

IN THE SUPREME COURT OF OHIO

LINDA ACKISON, Administratrix, etc.,

Appellee,

v.

ANCHOR PACKING CO., et al.,

Appellants.

CASE NO.:

07-0415

On Appeal from the Lawrence County
Court of Appeals,
Fourth Appellate District

Court of Appeals
Case No. 05 CA 46

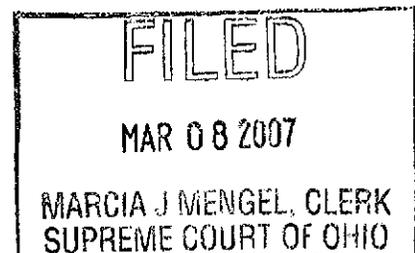
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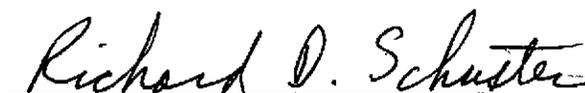
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NOTICE

On January 4, 2007, appellants filed a motion in the Fourth District Court of Appeals to certify a conflict between the Fourth District's opinion in *Ackison v. Anchor Packing Co., et al.*, 4th Dist. No. 05CA46, 2006-Ohio-7099 (attached as Exhibit A) and the Twelfth District Court of Appeal's decisions in *Wilson v. AC & S, Inc.* 12th Dist. No. CA2006-03-056, 2006-Ohio-6704 (attached as Exhibit B); *Staley v. AC&S, Inc.*, 12th Dist. No. CA2006-06-133, 2006-Ohio-7033 (attached as Exhibit C); and *Stahlheber v. Du Quebec, Ltee*, 12th Dist. No. CA2006-06-134, 2006-Ohio-7034 (attached as Exhibit D).¹ On February 28, 2007, the Fourth District granted appellants' motion and certified a conflict. (A copy of the Order certifying a conflict is attached as Exhibit E). In particular, the Fourth District certified the following issue: "Can R.C. 2307.91, 2307.92 and 2307.93 be applied to cases already pending on September 2, 2004?" Appellants therefore submit this notice in compliance with Supreme Court Practice Rule IV.

Respectfully submitted,



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¹ Appellants filed a discretionary appeal in this Court in connection with the above-captioned case on February 5, 2007. That appeal was assigned Case No. 2007-0219. In addition, a notice of appellants' motion to certify a conflict was filed with this Court on February 5, 2007.

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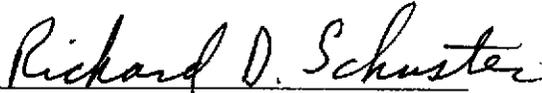
I certify that a copy of this Notice of Certified Conflict was sent by first-class U.S. mail, postage prepaid, this 8th day of March, 2007 to:

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APPENDIX

Slip Copy, 2006 WL 3861073 (Ohio App. 4 Dist.), 2006 -Ohio- 7099
(Cite as: Slip Copy)

C

Ackison v. Anchor Packing Co. Ohio App. 4 Dist., 2006.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Lawrence County.

LINDA ACKISON, as Administratrix of the Estate of Danny Ackison, Plaintiff-Appellant,

v.

ANCHOR PACKING CO., et al.,
Defendants-Appellees.

No. 05CA46.

Decided Dec. 20, 2006.

Civil Appeal from Common Pleas Court.

Richard E. Reverman and Kelly W. Thyne, Cincinnati, OH, for appellant.

Robin E. Harvey and Angela M. Hayden, Cincinnati, OH, for appellees Georgia Pacific.^{FN1}

FN1. The remaining counsel for appellees is too numerous to list in the caption. Instead, we included them in the appendix.

Jim Petro, Ohio Attorney General, and Holly J. Hunt, Assistant Attorney General, Columbus, OH, amicus curiae.

PER CURIAM.

*1 {¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment in favor of Anchor Packing Company and numerous other entities,^{FN2} defendants below and appellees herein.

