

IN THE SUPREME COURT OF OHIO

Mary J. Manley

Plaintiff-Appellee

v.

Nicholas P. Marsico, M.D.,

Defendant-Appellant

and

Eye Specialists, Inc.

Defendant

Case Number: 2006-1263

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

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

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III. STATEMENT OF THE FACTS

A. Ms. Manley's Initial Complaint.

On October 12, 2004, Plaintiff-Appellee Mary Manley (hereinafter "Ms. Manley") filed a Complaint against Dr. Nicholas P. Marsico (hereinafter "Dr. Marsico") and Eye Specialists, Inc. (hereinafter "ESI") in the Common Pleas Court of Clinton County, Ohio. In this Complaint, Ms. Manley contended that Dr. Marsico and ESI negligently treated her glaucoma-related eye condition, resulting in Ms. Manley suffering multiple fractures to her skull and other serious and permanent injuries. Notably, when Ms. Manley filed this Complaint, no affidavits of merit were required to be attached. When Ms. Manley's initial counsel relocated out of the area, that counsel contacted Ms. Manley's current counsel to arrange continuing representation of Ms. Manley. At that time, a suitable expert witness, Dr. Andrew A. Dahl, M.D., F.A.C.S, a physician specializing in ophthalmology, had already been identified and retained by Ms. Manley's initial counsel. Unbeknownst to Ms. Manley's current counsel, the initial counsel, on July 11, 2005, dismissed the Complaint pursuant to Civ.R. 41(A).

B. Ms. Manley's Refiled Complaint.

Ms. Manley timely refiled her Complaint on January 12, 2006. Ms. Manley did not possess any affidavits of merit when she refiled her Complaint because her expert witness had not replied to many requests for assistance. Further, on that same date, the availability of her expert witness or the necessity of soliciting another such expert were entirely unknown. Notably, Ms. Manley did not fail to comply with Civ.R. 10(D)(2)(a) as there were no affidavits of merit to file. Instead and specifically, Ms. Manley did not comply with Civ.R. 10(D)(2)(b) as she did not file with her refiled Complaint, a Motion for a Reasonable Extension of Time to Provide the Affidavits of Merit. On January 26, 2006, ESI moved to dismiss Ms. Manley's refiled Complaint arguing

that Ms. Manley did not comply with Civ.R. 10(D)(2). On February 1, 2006, Dr. Marsico also moved for dismissal on the same grounds.

At about that same time, Dr. Dahl, who had been staying for an extended period of time at his Colorado vacation home, was made aware of Ms. Manley's attempts to contact him by his housekeeper in New York. On or about February 21, 2006, Ms. Manley swiftly and successfully secured all the required affidavits of merit through the use of e-mail and overnight carrier. Accordingly, Ms. Manley properly moved the trial court, as it may allow, pursuant to Civ.R. 6(B), for leave to file the affidavits of merit *instanter*. Civ.R. 10(D)(2)(b), states in pertinent part that, "[f]or good cause shown, the court *shall* grant the plaintiff a reasonable period of time to file an affidavit of merit." (emphasis added). As there were no deficiencies in the affidavits of merit, and as Ms. Manley anticipated a grant of leave to file *instanter*, she filed the affidavits of merit on February 27, 2006. However, on March 9, 2006 Dr. Marsico moved to strike the affidavits of merit purely on procedural grounds claiming that they had not been filed with the Complaint. On March 13, 2006, ESI filed virtually the same motion.

The trial court granted Ms. Manley leave to file her affidavits of merit on March 24, 2006. (See Entry, Appx. 1 of Marsico Brief). In addition, in that same entry, the trial court *denied* all of appellants' motions to dismiss and motions to strike in toto, which included:

- (1) Defendant Eye Specialists, Inc.'s January 26, 2006 Motion to Dismiss Plaintiff's Complaint;
- (2) Defendant Nicholas P. Marsico, M.D.'s February 1, 2006 Motion to Dismiss Plaintiff's Complaint;
- (3) Defendant Nicholas P. Marsico, M.D.'s March 9, 2006, Motion to Strike Plaintiff's Tendered Affidavit of Merit;
- (4) Defendant Eye Specialists, Inc.'s March 13, 2006 Motion to Strike Plaintiff's Tendered Affidavit of Merit.

Id.

C. The Twelfth District Court of Appeals, Sua Sponte, Dismissed Appellant's Appeal and Subsequent Motion For Reconsideration.

On April 19, 2006, Dr. Marsico attempted to appeal the trial court's entry granting Ms. Manley's Motion for Leave to File Affidavits of Merit. However, on May 17, 2006, the Twelfth District Court of Appeals, sua sponte, dismissed Dr. Marsico's appeal, finding that it did not have jurisdiction to hear the appeals as the trial court's entry was not a final appealable order. (See Entry of Dismissal, Appx. 2 of Marsico Brief). Specifically, the court of appeals found that there were outstanding issues remaining in this matter and that the record did not indicate that the outstanding issues had ever been resolved. *Id.* Further, the appellate court stated that the trial court's entry did not contain the requirements of a final appealable order utilizing well established case law:

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

Id.

In addition, the appellate court also noted that the trial court's entry did not include language required by Civ. Rule 54(B). *Id.* As such, the court of appeals properly concluded that the trial court's entry was not a final appealable order and that the court of appeals was without jurisdiction to consider this appeal. *Id.*

Although the courts of appeals, sua sponte, dismissed the appeal, Dr. Marsico filed a Motion for Reconsideration of the court of appeals Entry of Dismissal. The court of appeals denied the Motion for Reconsideration.

D. Discretionary Appeal to This Court.

Subsequently, on June 30, 2006, Dr. Marsico filed a Notice of Appeal to this Court. Notably, ESI did not file a notice of appeal. On October 4, 2006, this Court exercised discretionary

jurisdiction over the issue of whether there was a final appealable order. Dr. Marsico filed his brief on December 12, 2006. Although ESI did not appeal to this Court, it filed a brief supporting Dr. Marsico's opinions. The Ohio Hospital Association, Ohio State Medical Association and Ohio Osteopathic Association filed a brief of amici curiae on that same date.

IV. ARGUMENT

PROPOSITION OF LAW NUMBER 1: A Trial Court's Decision to Deny a Motion to Dismiss for Failure to Comply with Civ.R. 10(D)(2) is Not a Final Order for Purposes of R.C. 2505.02 When a Plaintiff Timely Files Affidavits of Merit Pursuant to the Trial Court's Granting of Leave to File the Affidavits of Merit Instantly.

A. Where a Trial Court, for Good Cause Shown, Extends a Deadline Pursuant to Civ.R. 6(B), No "Provisional Remedy" is Implicated.

Ms. Manley respectfully requests that this Court should hold that a litigant may not seek immediate appellate review of an order denying a motion to dismiss for failure to comply with Civ.R. 10(D)(2)(b) when a plaintiff timely files affidavits of merit pursuant to the trial court's granting of leave to do so. By reviewing the Civil Rules pertinent to this action, it is clear that the filing deadline of Civ.R. 10(D)(2)(b) does not implicate any alleged "provisional remedy" because Civ.R. 6(B) vests the trial court with the power to extend that deadline.

1. *Civ.R. 10(D)(2)(B) allows a plaintiff to file an extension of time to file affidavits of merit.*

Civ.R. 10(D)(2)(b) permits a plaintiff to file a motion for an extension to file an affidavit of merit for good cause shown. Civ.R. 10(D)(2)(b) states in pertinent part:

The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit.

Clearly, Civ.R. 10(D)(2)(b) envisions situations, such as those described in the relevant staff notes provided *infra*, where affidavits of merit are simply not available when the complaint is filed. Importantly, this civil rule directs the trial court to grant an extension of the time period for

filing the affidavits of merit. Finally, while this civil rule does state that a motion to extend that period of time need be filed with the complaint, there are notably no statements that failure to file such a motion renders the complaint in any way deficient. In fact, the general operation of this civil rule is to allow the case to proceed when affidavits of merit are not available at the time the complaint is filed.

This is precisely what occurred in this case because the expert witness was staying at his Colorado vacation residence while Ms. Manley's requests to contact the expert witness were going unanswered at his primary New York residence. As such, as soon as the affidavits of merit were available, Ms. Manley filed a Motion for Leave to File the Affidavits of Merit Instantly. Thus, she properly complied with this rule.

