of a statute for a purpose and to have intended that every part should be carried into effect. Indeed, it is also a cardinal rule that significance and effect should be accorded every part of the statute including every section, paragraph, sentence, clause, phrase and word." *State v. Kasnett* (4th Dist. 1972), 30 Ohio App.2d 77, 85, 283 N.E.2d 636, *reversed on other grounds*, *State v. Kasnett* (1973), 34 Ohio St.2d 193, 297 N.E.2d 537.

If the legislature had intended every finding under R.C. § 2307.93(A)(3) to be an appealable final order, it would have explicitly so provided. Instead, the statute expressly states that such an order can only be considered final and appealable in the absence of a "meaningful or effective remedy" following final judgment, and this Court should give effect to the statute's limitation.

Moreover, an interpretation that essentially eliminates the no "meaningful or effective remedy" requirement from a determination that a finding under R.C. § 2307.93(A)(3) is a final order would raise serious constitutional issues under both the

appellate jurisdiction clause, Article IV, Section 3(B)(2), and the anti-retroactivity clause, Article II, Section 28, of the Ohio Constitution. First, Article II, Section 28 expressly limits appeals to "judgments or final orders". Although the legislature is granted authority to determine what final orders are appealable, it is not authorized to expand appellate jurisdiction beyond "judgments or final orders". Because the absence of a "meaningful or effective remedy" following final judgment is the statutory safeguard to ensure that provisional remedies are in some real sense final, the evisceration of that requirement would make the grant of appellate jurisdiction over all findings under R.C. § 2307.93(A)(3) unconstitutional.

Second, a rule that every finding under R.C. § 2307.93(A)(3) is automatically appealable would amount to an additional unconstitutional impairment of Appellees' rights under Article II, Section 28 of the Ohio Constitution, by applying H.B. 292 to burden precisely those plaintiffs whom the courts have found to have a constitutional right not to be burdened by the Act.

It is an accepted judicial principle that restraint should be exercised in the determination of constitutional questions, and that making such decisions should be avoided if it is reasonable to do so. As this Court has recognized,

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

City v. North Olmstead Land Holdings (8th Dist. 2000), 137 Ohio App.3d 1, 6, 738 N.E.2d 1 (*quoting Ashwander v. Tennessee Valley Authority* (1937), 297 U.S. 288, 347 (Brandeis, J., concurring). As to the present actions, a resolution on statutory grounds is not only possible, but the only possible resolution without doing violence to the statutory terms.

Appellants purposefully overlap the issue of the final judgment rule with what they perceive as the more enthralling argument of the supposed impact of this Court's decision on 39,000 asbestos cases, making broad generalizations regarding "Ohio's asbestos litigation crisis." Merit Brief at 11. Appellants further make irrelevant and inflammatory declarations regarding

> plaintiff lawyers dump[ing] cases into the judicial system with the 'clear motivation . . . to overwhelm the Defendants and the judicial system . . . in [the] hopes of extracting mass nuisance-value settlements because the Defendants and the judicial system are financially incapable of examining the merits of each individual claim.'

Merit Brief at 15, relying on the opinion of Judge Jack regarding the number of silica cases pending in her court, in *In re: Silica Products Liability Litigation* (S.D.Tex. 2005), 398 F.Supp.2d 563, 676. As discussed *supra*, Appellants have the opportunity for meaningful remedy on appeal from final judgment in an individual action. Given the previous inactivity of these nonmalignant cases, Appellants will not suffer any detriment in bringing one case to trial and final judgment. Indeed, the suggestion from Appellants' argument that the instant appeal is the most expeditious vehicle by which to resolve the applicability of H.B. 292 to all non-malignant asbestos cases pending before its effective date is belied by the path of the instant appeal. By trying one case to completion and obtaining a final judgment, Appellants would secure an appellate determination of their ultimate question much more quickly than via the present route, where resolution on the merits is uncertain, and, as Appellees argue, unwarranted.

Appellees contend that Appellants may obtain meaningful relief by seeking review from a final judgment in a single case and that requiring them to bring one of these cases to final judgment does not implicate the public policy concerns which Appellants invoke in urging this Court to reverse the decision of the 8th District. To the contrary, the determination of whether an Order constitutes a final determination cannot possibly be

construed to have the massive impact anticipated by Appellants. This attempt to divert the attention of this Court from the consideration of whether the determination of an order of the trial Court is final and appealable should not be countenanced. Thus, the Order is not final and appealable under R.C. § 2505.02(B)(4)(a) or (b), and this Court should affirm the 8th District.

C. The Order is an Advisory Opinion and Not Ripe for Review.

Because it does not decide the rights of any party in any case, the Order is merely an advisory opinion and as such, is not ripe for review. As stated by this Court in *State ex Rel. Park Investment Co. v. Board of Tax Appeal* (1972), 31 Ohio St.2d 183, 285 N.E.2d 356, 357:

> It is fundamental that general and abstract questions as to the interpretation and constitutionality of an act of the Legislature cannot with propriety be presented to a court.
>
> * * *
>
> Courts will not pass upon the constitutionality of an act of the General Assembly abstractly, but only when the question of the constitutionality of such act determines a case before it.

(citations omitted). Such is the case before this Court. For example, the Order does nothing more than outline how the trial court will act if certain situations come before the court: "this Court . . . *will administratively dismiss, without prejudice, any claim that fails to meet the requisite evidentiary threshold.*"[7] (Emphasis added). In other words, the trial Court is merely advising asbestos claimants in general how it will act in the future, but has yet to take any action as to any particular plaintiff. Consequently, the Order is nothing more than an advisory opinion. *See, e.g., OPBA v. McFaul* (8th Dist.