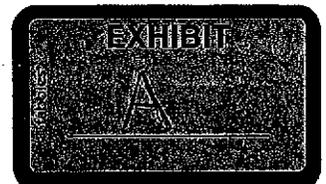
FN2. The other defendants are: (1) Beazer East, Inc.; (2) Clark Industrial Insulation Co.; (3) Crown Cork and Seal Company, Inc.; (4) CSR Limited; (5) Foseco, Inc.; (6) Foster Wheeler Energy Corporation; (7)

General Refractories Company; (8) Metropolitan Life Insurance Company; (9) Minnesota Mining and Manufacturing Company; (10) Ohio Valley Insulating Co., Inc.; (11) Owens-Illinois Corporation, Inc.; (12) Rapid-American Corp.; (13) Union Boiler Company; (14) Viacom, Inc.; (15) R.E. Kramig, Inc.; (16) McGraw Construction Company, Inc.; (17) McGraw/Kokosing, Inc.; (18) Frank W. Schaeffer, Inc.; (19) International Minerals and Chemical Corporation; (20) George P. Reintjes Company; (21) International Chemicals Company; (22) General Electric Company; (23) Georgia Pacific Corporation; (24) Uniroyal Holding, Inc.; (25) John Crane, Inc.; (26) Amchem Products, Inc.; (27) Certainteed Corp.; (28) Dana Corp.; (29) Maremont Corp.; (30) Pfizer, Inc.; (31) Quigley Co., Inc.; (32) Union Carbide Chemical and Plastics Co., Inc.; (33) Garlock, Inc.; (34) A.W. Chesterton Co.; (35) Mobile Oil Corp. aka Mobil Oil Corp.; (36) Wheeler Protective Apparel, Inc.; (37) Ingersoll-Rand Company; (38) D.B. Riley, Inc.; (39) Allied Corporation; (40) Lincoln Electric Co.; (41) Wagner Electric Company; (42) Aircro, Inc.; (43) Hobart Brothers Company; (44) Asarco, Inc.; (45) Cleaver Brooks Company; (46) Uniroyal, Inc.; (47) H.B. Fuller Co.; (48) Norton Company; (49) Industrial Holdings Company; (50) Bigelow Litpak Company; (51) John Doe 1 through 100.

*1 {¶ 1} Linda Ackison, as administratrix of the estate of Danny Ackison, deceased, and Linda Ackison, individually, plaintiffs below and appellants herein, raise the following assignments of error for review:

*1 FIRST ASSIGNMENT OF ERROR:

*1 "THE TRIAL COURT ERRED IN RULING THAT AN 'OTHER CANCER' AND



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ASBESTOSIS DIAGNOSIS HAS TO BE DIAGNOSED BY A COMPETENT MEDICAL AUTHORITY AS R.C. 2305.10 AS [SIC] H.B. 292, R.C. 2307.92, R.C. 2307.93, R.C. 2307.94, AND THEIR PROGENY ARE UNCONSTITUTIONAL WHEN APPLIED RETROACTIVELY."

*1 SECOND ASSIGNMENT OF ERROR:

*1 "THE TRIAL COURT ERRED IN FINDING THAT H.B. 292, R.C. 2307.92, R.C. 2307.93, R.C. 2307.94, AND ITS PROGENY REQUIRES PLAINTIFFS-APPELLANTS TO MEET A PRIMA FACIE CASE FOR BOTH AN ESOPHAGEAL CANCER AND ASBESTOSIS CLAIM."

*1 THIRD ASSIGNMENT OF ERROR:

*1 "THE TRIAL COURT ERRED IN FINDING THAT R.C. 2307.92(D) SETS FORTH CERTAIN MINIMUM REQUIREMENTS FOR BRINGING OR MAINTAINING A TORT ACTION ALLEGING AN ASBESTOS CLAIM THAT IS BASED UPON WRONGFUL DEATH AND THAT THESE REQUIREMENTS APPLY NO MATTER WHAT THE UNDERLYING DISEASE."