Further, this operation of Civ.R. 10(D) has precedents. Civ.R. 10(D)(1), for example, states:

When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

While defendants have often sought to invoke this rule as an absolute procedural right to dismissal when the account or written instrument is not attached to a complaint when filed, several courts have held that the appropriate method of curing this technical procedural deficiency was for those defendants to move for a more definite statement thereby notifying the plaintiff of, and allowing the plaintiff to then cure, the deficiency. See *Schwartz v. Bank One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 812, fn 4; *Point Rental Co. v. Posani* (1976), 52 Ohio App.2d 183, 185. This widely accepted approach should apply equally to the operation of Civ. Rule 10(D)(2).

2. *Civ.R. 6(B) permits a trial court to grant an extension of time at its own discretion.*

In addition, Civ.R. 6(B) states in pertinent part:

When by these rules * * * an act is required * * * to be done at * * * a specified time, the court for cause shown may at any time *in its discretion* * * * upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D), and Rule 60(B), except to the extent and under the conditions stated in them.

Civ.R. 6(B) (emphasis added).

By its plain wording, Civ.R. 6(B) vests the trial court with the discretionary power to extend the deadline by which Civ.R. 10(D)(2)(b) requires the filing of a motion to extend the period of time to file affidavits of merit. This is precisely what was accomplished when the trial court granted Ms. Manley's Motion for Leave to File the Affidavits of Merit Instanter.

Moreover, appropriate affidavits of merit *were* filed in this case. The trial court granted Ms. Manley leave to file the affidavits of merit instanter which were timely filed. So the gravamen of this case is not whether the affidavits of merit were filed but *when Ms. Manley filed her motion*, as required by Civ.R. 10(D)(2)(b), whereby she requested the trial court's leave to file the affidavits of merit within a reasonable time, immediately. This is purely a procedural matter, a filing deadline, which Civ.R. 6(B) leaves to the discretion of the trial court. Viewed in light of the facts of this case, then, no alleged "provisional remedy" is even implicated.

Accordingly, because Ms. Manley did file appropriate affidavits of merit pursuant to the trial court's grant of leave to file them instanter, no final order was issued from the trial court's overruling Dr. Marsico's and ESI's motions to dismiss on purely procedural grounds. This result is in accord with the treatment of Civ.R. 10(D)(1) and supports this Court's holding that cases are to be tried on the merits as discussed *infra*.

PROPOSITION OF LAW NUMBER 2: A Trial Court's Decision to Deny a Motion to Dismiss for Failure to Comply with Civ.R. 10(D)(2), when Affidavits of Merit were Timely Filed Pursuant to the Trial Court's Granting of Leave to File Instanter, is Not a Final Order for Purposes of R.C. 2505.02.

Ms. Manley respectfully requests that this Court hold that a litigant may not seek immediate appellate review of an order denying a motion to dismiss for failure to comply with Civ.R. 10(D)(2) as any such order is not a “final order” as defined in R.C. 2505.02 because Civ.R. 10(D)(2) is not a “provisional remedy” as defined in R.C. 2505.02(A)(3).

An appellate court, when determining whether a judgment is final, must engage in a two-step analysis. First, it must determine if the order is final within the requirements of R.C. 2505.02. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 21 If the court finds that the order complies with R.C. 2505.02 and is in fact final, then the court must take a second step to decide if Civ.R. 54(B) language is required. *Id.*

In this case, it is not disputed that the trial court did not include the Civ.R. 54(B) language in its decision. Further, if this Court decides that, pursuant to Civ.R. 6(B), a trial court does not have the power to extend the deadline of Civ.R. 10(D)(2)(b), then the trial court's overruling of Dr. Marsico's and EST's motions to dismiss were not, in any case, a final order under the purview of R.C. 2505.02.

A. Civ.R. 10(D)(2) Was Not Intended To Be A “Provisional Remedy.”

Civ.R. 10(D)(2)(a) states that any complaint that asserts a medical claim “shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability.” Civ.R. 10(D)(2)(c) states the affidavits of merit are “solely to establish the adequacy of the complaint and *shall not otherwise be admissible as evidence or used for purposes of impeachment.*” (emphasis added). Moreover, while affidavits of merit establish the adequacy of the complaint, lack of the affidavits does not necessarily render the complaint inadequate. In particular, Civ.R.10(D)(2)(b) states, in pertinent part, “[f]or good cause shown, the

court *shall* grant the plaintiff a reasonable period of time to file an affidavit of merit” and the case can proceed for some time without any affidavits of merit filed. (emphasis added). While Civ.R. 10(D)(2)(b) also states that a plaintiff must file a motion to extend the period of time to produce the affidavits of merit with the complaint, nowhere in the rules is the failure to timely file that motion equated with a failure of the complaint. The accompanying staff notes are illuminating and read:

Because there may be circumstances in which the plaintiff is unable to provide an affidavit of merit when the complaint is filed, division (D)(2)(b) of the rule requires the trial court, when good cause is shown, to provide a reasonable period of time for the plaintiff to obtain and file the affidavit.

For example, “good cause” may exist in a circumstance where the plaintiff obtains counsel near the expiration of the statute of limitations, and counsel does not have sufficient time to identify a qualified health care provider to conduct the necessary review of applicable medical records and prepare an affidavit. Similarly, the relevant medical records may not have been provided to the plaintiff in a timely fashion.

Further, there may be situations where the medical records do not reveal the names of all of the potential defendants and so until discovery reveals those names, it may be necessary to name a “John Doe” defendant. Once discovery has revealed the name of a previously unknown defendant and that person is added as a party, the affidavit of merit would then be required as to that newly named defendant.

Under these or similar circumstances, the court must afford the plaintiff a reasonable period of time, once a qualified health care provider is identified, to have the records reviewed and submit an affidavit that satisfies the requirements set forth in the rule.

Staff Notes to Civ. Rule 10 (emphasis added) (App.7).

The obvious tone of the rule and the staff notes indicate the requirements of affidavits of merit were never intended to be jurisdictional, compelling a court to dismiss an otherwise meritorious case without allowing an injured plaintiff an opportunity to cure a minor technical procedural defect. Such an interpretation would contravene the long held fundamental tenet of

this Court that cases are to be decided on the merits. *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 192. As this Court has stated, “[j]udicial discretion must be carefully - and cautiously - exercised before this court will uphold an outright dismissal of a case on *purely procedural grounds.*” Id. [emphasis added].

B. The Trial Court's Entry was Not a “Final Order” Within the Requirements of R.C. 2505.02.

Effectively overlooking the fact that appropriate affidavits of merit were timely filed in this case pursuant to the trial court's granting of leave to do so, Dr. Marsico and ESI rely on R.C. 2505.02(B)(4) for the unwarranted proposition that failure to comply with Civ.R. 10(D)(2) gives rise, per se, to a “provisional remedy. R.C. 2505.02(B)(4) states in pertinent part:

- (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.

However, a motion to dismiss pursuant to Civ. Rule 10(D)(2) is not a “provisional remedy” as defined in R.C. 2505.2. Rather, R.C. 2505.02 defines “provisional remedy” as:

- (A) As used in this section * * *
- (3) “Provisional remedy” means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, oppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, 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.

Focusing on the list, in the context of statutory interpretation, the phrase “including, but not limited to” is, itself, limited. This Court has stated that where a nonexhaustive list is preceded by the phrase “including but not limited to,” the canon of *ejusdem generis* applies and the general or unstated terms should be determined with reference to the terms expressly included. *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 151. However, “the rule of *ejusdem generis* should not be invoked to defeat the obvious purpose of a legislative enactment.” *State v. Warner* (1990), 55 Ohio St.3d 31, 62. Given the relatively recent legislative changes to R.C. 2505.02(A)(3), *ejusdem generis* should not be applied in a vacuum as though that statute were newly enacted as a complete listing but should be reasonably applied in conjunction with the rule against surplusage.

Accordingly, this Court has held that a basic rule of statutory construction requires that “words in statutes should not be construed to be redundant, nor should any words be ignored.” *E. Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299. Statutory language “must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” *Meyer v. Board Of Education, Lucas County* (1917), 95 Ohio St. 367, 372-373.

In this case, the list in R.C. 2505.02(A)(3) includes a preliminary injunction, attachment, discovery of privileged matter, and suppression of evidence. This was the entire list and it was already preceded by the words “but not limited to” prior to the statute's 2004 amendments. These “provisional remedies” involve situations wherein an adequate remedy at law, a timely appeal, is effectively denied because it is delayed while a party suffers immediate and irreparable harm. Applying *ejusdem generis*, it is easy to extend this list to include protection of trade secrets, disputes in zoning and construction, wrongful confinement and the like. See *GZK, Inc. v.*

Schumaker Ltd. Partnership, 2006-Ohio-3744 (protecting trade secrets is a provisional remedy); *Neighbors for Responsible Land Use v. Akron*, 2006-Ohio-6966 (disputes over zoning and construction are provisional remedies because the damage is already done); *State v. Upshaw*, 110 Ohio St.3d 189 (wrongful confinement is a provisional remedy). Never in Ohio has defending against a claim of medical malpractice ever been found to give rise to immediate and irreparable harm nor, predictably, is there any case law supporting that dubious proposition. Consequently, any analogy between a person being unjustly imprisoned, forever deprived of that liberty in a criminal context and a medical professional having to defend against a malpractice claim in a civil context is a *non sequitur*.