[7]The use of the future tense in the Order demonstrates nothing more than the intent of the trial court to act in a specified manner if and when certain factual situations occur.

2001), 144 Ohio App.3d 311, 760 N.E.2d 31, 33 (appellate courts are not to give advisory opinions).

In *Lorain v. Davidson* (9th Dist. 1989), 65 Ohio App.3d 408, 584 N.E.2d 744, 746, the Court noted:

> The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before the court.

Accord, Cleveland Gear Co. v. Lambach (1988), 35 Ohio St.3d 229, 520 N.E.2d 188; *Petrocon v. Kosydar* (1974), 38 Ohio St.2d 264, 313 N.E.2d 373. Following this rationale, the Court in *Palm Beach Mall, Inc. v. Cuyahoga County Board of Revision* (8th Dist. 1994), 96 Ohio App.3d 549, 645 N.E.2d 667, 772, noted:

> Based upon *Davidson*, we may not consider the constitutionality of R.C. 5715.19(A)(2) with respect to appellant's hypothetical situation. Furthermore, this appellate court declines to issue advisory opinions with regard to hypothetical issues not ripe for adjudication.

As discussed *supra*, this is particularly true in the instant case, as the constitutionality of H.B. 292 has been called into question. *See City of Cincinnati v. Ohio Council 8, AFL-CIO* (1991), 61 Ohio St.3d 658, 576 N.E.2d 745, 757 (recognizing that until a developed factual record exists in the trial court, a question of law is not ripe for determination and that courts should refrain from deciding constitutional issues if the case may be decided without reaching them). *Accord, State ex rel. Williams v. Industrial Commission* (1927), 116 Ohio St. 45, 156 N.E. 101, 104 ("Unlike some jurisdictions, we are not empowered to give advisory opinions as to the constitutional validity of laws if future eventualities should occur.").

In the instant cases, until concrete facts come before the trial Court in which it can determine whether a specific plaintiff meets the evidentiary requirements of H.B. 292, there is no controversy before the Court other than potential hypothetical situations.

Consequently, based upon long standing Ohio precedent, the Order is nothing more than an advisory opinion which precludes appeal at this time. *See Thomas v. City of Cleveland* (8th Dist. 2000), 140 Ohio App.3d 136, 746 N.E.2d 1130, 1134 ("A proceeding does not lie to obtain a judgment which is merely advisory or which answers moot or abstract questions.").

D. Appellate Review Absent Factual Determinations in Individual Cases Would Violate Due Process.

The instant appeal concerns an Order entered on a special docket created generally for all pending asbestos cases in Cuyahoga County. Neither the Appellants' Motion in the Court below nor the Notice of Appeal identifies with particularity the names, docket numbers, or disease processes of affected cases. Thus, there is no record to enable meaningful review of any findings in any individual cases.

Ohio courts have recognized, in other contexts, the necessity of a record on appeal that includes the trial court's factual findings as well as conclusions of law in order for the appellate court to have an adequate basis to decide the legal issues presented. *Cf. State v. Lester* (1975), 41 Ohio St.2d 51, 322 N.E.2d 656 (petition for post-conviction relief); *Salisbury v. Smouse* (4th Dist.), 2005 WL 2812754 (factual findings by the court under Pa.R.C.P. 52); In *State v. Greer*, 1991 WL 21548, *2 (Ohio App. 1991), another decision concerning a petition for post-conviction relief, the court's reasoning for the need for the requirement of findings of fact and conclusions of law in the dismissal of such a petition is equally applicable to the instant actions:

> Without them, a petitioner knows no more than he lost and hence is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge to make the requisite findings prevents any meaningful judicial review, for it is the findings and the conclusions which an appellate court reviews for error.

The need for specific factual findings at the trial court level affects more than the depth of the record before the appellate court: it can also have an effect on the efficiency of the appellate process. In *Lester*, this Court stated,

> unless the trial court makes and files findings on all issues presented, appeals may well be piecemeal; the reversal of any dismissal [of a petition for post-conviction relief] could require the cause to be remanded to decide issues not considered by the trial court, while the reversal of the granting of relief upon one ground might be mooted by a later appeal upon some valid ground.

41 Ohio St.2d at 56. Allowing the present appeal to go forward would almost certainly result in a piecemeal appellate process involving the individual actions subsumed within Appellants' appeal once this Court has made a determination on the application of H.B. 292.

Moreover, Appellees submit further that permitting Appellants' appeal to continue without adequate records on the individual cases involved prevents them from effectively defending their vested rights to a previously accrued cause of action, in violation of the due process clause of the Ohio Constitution. Article I, Section 16 of the Ohio Constitution sets forth, "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." The importance of this provision has been articulated by this Court: "Manifestly, when the constitution of the state declares and defines certain public policies, such public policies must be paramount, though a score of statutes conflict and a multitude of judicial decisions be to the contrary." *Kintz v. Harriger* (1919), 99 Ohio St. 240, 247, 124 N.E. 168. Appellees submit that the Order is not final and appealable because of the lack of findings as to any particular action and that the decision of the Court of Appeals for the 8th District should be affirmed.

CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the Order of the Court of Appeals for the Eighth District dismissing Appellants' appeal for lack of a final order.

Dated: January 16, 2007

Respectfully submitted,

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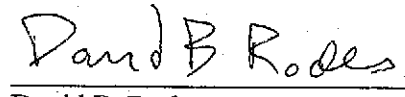

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