*1 {¶ 3} This case centers around appellants' ability to pursue recovery for alleged asbestos-related injuries and whether recently-enacted H.B. 292 governs appellants' claims. On May 5, 2004, appellants filed a multi-plaintiff, seventy-eight page complaint against appellees alleging various asbestos-related injuries. On September 2, 2004, H.B. 292 became effective. The legislation requires a plaintiff "in any tort action who alleges an asbestos claim [to] file * * * 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 [R.C. 2307.92(B), (C), or (D)], whichever is applicable." The statute also applies to cases that are pending on the legislation's effective date. The statute requires plaintiffs with cases pending before the effective day to submit, within one hundred twenty days following the effective date, evidence sufficient to meet the R.C. 2307.92 prima facie showing requirement.

*1 {¶ 4} R.C. 2307.92 specifies three types of plaintiffs who must establish a prima-facie showing: (1) plaintiffs alleging an asbestos claim based on a nonmalignant condition; (2) plaintiffs alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker; and (3) plaintiffs alleging an asbestos claim that is based upon a wrongful death. See R.C. 2307.92(B), (C), and (D). The statute does not specifically require a prima-facie showing regarding other asbestos-related claims. The statute requires each of the foregoing types of plaintiffs to show that a "competent medical authority" has, inter alia, diagnosed an asbestos-related injury. R.C. 2307.91(Z) defines "competent medical authority" as follows:

*2 "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 [R.C. 2307.92] and who meets the following requirements:

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

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

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

*2 (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;

*2 (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;

*2 (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

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agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

*2 (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 revenue from providing those services.

*2 {¶ 5} In an attempt to set forth a prima facie case, appellants stated: "Danny R. Ackinson's [sic ^{FN3}] radiological report diagnosed ulcerated distal esophagus cancer. A B-Read report showed small opacities of profusion 0/1 in the mid and lower lung zones bilaterally and circumscribed pleural thickening. Mr. Ackinson also signed an affidavit wherein he testifies he has worked with or in the vicinity of asbestos containing products and recalls the cutting, handling and application of asbestos containing products which produced visible dust to which he was exposed and inhaled. Mr. Ackinson's death certificate states that his cause of death was congestive heart failure and aortic stenosis. The evidence of ulcerated distal esophagus cancer in Mr. Ackinson's throat is proof that asbestos was a substantial contributing factor to Mr. Ackinson's esophageal cancer diagnosis." Appellants also asserted that applying H.B. 292 to their cause of action would be unconstitutionally retroactive and that it does not specifically apply to an esophageal cancer claim.

FN3. Appellants misspelled Ackison's name throughout the foregoing paragraph as contained in "Plaintiff Danny Ackison's Motion to Prove Plaintiffs' Prima Facie Case Under R.C. 2307 and Motion for Trial Setting."

*3 {¶ 6} The trial court denied appellants' "motion to prove prima facie case under R.C. 2307 and motion for trial setting." The court determined: (1) R.C. 2305.10 requires that for an asbestos-related cause of action to accrue, a competent medical