C. **The Legislative Changes to R.C. 2505.02 Do Not Demonstrate That Medical Malpractice Claims Are Provisional Remedies.**

The remaining items in the list in R.C. 2505.02(A)(3) are very specific in nature and include: (1) a prima-facie showing pursuant to section 2307.85 (App.3) or 2307.86 (App.4) of the Revised Code; (2) a prima-facie showing pursuant to section 2307.92 of the Revised Code (App.5); and (3) a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code (App.6). The legislature added the prima-facie showings specifically for R.C. 2307.85 and R.C. 2307.86, which deal only with silicosis and mixed dust disease respectively, in 2004 via Am.Sub.H.B. No. 342 § 1 (App.2). Given that the “but not limited to” wording *already* existed in R.C. 2505.02(A)(3), the legislature clearly felt that these prima-facie showings were sufficiently different from the provisional remedies already listed that these specific additions were required. Otherwise, the amendment would have been superfluous *ab initio*. It is also telling that the legislature amended the statute to include not one but *two* very narrow and distinct types of tort actions; silicosis and mixed dust disease claims. It cannot be logically maintained that where the legislature felt that two pulmonary or lung-related injury claims were not sufficiently related to fall

within the penumbra of the “but not limited to” wording of the very same statute, it somehow intended to include affidavits of merit in cases of botched eye surgeries.

Where two are telling, four are compelling. Again, in 2004, the legislature, via Am.Sub.H.B. No. 292 §1 (App.1), separately amended R.C.2505.02(A)(3) to add third and fourth “provisional remedies”; a prima-facie showing for R.C. 2307.92 and a finding pursuant to R.C. 2307.93, both applicable to asbestos claims and *only* asbestos claims. Not only did the legislature evidently believe asbestos claims were not sufficiently related to silicosis and mixed dust diseases claims to already be “provisional remedies” by virtue of the “but not limited to” wording of the statute and a logical relation to pulmonary injuries, but the legislature went so far as to distinguish between a prima-facie showing in asbestos claims and a finding of fact in asbestos claims. Thus, in 2004, the legislature deliberately amended R.C. 2505.02(A)(3) not to make the definition of “provisional remedy” generally broad and inclusive but only to add extremely specific statutorily required prima-facie showings and findings of fact in silicosis, mixed dust disease, and asbestos claims. Moreover, the legislative history of R.C. 2505.02(A)(3) shows both, that the legislature knows how to add new “provisional remedies” and that it has recently done so with great specificity. Civ.R. 10(D)(2), promulgated by this Court at the request of the legislature, became effective July 1, 2005. The Ohio General Assembly has not seen fit to modify R.C. 2505.02(A)(3) to include affidavits of merit in medical malpractice claims as a “provisional remedy” and there are no such bills pending.

Even assuming, arguendo, that *ejusdem generis* should be broadly applied to the specific statutory listings in R.C. 2505.02(A)(3), Civ.R. 10(D)(2) is still not a “provisional remedy” within the statute. The last items in the list in R.C. 2505.02(A)(3) applies to threshold evidentiary showings narrowly and specifically for prima-facie silicosis, mixed dust disease and asbestos claims and findings of fact in asbestos claims. See R.C. 2307.85-86; 2307.92-93. The claims in

this case are for medical malpractice, essentially a botched eye surgery resulting in Ms. Manley's skull being fractured multiple times. Moreover, Civ.R. 10(D)(2) makes it perfectly clear that affidavits of merit are *not* evidence or even to be used for impeachment, stating that “[a]n affidavit of merit ... *shall not otherwise be admissible as evidence* or used for purposes of impeachment. Civ. R. 10(D)(2)(c) (emphasis added). Where the prima-facie showings and findings of fact are evidence reviewed by a judge for support of a plaintiff's silicosis, mixed dust disease, or asbestos claim, an affidavit of merit is never evidence to be reviewed by any judge.

The stark differences between Civ.R. 10(D)(2) and prima-facie requirements for silicosis mix dust disease, and asbestos claims go even deeper. As detailed supra, Civ.R. 10(D)(2) *compels* a trial court to allow a medical malpractice claim to proceed when, for good cause, an affidavit of merit cannot be provided when the complaint is filed. Contrast this with the prima-facie requirements for silicosis, mixed dust disease, and asbestos claims which statutorily prevent the filing of the claims. R.C. 2307.85(B); R.C. 2307.86(B); 2307.92(B).

Moreover, the legislature has never expressed any intent whatsoever that affidavits of merit in medical claims cases were to be “provisional remedies” within R.C. 2505.02. The 2004 legislative bills that amended the definitions of “provision remedies” within R.C. 2505.02 explicitly evidence the intent of legislature. One need not analyze further than reading the intent the legislature documented in those bills for all posterity. In section 4 of the 2004 Am.Sub.H.B. No. 342, the General Assembly announced its intent in enacting that legislation and states that the intention was to approve use of the factors listed in *Lohrmann v. Pittsburgh Corning Cor.* (4th Cir. 1986), 782 F.2d 1156, effectively overruling the holding of this Court in *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679 at paragraph 2 of the syllabus, for the element of proximate causation “[w]here specific evidence of frequency of exposure to, or proximity and length of exposure to, a particular defendant's silica or mixed dust is lacking * * *.” Nowhere is

there an intent to make overruling a motion to dismiss pursuant to Civ.R. 10(B)(2) a “provisional remedy.”

In section 3 of the 2004 Am.Sub.H.B. No. 292, the General Assembly also announced its intent in enacting that legislation and states that essentially because asbestos claims were overburdening the judicial system and the legislation was intended to “* * * give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos * * *.” Again, nowhere is there the slightest expression of any intent to make overruling a motion to dismiss pursuant to Civ.R. 10(B)(2) a “provisional remedy.”

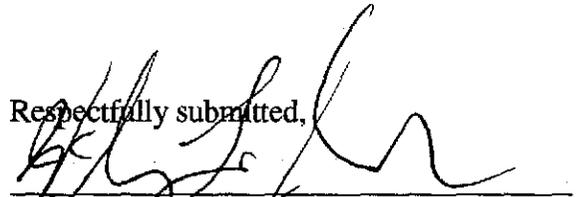
V. *CONCLUSION*

Civ.R. 6(B) allows the trial court the power to modify the deadline provisions of Civ.R. 10(D)(2)(b) when the trial court grants a plaintiff's motion to file the required affidavits of merit *instanter* and no “provisional remedy” is even implicated. Moreover, Civ.R. 10(D)(2), requiring affidavits of merit where medical claims are made, is not expressly a “provisional remedy” within R.C. 2505.02(A)(3). Applying *ejusdem generis*, overruling a motion to dismiss pursuant to Civ.R. 10(D)(2) neither implicates an immediate and irreparable harm nor does it involve silicosis, mixed dust disease, or asbestos claims. Finally, the legislature has never expressed an intent to include Civ.R. 10(D)(2) as a “provisional remedy” nor enacted any legislation or even submitted any bill that would add Civ.R. 10(D)(2) to the list of “provisional remedies” found in R.C. 2505.02(A)(3). Thus, Civ.R. 10(D)(2), a judiciary procedural rule is simply not a “provisional remedy” within the meaning of R.C. 2505.02(A)(3).

Because Civ.R. 10(D)(2) is not a “provisional remedy”, it cannot be a final order pursuant to R.C. 2505, et. seq. and, as the Twelfth District Court of Appeals properly determined, the trial court's overruling Dr. Marsico's and EMI's motions to dismiss based on Civ.R. 10(D)(2) were not final appealable orders.

For these reasons, Ms. Manley respectfully request this Court make holdings consistent with her two propositions of law herein.

Respectfully submitted,



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VII. APPENDIX

Am.Sub.H.B. No. 292 § 1.....1
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R.C. 2307.85.....3
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(125th General Assembly)
(Amended Substitute House Bill Number 292)

AN ACT

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

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

SECTION 1. That section 2505.02 be amended and sections 2307.91, 2307.92, 2307.93, 2307.94, 2307.941, 2307.95, 2307.96, and 2307.98 of the Revised Code be enacted to read as follows:

Sec. 2307.91. As used in sections 2307.91 to 2307.96 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(C) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(D) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(E) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(F) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(G) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(H) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(I) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(J) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(K) "Certified industrial hygienist" means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

(L) "Certified safety professional" means a safety professional who has met and continues to meet all

requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

(M) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(1) A civil action relating to any workers' compensation law;

(2) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(3) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(N) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under section 2307.92 of the Revised Code.

(O) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(P) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(Q) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (2000), as amended.

(R) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma.

(S) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(T) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(U) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(V) "Physical impairment" means a nonmalignant condition that meets the minimum requirements specified in division (B) of section 2307.92 of the Revised Code, lung cancer of an exposed person who is a smoker that meets the minimum requirements specified in division (C) of section 2307.92 of the Revised Code, or a condition of a deceased exposed person that meets the minimum requirements specified in division (D) of section 2307.92 of the Revised Code.

(W) "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes.

(X) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(Y) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways,

or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(Z) "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(AA) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(BB) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(CC) "Regular basis" means on a frequent or recurring basis.

(DD) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections 2307.92 and 2307.93 of the Revised Code, during the last fifteen years.

(EE) "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung.

(FF) "Substantial contributing factor" means both of the following:

(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.

(GG) "Substantial occupational exposure to asbestos" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled raw asbestos fibers;

(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers.

(HH) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer.

(II) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(JJ) "Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration.

(KK) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(LL) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code.

Sec. 2307.92. (A) For purposes of section 2305.10 and sections 2307.92 to 2307.95 of the Revised Code, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking

history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

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

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective

exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed person's occupational history and history of exposure to asbestos.

(2) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (C)(1)(c) of this section, and alleges that the plaintiff lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code, the plaintiff is considered as having satisfied the requirements specified in division (C)(1)(c) of this section.

(D)(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in section 2125.01 of the Revised Code of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(2) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section, and alleges that the exposed person lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(3) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under division (D)(1) or (2) of this section regarding a tort action of the type described in that division.

(E) No prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.

(F) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing

procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decisions are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

Sec. 2307.93. (A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

Sec. 2307.94. (A) Notwithstanding any other provision of the Revised Code, with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person has a cause of action for bodily injury pursuant to section 2305.10 of the Revised Code. An asbestos claim based upon a nonmalignant condition that is filed before the cause of action for bodily injury pursuant to that section arises is preserved for purposes of the period of limitations.

(B) An asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition.

(C) No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer.

Sec. 2307.941. (A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

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

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

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

(b) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the

premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from asbestos exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

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

(B) As used in this section:

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

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

(b) Cadmium: 0.10 milligrams per cubic meter;

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

(d) Lead: 0.15 milligrams per cubic meter;

(e) Manganese: 6.0 milligrams per cubic meter;

(f) Mercury: 0.10 milligrams per cubic meter;

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

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

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

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

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

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

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

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

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

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

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

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

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

- (h) The individual is required to devote full time to the business of the other contracting party.
- (i) The person is required to perform the work on the premises of the other contracting party.
- (j) The individual is required to follow the order of work set by the other contracting party.
- (k) The individual is required to make oral or written reports of progress to the other contracting party.
- (l) The individual is paid for services on a regular basis, including hourly, weekly, or monthly.
- (m) The individual's expenses are paid for by the other contracting party.
- (n) The individual's tools and materials are furnished by the other contracting party.
- (o) The individual is provided with the facilities used to perform services.
- (p) The individual does not realize a profit or suffer a loss as a result of the services provided.
- (q) The individual is not performing services for a number of employers at the same time.
- (r) The individual does not make the same services available to the general public.
- (s) The other contracting party has a right to discharge the individual.
- (t) The individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Sec. 2307.95. (A) Nothing in sections 2307.92 to 2307.95 of the Revised Code is intended to do, and nothing in any of those sections shall be interpreted to do, either of the following:

(1) Affect the rights of any party in bankruptcy proceedings;

(2) Affect the ability of any person who is able to make a showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11, to make a claim or demand against that trust.

(B) Sections 2307.91 to 2307.95 of the Revised Code shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

(C) Except as provided in division (D) of section 2307.92 of the Revised Code and in other provisions that relate to the application of that division and the procedures and criteria it contains, nothing in sections 2307.92, 2307.93, 2307.94, and 2307.95 of the Revised Code is intended, and nothing in any of those sections shall be interpreted, to affect any wrongful death claim, as described in section 2125.01 of the Revised Code.

Sec. 2307.96. (A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

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

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

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

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

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

(C) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of this section.

Sec. 2307.98. (A) A holder has no obligation to, and has no liability to, the covered entity or to any person with respect to any obligation or liability of the covered entity in an asbestos claim under the doctrine of piercing the corporate veil unless the person seeking to pierce the corporate veil demonstrates all of the following:

(1) The holder exerted such control over the covered entity that the covered entity had no separate mind, will, or existence of its own.

(2) The holder caused the covered entity to be used for the purpose of perpetrating, and the covered entity perpetrated, an actual fraud on the person seeking to pierce the corporate veil primarily for the direct pecuniary benefit of the holder.

(3) The person seeking to pierce the corporate veil sustained an injury or unjust loss as a direct result of the control described in division (A)(1) of this section and the fraud described in division (A)(2) of this section.

(B) A court shall not find that the holder exerted such control over the covered entity that the covered entity did not have a separate mind, will, or existence of its own or to have caused the covered entity to be used for the purpose of perpetrating a fraud solely as a result of any of the following actions, events, or relationships:

(1) The holder is an affiliate of the covered entity and provides legal, accounting, treasury, cash management, human resources, administrative, or other similar services to the covered entity, leases assets to the covered entity, or makes its employees available to the covered entity.

(2) The holder loans funds to the covered entity or guarantees the obligations of the covered entity.

(3) The officers and directors of the holder are also officers and directors of the covered entity.

(4) The covered entity makes payments of dividends or other distributions to the holder or repays loans owed to the holder.

(5) In the case of a covered entity that is a limited liability company, the holder or its employees or agents serve as the manager of the covered entity.

(C) The person seeking to pierce the corporate veil has the burden of proof on each and every element of the person's claim and must prove each element by a preponderance of the evidence.

(D) Any liability of the holder described in division (A) of this section for an obligation or liability that is limited by that division is exclusive and preempts any other obligation or liability imposed upon that holder for that obligation or liability under common law or otherwise.

(E) This section is intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in asbestos claims. Nothing in this section shall be construed as creating a right or cause of action that did not exist under the common law as it existed on the effective date of this section.

(F) This section applies to all asbestos claims commenced on or after the effective date of this section or commenced prior to and pending on the effective date of this section.

(G) This section applies to all actions asserting the doctrine of piercing the corporate veil brought against a holder if any of the following apply:

(1) The holder is an individual and resides in this state.

(2) The holder is a corporation organized under the laws of this state.

(3) The holder is a corporation with its principal place of business in this state.

(4) The holder is a foreign corporation that is authorized to conduct or has conducted business in this state.

(5) The holder is a foreign corporation whose parent corporation is authorized to conduct business in this state.

(6) The person seeking to pierce the corporate veil is a resident of this state.

(H) As used in this section, unless the context otherwise requires:

(1) "Affiliate" and "beneficial owner" have the same meanings as in section 1704.01 of the Revised Code.

(2) "Asbestos" has the same meaning as in section 2307.91 of the Revised Code.

(3) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes any of the following:

(a) A claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos;

(b) A claim for damage or loss to property that is caused by the installation, presence, or removal of asbestos.

(4) "Corporation" means a corporation for profit, including the following:

(a) A domestic corporation that is organized under the laws of this state;

(b) A foreign corporation that is organized under laws other than the laws of this state and that has had a certificate of authority to transact business in this state or has done business in this state.

(5) "Covered entity" means a corporation, limited liability company, limited partnership, or any other entity organized under the laws of any jurisdiction, domestic or foreign, in which the shareholders, owners, or members are generally not responsible for the debts and obligations of the entity. Nothing in this section limits or otherwise affects the liabilities imposed on a general partner of a limited partnership.

(6) "Holder" means a person who is the holder or beneficial owner of, or subscriber to, shares or any other ownership interest of a covered entity, a member of a covered entity, or an affiliate of any person who is the holder or beneficial owner of, or subscriber to, shares or any other ownership interest of a covered entity.

(7) "Piercing the corporate veil" means any and all common law doctrines by which a holder may be liable for an obligation or liability of a covered entity on the basis that the holder controlled the covered entity, the holder is or was the alter ego of the covered entity, or the covered entity has been used for the purpose of actual or constructive fraud or as a sham to perpetrate a fraud or any other common law doctrine by which the covered entity is disregarded for purposes of imposing liability on a holder for

the debts or obligations of that covered entity.

(8) "Person" has the same meaning as in section 1701.01 of the Revised Code.

Sec. 2505.02. (A) As used in this section:

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

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

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence, 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.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

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

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

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

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

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

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

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

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

SECTION 2. That existing section 2505.02 of the Revised Code is hereby repealed.

SECTION 3. (A) The General Assembly makes the following statement of findings and intent:

(1) Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases.

(2) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of fifty-four billion dollars have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range

from two hundred to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick.

(3) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts.

(a) Today, it is estimated that there are more than two hundred thousand active asbestos cases in courts nationwide. According to a recent RAND study, over six hundred thousand people have filed asbestos claims for asbestos-related personal injuries through the end of 2000.

(b) Before 1998, five states, Mississippi, New York, West Virginia, Texas, and Ohio, accounted for nine per cent of the cases filed. However, between 1998 and 2000, these same five states handled sixty-six per cent of all filings. Today, Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.

(c) According to testimony by Laura Hong, a partner at the law firm of Squire, Sanders & Dempsey who has been defending companies in asbestos personal injury litigation since 1985, there are at least thirty-five thousand asbestos personal injury cases pending in Ohio state courts today.

(d) If the two hundred thirty-three Ohio state court general jurisdictional judges started trying these asbestos cases today, Ms. Hong noted, each would have to try over one hundred fifty cases before retiring the current docket. That figure conservatively computes to at least one hundred fifty trial weeks or more than three years per judge to retire the current docket.

(e) The current docket, however, continues to increase at an exponential rate. According to Judge Leo Spellacy, one of two Cuyahoga County Common Pleas Court judges appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999 there were approximately twelve thousand eight hundred pending asbestos cases in Cuyahoga County. However, by the end of October 2003, there were over thirty-nine thousand pending asbestos cases. Approximately two hundred new asbestos cases are filed in Cuyahoga County every month.

(4) Nationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(a) As stated by Linda Woggon, Vice President of Governmental Affairs of the Ohio Chamber of Commerce, a recent RAND study found that during the first ten months of 2002, fifteen companies facing significant asbestos-related liabilities filed for bankruptcy and more than sixty thousand jobs have been lost because of these bankruptcies. The RAND study estimates that the eventual cost of asbestos litigation could reach as high as four hundred twenty-three thousand jobs.

(b) Joseph Stiglitz, Nobel award-winning economist, in "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," calculated that bankruptcies caused by asbestos have already resulted in the loss of up to sixty thousand jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated twenty-five thousand to fifty thousand dollars in wages over the worker's career, and at least a quarter of the accumulated pension benefits.

(c) At least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick.

(d) Owens Corning, a Toledo company, has been sued four hundred thousand times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy. The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off two hundred seventy-five workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of five hundred jobs and a fifteen-

million to twenty-million dollar annual reduction in regional income.

(e) According to testimony presented by Robert Bunda, a partner at the firm of Bunda, Stutz & DeWitt in Toledo, Ohio who has been involved with the defense of asbestos cases on behalf of Owens-Illinois for twenty-four years, at least five Ohio-based companies have gone bankrupt because of the cost of paying people who are not sick. Wage losses, pension losses, and job losses have significantly affected workers for the bankrupt companies like Owens Corning, Babcox & Wilcox, North American Refractories, and A-Best Corp.

(5) The General Assembly recognizes that the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment. Eighty-nine per cent of asbestos claims come from people who do not have cancer. Sixty-six to ninety per cent of these non-cancer claimants are not sick. According to a Tillinghast-Towers Perrin study, ninety-four per cent of the fifty-two thousand nine hundred asbestos claims filed in 2000 concerned claimants who are not sick. As a result, the General Assembly recognizes that reasonable medical criteria are a necessary response to the asbestos litigation crisis in this state. Medical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future. As stated by Dr. James Allen, a pulmonologist, Professor and Vice-Chairman of the Department of Internal Medicine at The Ohio State University, the medical criteria included in this act are reasonable criteria and are the first step toward ensuring that impaired plaintiffs are compensated. In fact, Dr. Allen noted that these criteria are minimum medical criteria. In his clinical practice, Dr. Allen stated that he always performs additional tests before assigning a diagnosis of asbestosis and would never rely solely on these medical criteria.

(6) The cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings, retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

(7) The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state's employees and the well being of the Ohio economy.

(B) In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

SECTION 4. (A) As used in this section, "asbestos," "asbestos claim," "exposed person," and "substantial contributing factor" have the same meanings as in section 2307.91 of the Revised Code.

(B) The General Assembly acknowledges the Supreme Court's authority in prescribing rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution.

(C) The General Assembly hereby requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of asbestos claims brought pursuant to sections 2307.91 to 2307.95 of the

Revised Code.

(D) With respect to procedures for venue in regard to asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that requires that an asbestos claim meet specific nexus requirements, including the requirement that the plaintiff be domiciled in Ohio or that Ohio is the state in which the plaintiff's exposure to asbestos is a substantial contributing factor.

(E) With respect to procedures for consolidation of asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that permits consolidation of asbestos claims only with the consent of all parties, and in absence of that consent, permits a court to consolidate for trial only those asbestos claims that relate to the same exposed person and members of the exposed person's household.

SECTION 5. It is the intent of the General Assembly in enacting section 2307.96 of the Revised Code in this act to establish specific factors to be considered when determining whether a particular plaintiff's exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. The consideration of these factors involving the plaintiff's proximity to the asbestos exposure, frequency of the exposure, or regularity of the exposure in tort actions involving exposure to asbestos is consistent with the factors listed by the court in *Lohrmann v. Pittsburgh Corning Cor.* (4th Cir. 1986), 782 F.2d 1156. The General Assembly by its enactment of those factors intends to clarify and define for judges and juries that evidence which is relevant to the common law requirement that plaintiff must prove proximate causation. It recognizes this section's language is contrary to the language contained in paragraph 2 of the Syllabus of the Ohio Supreme Court in *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679. However, the General Assembly also recognizes that the courts of Ohio prior to the *Horton* decision generally followed the rationale of the *Lohrmann* decision in determining whether plaintiff had submitted any evidence that a particular defendant's product was a substantial cause of the plaintiff's injury in tort actions involving exposure to certain hazardous or toxic substances, and that the *Lohrmann* factors were of great assistance to the trial courts in the consideration of summary judgment motions and to juries when deciding issues of proximate causation. The General Assembly further recognizes that a large number of states have adopted this standard. It has also held hearings where medical evidence has been submitted indicating such a standard is medically appropriate and is scientifically sound public policy. The *Lohrmann* standard provides litigants, juries, and the courts of Ohio an objective and easily applied standard for determining whether a plaintiff has submitted evidence sufficient to sustain plaintiff's burden of proof as to proximate causation. Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail. To submit a legal concept such as a "substantial factor" to a jury in these complex cases without such scientifically valid defining factors would be to invite speculation on the part of juries, something that the General Assembly has determined not to be in the best interests of Ohio and its courts.

SECTION 6. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

SECTION 7. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given effect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

SECTION 8. The General Assembly hereby requests the Supreme Court to collect data regarding the number of awards made pursuant to section 2323.42 or 2323.51 of the Revised Code to parties to civil actions in the courts of common pleas who were adversely affected by frivolous conduct as defined in section 2323.51 of the Revised Code or by the bringing of a civil action for which there was not a reasonable good faith basis

(125th General Assembly)
(Amended Substitute House Bill Number 342)

AN ACT

To amend section 2505.02 and to enact sections 2307.84 to 2307.90, 2307.901, and 2307.902 of the Revised Code to establish minimum medical requirements for filing certain silicosis claims or mixed dust disease claims, to establish premises liability in relation to those claims, to specify a plaintiff's burden of proof in tort actions involving exposure to silica or mixed dust, and to prescribe the requirements for shareholder liability for silicosis claims or mixed dust disease claims under the doctrine of piercing the corporate veil.

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

SECTION 1. That section 2505.02 be amended and sections 2307.84, 2307.85, 2307.86, 2307.87, 2307.88, 2307.89, 2307.90, 2307.901, and 2307.902 of the Revised Code be enacted to read as follows:

Sec. 2307.84. As used in sections 2307.84 to 2307.90 and 2307.901 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(C) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(D) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(E) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(F) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(G) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(H) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(1) A civil action relating to any workers' compensation law;

(2) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(3) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(I) "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 2307.85 or 2307.86 of the Revised Code, whichever is applicable, and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(J) "Exposed person" means either of the following, whichever is applicable:

(1) A person whose exposure to silica is the basis for a silicosis claim under section 2307.85 of the Revised Code;

(2) A person whose exposure to mixed dust is the basis for a mixed dust disease claim under section 2307.86 of the Revised Code.

(K) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (2000), as amended.

(L) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs.

(M) "Mixed dust" means a mixture of dusts composed of silica and one or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity.

(N) "Mixed dust disease claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with mixed dust. "Mixed dust disease claim" includes a claim made by or on behalf of any person who has been exposed to mixed dust, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to mixed dust.

(O) "Mixed dust pneumoconiosis" means the interstitial lung disease caused by the pulmonary response to inhaled mixed dusts.

(P) "Nonmalignant condition" means a condition, other than a diagnosed cancer, that is caused or may be caused by either of the following, whichever is applicable:

(1) Silica, as provided in section 2307.85 of the Revised Code;

(2) Mixed dust, as provided in section 2307.86 of the Revised Code.

(Q) "Pathological evidence of mixed dust pneumoconiosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar and parenchymal stellate (star-shaped) nodular scarring and that there is no other more likely explanation for the presence of the fibrosis.

(R) "Pathological evidence of silicosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of round silica nodules and birefringent crystals or other demonstration of crystal structures consistent with silica (well-organized concentric whorls of collagen surrounded by inflammatory cells) in the lung parenchyma and that there is no other more likely explanation for the presence of the fibrosis.

(S) "Physical impairment" means any of the following, whichever is applicable:

(1) A nonmalignant condition that meets the minimum requirements of division (B) of section 2307.85 of the Revised Code or lung cancer of an exposed person who is a smoker that meets the minimum requirements of division (C) of section 2307.85 of the Revised Code;

(2) A nonmalignant condition that meets the minimum requirements of division (B) of section 2307.86 of the Revised Code or lung cancer of an exposed person who is a smoker that meets the minimum requirements of division (C) of section 2307.86 of the Revised Code.

(T) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(U) "Radiological evidence of mixed dust pneumoconiosis" means a chest x-ray showing bilateral rounded or irregular opacities in the upper lung fields graded by a certified B-reader as at least 1/1 on the ILO scale.

(V) "Radiological evidence of silicosis" means a chest x-ray showing bilateral small rounded opacities (p, q, or r) in the upper lung fields graded by a certified B-reader as at least 1/1 on the ILO scale.

(W) "Regular basis" means on a frequent or recurring basis.

(X) "Silica" means a respirable crystalline form of silicon dioxide, including, but not limited to, alpha quartz, cristobalite, and trypmite.

(Y) "Silicosis claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with silica. "Silicosis claim" includes a claim made by or on behalf of any person who has been exposed to silica, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to silica.

(Z) "Silicosis" means an interstitial lung disease caused by the pulmonary response to inhaled silica.

(AA) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to section 2307.85 or 2307.86 and section 2307.87 of the Revised Code, during the last fifteen years.

(BB) "Substantial contributing factor" means both of the following:

(1) Exposure to silica or mixed dust is the predominate cause of the physical impairment alleged in the silicosis claim or mixed dust disease claim, whichever is applicable.

(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the silica or mixed dust exposures the physical impairment of the exposed person would not have occurred.

(CC) "Substantial occupational exposure to silica" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled silica;

(2) Fabricated silica-containing products so that the person was exposed to silica in the fabrication process;

(3) Altered, repaired, or otherwise worked with a silica-containing product in a manner that exposed the person on a regular basis to silica;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (CC)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to silica.

(DD) "Substantial occupational exposure to mixed dust" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled mixed dust;

(2) Fabricated mixed dust-containing products so that the person was exposed to mixed dust in the fabrication process;

(3) Altered, repaired, or otherwise worked with a mixed dust-containing product in a manner that exposed the person on a regular basis to mixed dust;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (DD)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to mixed dust.

(EE) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(FF) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(GG) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code.

Sec. 2307.85. (A) Physical impairment of the exposed person, to which the person's exposure to silica is a substantial contributing factor, shall be an essential element of a silicosis claim in any tort action.

(B) No person shall bring or maintain a tort action alleging a silicosis claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to silica is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the

person who is most knowledgeable about the exposures that form the basis of the silicosis claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, silica or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that both of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) The exposed person has silicosis based at a minimum on radiological or pathological evidence of silicosis.

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

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

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption and the plaintiff has the burden of proof to rebut the presumption.

(3) Both of the following:

(a) Radiological or pathological evidence of silicosis;

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

(D)(1) No person shall bring or maintain a tort action alleging a silicosis claim based on wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were the result of a medical condition, and that the person's exposure to silica was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to silica was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis under division (D)(1)(a) of this section or death of the exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Both of the following:

(i) Radiological or pathological evidence of silicosis;

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

(2) If a person files a tort action that alleges a silicosis claim based on wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person and further alleges in the action that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section and that the exposed person lived with the other person for the period of time specified in division (CC) of section 2307.84 of the Revised Code, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(E) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E, and F, and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(F) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by a silica-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decision are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

Sec. 2307.86. (A) Physical impairment of the exposed person, to which the person's exposure to mixed dust is a substantial contributing factor, shall be an essential element of a mixed dust disease claim in any tort action.

(B) No person shall bring or maintain a tort action alleging a mixed dust disease claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to mixed dust is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the mixed dust disease claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, mixed dust, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking

history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that both of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) The exposed person has mixed dust pneumoconiosis, based at a minimum on radiological or pathological evidence of mixed dust pneumoconiosis.

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

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

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to mixed dust until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(3) Both of the following:

(a) Radiological or pathological evidence of mixed dust pneumoconiosis;

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

(D)(1) No person shall bring or maintain a tort action alleging a mixed dust disease claim based on wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were the result of a medical condition, and that the person's exposure to mixed dust was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to mixed dust was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to mixed dust until the date of diagnosis under division (D)(1)(a) of this section or death of the exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Both of the following:

(i) Radiological or pathological evidence of mixed dust pneumoconiosis;

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

(2) If a person files a tort action that alleges a mixed dust disease claim based on wrongful death, as defined in section 2125.01 of the Revised Code, of an exposed person and further alleges in the action that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of

this section and that the exposed person lived with the other person for the period of time specified in division (DD) of section 2307.84 of the Revised Code, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(E) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(F) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by a mixed dust-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decision are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

Sec. 2307.87. (A) The plaintiff in any tort action who alleges a silicosis claim or a mixed dust disease claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.85 or division (B), (C), or (D) of section 2307.86 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.85 or division (B), (C), or (D) of section 2307.86 of the Revised Code, whichever is applicable. The defendant has one hundred twenty days from the date the prima-facie evidence of the exposed person's physical impairment is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in divisions (1)(1), (3), and (4) of section 2307.84 of the Revised Code.

(B) If the defendant challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.85 or division (B), (C), or (D) of section 2307.86 of the Revised Code, whichever is applicable. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by any of those divisions as applicable, by applying the standard for resolving a motion for summary judgment.

(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.85 or division (B), (C), or (D) of section 2307.86 of the Revised Code, whichever is applicable. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in any of those divisions as applicable.

(D) This section applies only to tort actions that allege a silicosis claim or a mixed dust disease claim and that are filed on or after the effective date of this section.

Sec. 2307.88. (A) Notwithstanding any other provision of the Revised Code, with respect to any silicosis claim or mixed dust disease claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment due to a nonmalignant condition. A silicosis claim or a mixed dust disease claim based upon a nonmalignant condition that is filed before the cause of action pursuant to this division arises is preserved for purposes of the period of limitations.

(B) A silicosis claim or a mixed dust disease claim that arises out of a nonmalignant condition shall be a distinct cause of action from a silicosis claim or a mixed dust disease claim, as the case may be, relating to the same exposed person that arises out of silica-related cancer or mixed dust-related cancer. No damages shall be awarded for fear or risk of cancer in any tort action asserting only a silicosis claim or a mixed dust disease claim for a nonmalignant condition.

(C) No settlement of a silicosis claim or a mixed dust disease claim for a nonmalignant condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for silica-related cancer or mixed dust-related cancer.

Sec. 2307.89. The following apply to all tort actions for silicosis or mixed dust disease claims brought against a premises owner to recover damages or other relief for exposure to silica or mixed dust on the premises owner's property:

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

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

(C)(1) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove products containing silica or mixed dust on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must demonstrate by a preponderance of the evidence that the premises owner had actual knowledge of the potential dangers of the products containing silica or mixed dust at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

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

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

cause of the plaintiff's medical condition.

(D) As used in this section:

(1) "Threshold limit values" means the maximum allowable concentration of silica, or other dust, set forth in regulation 247 of the "regulations for the prevention and control of diseases resulting from exposure to toxic fumes, vapors, mists, gases, and dusts in order to preserve and protect the public health," as adopted by the public health council of the department of health on January 1, 1947, and set forth by the industrial commission of Ohio in bulletin no. 203, "specific requirements and general safety standards of the industrial commission of Ohio for work shops and factories, chapter XV, ventilation and exhausts," effective January 3, 1955.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 2307.90. (A) Nothing in sections 2307.84 to 2307.90 of the Revised Code is intended to do, and nothing in any of those sections is interpreted to do, either of the following:

(1) Affect the rights of any party in bankruptcy proceedings;

(2) Affect the ability of any person who is able to make a showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11, to make a claim or demand against that trust.

(B) Sections 2307.84 to 2307.90 of the Revised Code shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

(C) Nothing in sections 2307.85, 2307.86, 2307.87, and 2307.88 of the Revised Code shall require or permit the exhumation of bodies in making the prima-facie showing as required by section 2307.85 or 2307.86 of the Revised Code or rebutting the presumption as provided in section 2307.85 or 2307.86 of the Revised Code.

Sec. 2307.901. (A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to silica or mixed dust as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

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

(1) The manner in which the plaintiff was exposed to the defendant's silica or mixed dust;

(2) The proximity of the defendant's silica or mixed dust to the plaintiff when the exposure to the defendant's silica or mixed dust occurred;

(3) The frequency and length of the plaintiff's exposure to the defendant's silica or mixed dust;

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

(C) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to silica or mixed dust and that are brought on or after the effective date of this section.

Sec. 2307.902. (A) A holder has no obligation to, and has no liability to, the covered entity or to any person with respect to any obligation or liability of the covered entity in a silicosis claim or a mixed dust disease claim under the doctrine of piercing the corporate veil unless the person seeking to pierce the corporate veil demonstrates all of the following:

(1) The holder exerted such control over the covered entity that the covered entity had no separate mind, will, or existence of its own.

(2) The holder caused the covered entity to be used for the purpose of perpetrating, and the covered entity perpetrated, an actual fraud on the person seeking to pierce the corporate veil primarily for the direct pecuniary benefit of the holder.

(3) The person seeking to pierce the corporate veil sustained an injury or unjust loss as a direct result of

the control described in division (A)(1) of this section and the fraud described in division (A)(2) of this section.

(B) A court shall not find that the holder exerted such control over the covered entity that the covered entity did not have a separate mind, will, or existence of its own or to have caused the covered entity to be used for the purpose of perpetrating a fraud solely as a result of any of the following actions, events, or relationships:

(1) The holder is an affiliate of the covered entity and provides legal, accounting, treasury, cash management, human resources, administrative, or other similar services to the covered entity, leases assets to the covered entity, or makes its employees available to the covered entity.

(2) The holder loans funds to the covered entity or guarantees the obligations of the covered entity.

(3) The officers and directors of the holder are also the officers and directors of the covered entity.

(4) The covered entity makes payments of dividends or other distributions to the holder or repays loans owed to the holder.

(5) In the case of a covered entity that is a limited liability company, the holder or its employees or agents serve as the manager of the covered entity.

(C) The person seeking to pierce the corporate veil has the burden of proof on each and every element of the person's claim and must prove each element by a preponderance of the evidence.

(D) Any liability of the holder described in division (A) of this section for an obligation or liability that is limited by that division is exclusive and preempts any other obligation or liability imposed upon that holder for that obligation or liability under common law or otherwise.

(E) This section is intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in silicosis claims and mixed dust disease claims. Nothing in this section shall be construed as creating a right or cause of action that did not exist under the common law as it existed on the effective date of this section.

(F) This section applies to all silicosis claims and mixed dust disease claims commenced on or after the effective date of this section or commenced prior to and pending on the effective date of this section.

(G) This section applies to all actions asserting the doctrine of piercing the corporate veil brought against a holder if any of the following apply:

(1) The holder is an individual and resides in this state.

(2) The holder is a corporation organized under the laws of this state.

(3) The holder is a corporation with its principal place of business in this state.

(4) The holder is a foreign corporation that is authorized to conduct or has conducted business in this state.

(5) The holder is a foreign corporation the parent corporation of which is authorized to conduct business in this state.

(6) The person seeking to pierce the corporate veil is a resident of this state.

(H) As used in this section, unless the context otherwise requires:

(1) "Affiliate" and "beneficial owner" have the same meanings as in section 1704.01 of the Revised Code.

(2) "Mixed dust," "mixed dust disease claim," "silica," and "silicosis claim" have the same meanings as in section 2307.84 of the Revised Code.

(3) "Covered entity" means a corporation, limited liability company, limited partnership, or any other entity organized under the laws of any jurisdiction, domestic or foreign, in which the shareholders, owners, or members are generally not responsible for the debts and obligations of the entity. Nothing in this section limits or otherwise affects the liabilities imposed on a general partner of a limited partnership.

(4) "Holder" means a person who is the holder, beneficial owner, or subscriber of shares or any other ownership interest of a covered entity, a member of a covered entity, or an affiliate of any person who is the holder, beneficial owner, or subscriber of shares or any other ownership interest of a covered entity.

(5) "Piercing the corporate veil" means any and all common law doctrines by which a holder may be liable for an obligation or liability of a covered entity on the basis that the holder controlled the covered entity, the holder is or was the alter ego of the covered entity, or the covered entity has been used for the purpose of actual or constructive fraud or as a sham to perpetrate a fraud or any other common law doctrine by which the covered entity is disregarded for purposes of imposing liability on a holder for the debts or obligations of that covered entity.

(6) "Person" has the same meaning as in section 1701.01 of the Revised Code.

Sec. 2505.02. (A) As used in this section:

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

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

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

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

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

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

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

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

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

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

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

(D) This section applies to and governs any action, including an appeal, that is pending in any court on ~~the effective date of this amendment~~ July 22, 1998, and all claims filed or actions commenced on or after ~~the effective date of this amendment~~ July 22, 1998, notwithstanding any provision of any prior

statute or rule of law of this state.

SECTION 2. That existing section **Sec. 2505.02.** of the Revised Code is hereby repealed.

SECTION 3. (A) As used in this section, "exposed person," "mixed dust," "mixed dust disease claim," "silica," "silicosis claim," and "substantial contributing factor" have the same meanings as in section 2307.84 of the Revised Code.

(B) The General Assembly acknowledges the Court's authority in prescribing rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution.

(C) The General Assembly hereby requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of silicosis claims or mixed dust disease claims brought pursuant to sections 2307.84 to 2307.90 of the Revised Code.

(D) With respect to procedures for venue in regard to silicosis claims or mixed dust disease claims, the General Assembly hereby requests the Supreme Court to adopt a rule that requires that a silicosis claim or a mixed dust disease claim meet specific nexus requirements, including the requirement that the plaintiff be domiciled in Ohio or that Ohio is the state in which the plaintiff's exposure to silica or mixed dust is a substantial contributing factor.

(E) With respect to procedures for consolidation of silicosis claims or mixed dust disease claims, the General Assembly hereby requests the Supreme Court to adopt a rule that permits consolidation of silicosis claims or mixed dust disease claims only with the consent of all parties, and in absence of that consent, permits a court to consolidate for trial only those silicosis claims or mixed dust disease claims that relate to the same exposed person and members of the exposed person's household.

SECTION 4. It is the intent of the General Assembly in enacting section 2307.901 of the Revised Code in this act to establish specific factors to be considered when determining whether a particular plaintiff's exposure to a particular defendant's silica or mixed dust was a substantial factor in causing the plaintiff's injury or loss. The consideration of these factors, involving the plaintiff's proximity to the dust exposure, frequency of the exposure, or regularity of the exposure in tort actions involving exposure to silica or mixed dust is consistent with the factors listed by the court in *Lohrmann v. Pittsburgh Corning Cor.* (4th Cir. 1986), 782 F.2d 1156. The General Assembly, by its enactment of these factors, intends to clarify and define for judges and juries the evidence that is relevant to the common law requirement that the plaintiff must prove proximate causation. The General Assembly recognizes that the language in section 2307.091 of the Revised Code, as enacted by this act, is contrary to the language contained in paragraph 2 of the Syllabus of the Ohio Supreme Court in *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679. However, the General Assembly also recognizes that the courts of Ohio prior to the *Horton* decision generally followed the rationale of the *Lohrmann* decision in determining whether a plaintiff had submitted any evidence that a particular defendant's product was a substantial cause of the plaintiff's injury in tort actions involving exposure to certain hazardous or toxic substances, and that the *Lohrmann* factors were of great assistance to the trial courts in the consideration of motions for summary judgment and to juries when deciding issues of proximate causation. The General Assembly further recognizes that a large number of states have adopted the *Lohrmann* standard. The General Assembly also has held hearings in which medical evidence has been submitted indicating that such a standard is medically appropriate and is scientifically sound public policy.

The *Lohrmann* standard provides litigants, juries, and the courts of Ohio an objective and easily applied standard for determining whether a plaintiff has submitted evidence that is sufficient to sustain the plaintiff's burden of proof as to proximate causation. Where specific evidence of frequency of exposure to, or proximity and length of exposure to, a particular defendant's silica or mixed dust is lacking, summary judgment is appropriate in tort actions involving silica or mixed dust because such a plaintiff

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

SECTION 5. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

SECTION 6. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given effect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

§ 2307.85

Statutes & Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2307: CIVIL ACTIONS

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

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

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

(B) No person shall bring or maintain a tort action alleging a silicosis claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to silica is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the silicosis claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, silica or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that both of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) The exposed person has silicosis based at a minimum on radiological or pathological evidence of silicosis.

(C) No person shall bring or maintain a tort action alleging that silica caused that person to contract lung cancer if the exposed person is or was also a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to silica is a substantial contributing factor to the medical

condition. That prima-facie showing shall include all of the following minimum requirements:

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

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption and the plaintiff has the burden of proof to rebut the presumption.

(3) Both of the following:

(a) Radiological or pathological evidence of silicosis;

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

(D)(1) No person shall bring or maintain a tort action alleging a silicosis claim based on wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were the result of a medical condition, and that the person's exposure to silica was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to silica was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis under division (D)(1)(a) of this section or death of the exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Both of the following:

(i) Radiological or pathological evidence of silicosis;

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

(2) If a person files a tort action that alleges a silicosis claim based on wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person and further alleges in the action that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section and that the exposed person lived with the other person for the period of time specified in division (CC) of section 2307.84 of the Revised Code, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(E) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease,

1991:144:1202-1218.

(F) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by a silica-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decision are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

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§ 2307.86

Statutes & Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2307: CIVIL ACTIONS

2307.86 Mixed dust disease claim - prima facie showing - evidence of physical impairment - effect of decision.

2307.86 Mixed dust disease claim - prima facie showing - evidence of physical impairment - effect of decision.

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

(B) No person shall bring or maintain a tort action alleging a mixed dust disease claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to mixed dust is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the mixed dust disease claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, mixed dust, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that both of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) The exposed person has mixed dust pneumoconiosis, based at a minimum on radiological or pathological evidence of mixed dust pneumoconiosis.

(C) No person shall bring or maintain a tort action alleging that mixed dust caused that person to contract lung cancer if the exposed person is or was also a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to mixed dust is a substantial contributing

factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

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

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to mixed dust until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(3) Both of the following:

(a) Radiological or pathological evidence of mixed dust pneumoconiosis;

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

(D)(1) No person shall bring or maintain a tort action alleging a mixed dust disease claim based on wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.87 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were the result of a medical condition, and that the person's exposure to mixed dust was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to mixed dust was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to mixed dust until the date of diagnosis under division (D)(1)(a) of this section or death of the exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Both of the following:

(i) Radiological or pathological evidence of mixed dust pneumoconiosis;

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

(2) If a person files a tort action that alleges a mixed dust disease claim based on wrongful death, as defined in section 2125.01 of the Revised Code, of an exposed person and further alleges in the action that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section and that the exposed person lived with the other person for the period of time specified in division (DD) of section 2307.84 of the Revised Code, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(E) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404,

Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(F) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by a mixed dust-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decision are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

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§ 2307.92

Statutes & Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2307: CIVIL ACTIONS

2307.92 Asbestos claim - prima facie showing - evidence of physical impairment - effect of decision.

2307.92 Asbestos claim - prima facie showing - evidence of physical impairment - effect of decision.

(A) For purposes of section 2305.10 and sections 2307.92 to 2307.95 of the Revised Code, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of

the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

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

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed person's occupational history and history of exposure to asbestos.

(2) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (C)(1)(c) of this section, and alleges that the plaintiff lived with

the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code, the plaintiff is considered as having satisfied the requirements specified in division (C)(1)(c) of this section.

(D)(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in section 2125.01 of the Revised Code of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(2) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section, and alleges that the exposed person lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(3) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under division (D)(1) or (2) of this section regarding a tort action of the type described in that division.

(E) No prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.

(F) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official

statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decisions are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

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§ 2307.93

Statutes & Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2307: CIVIL ACTIONS

2307.93 Asbestos claim - filing of evidence of physical impairment - challenge - administrative dismissal.

2307.93 Asbestos claim - filing of evidence of physical impairment - challenge - administrative dismissal.

(A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

- (i) A substantive right of a party to the case has been impaired.
- (ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the

exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

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§ RULE 10
Ohio Court Rules
RULES OF CIVIL PROCEDURE
TITLE III. PLEADINGS AND MOTIONS
RULE 10 Form of Pleadings

RULE 10. Form of Pleadings

(A) Caption; names of parties.

Every pleading shall contain a caption setting forth the name of the court, the title of the action, the case number, and a designation as in Rule 7(A). In the complaint the title of the action shall include the names and addresses of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(B) Paragraphs; separate statements.

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(C) Adoption by reference; exhibits.

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.

(D) Attachments to pleadings.

(1) Account or written instrument. When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

(2) Affidavit of merit; medical liability claim.

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. The affidavit of merit shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit.

(c) An affidavit of merit is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment.

(E) Size of paper filed.

All pleadings, motions, briefs, and other papers filed with the clerk, including those filed by electronic means, shall be on paper not exceeding 8 1/2 x 11 inches in size without backing or cover.

[Effective: July 1, 1970; amended effective July 1, 1985; July 1, 1991; July 1, 2005.]

Staff Note (July 1, 2005 Amendment)

Civ. R. 10 is amended in response to a request from the General Assembly contained in Section 3 of Sub. H.B. 215 of the 125th General Assembly, effective Sept. 13, 2004. The act amends and enacts provisions relative to medical, dental, optometric, and chiropractic malpractice actions, and Section 3 contains a request that the Supreme Court adopt a rule that "require[s] a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant."

Rule 10(D) Attachments to pleadings

Civ. R. 10(D) is retitled and reorganized to reflect the inclusion of a requirement in division (D)(2) that a medical liability complaint include an affidavit of merit concerning the alleged breach of the standard of care by each defendant to the action. Division (D)(2)(a) specifies three items that must be included in the affidavit and sets forth the qualifications of the person providing the affidavit of merit.

There may be instances in which multiple affidavits of merit are required as to a particular plaintiff. For example, the plaintiff may find it necessary to provide one affidavit that addresses only the issue of "standard of care" and a separate affidavit that addresses only the issue of injury caused by the breach of the standard of care.

Because there may be circumstances in which the plaintiff is unable to provide an affidavit of merit when the complaint is filed, division (D)(2)(b) of the rule requires the trial court, when good cause is shown, to provide a reasonable period of time for the plaintiff to obtain and file the affidavit. For example, "good cause" may exist in a circumstance where the plaintiff obtains counsel near the expiration of the statute of limitations, and counsel does not have sufficient time to identify a qualified health care provider to conduct the necessary review of applicable medical records and prepare an affidavit. Similarly, the relevant medical records may not have been provided to the plaintiff in a timely fashion. Further, there may be situations where the medical records do not reveal the names of all of the potential defendants and so until discovery reveals those names, it may be necessary to name a "John Doe" defendant. Once discovery has revealed the name of a previously unknown defendant and that person is added as a party, the affidavit of merit would then be required as to that newly named defendant. Under these or similar circumstances, the court must afford the plaintiff a reasonable period of time, once a qualified health care provider is

identified, to have the records reviewed and submit an affidavit that satisfies the requirements set forth in the rule.

Division (D)(2)(c) provides that an affidavit of merit is intended to establish the sufficiency of the complaint filed in a medical liability action and specifies that an affidavit of merit is not otherwise admissible as evidence or for purposes of impeachment.

The amendments to Rule 10 also include nonsubstantive changes.

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