authority must inform the plaintiff that his injury is related to asbestos exposure; (2) R.C. 2307.92(D) sets forth certain minimum requirements for bringing or maintaining a tort action alleging an asbestos claim that is based upon a wrongful death and they apply no matter what plaintiff alleges is the underlying disease; (3) R.C. 2307.92(B) sets forth minimum requirements for maintaining a tort action alleging an asbestos claim based on a non-malignant condition; (4) R.C. 2307.93(A)(3)(a) provides that the provisions apply to claims that arose before the effective date of the law unless the court finds that a substantive right of the party has been impaired and that it violates Section 28, Article II of the Ohio Constitution; (5) appellant failed to meet the criteria for maintaining a wrongful death claim under R.C. 2307.92(D)-she failed to present evidence that the decedent's death would not have occurred without asbestos exposure; (7) appellant failed to meet the criteria for maintaining an injury claim for a non-malignant condition under R.C. 2307.92(B)-she failed to present evidence that the decedent was diagnosed by a competent medical authority with at least a Class 2 respiratory impairment and asbestosis or diffuse pleural thickening and that the asbestosis or diffuse pleural thickening is a substantial contributing factor to the decedent's physical impairment; (8) R.C. 2307.92 does not set forth specific criteria for maintaining an asbestos claim for esophageal cancer, but in order for a cause of action to accrue based upon bodily injury caused by asbestos exposure, a plaintiff must have been informed by competent medical authority that he has an asbestos related injury under R.C. 2305.10; appellant did not present such evidence and a cause of action for esophageal cancer has yet to accrue; and (9) the statute does not impair appellant's substantive rights; instead, the statutes define previously undefined terms. Thus, the court administratively dismissed appellants' claims.

*3 {¶ 7} This appeal followed.

I

*3 {¶ 8} In their first assignment of error, appellants assert that the trial court erred by failing to find the asbestos-related claim legislation

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unconstitutional because the legislation

*3 {¶ 9} retroactively changes the standard for bringing a claim. Appellants further contend that the trial court improperly concluded that a “competent medical authority,” as H.B. 292 defines that term, must diagnose the asbestos-related claims for the claims to accrue under R.C. 2305.10.

*3 {¶ 10} Appellees contend that the legislation is not unconstitutionally retroactive. Rather, they argue that the statutes are remedial and merely define and clarify terms used in earlier legislative enactments. Appellees further assert that R.C. 2307.93(A)(3)(a), the “savings clause,” prevents the legislation from being declared unconstitutionally retroactive. The “savings clause” provides that the legislation does not apply to a pending case if its application would unconstitutionally impair a claimant's vested rights in a particular case.

*4 {¶ 11} Initially, we state our agreement with appellees that the legislation itself is not unconstitutionally retroactive. R.C. 2307.93(A)(3)(a) provides:

*4 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 [R.C. 2307.92) are to be applied unless the court that has jurisdiction over the case finds both of the following:

*4 (i) A substantive right of the party has been impaired.

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

*4 Thus, because the legislation itself prohibits its application if it would result in unconstitutional retroactivity, the legislation could not be declared unconstitutionally retroactive.

*4 The legislature has left it open for courts to decide, on a case-by-case basis, whether its application to cases prior to the legislation's effective date would be unconstitutionally retroactive. Therefore, we limit our review to whether applying the legislation to appellant's case would be unconstitutionally retroactive.

*4 “Retroactive laws and retrospective application

of laws have received the near universal distrust of civilizations.’ *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 104, 522 N.E.2d 489; see, also, *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (noting that ‘the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic’). In recognition of the ‘possibility of the unjustness of retroactive legislation,’ *Van Fossen*, 36 Ohio St.3d at 104, 522 N.E.2d 489, Section 28, Article II of the Ohio Constitution provides that the General Assembly ‘shall have no power to pass retroactive laws.’ “

*4 *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 9.

*4 {¶ 12} The Ohio Supreme Court has interpreted Section 28, Article II of the Ohio Constitution to mean that the Ohio General Assembly may not pass retroactive, substantive laws. See *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, at ¶ 6; *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 352-353, 721 N.E.2d 28; *State ex rel. Slaughter v. Indus. Comm.* (1937), 132 Ohio St. 537, 542, 9 N.E.2d 505 (stating that the prohibition against retroactive laws “has reference only to laws which create and define substantive rights, and has no reference to remedial legislation”). Generally, a substantive statute is one that “impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.” *Bielat*, 87 Ohio St.3d at 354. In contrast, retroactive, remedial laws do not violate Section 28, Article II of the Ohio Constitution. *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; *Van Fossen*, 36 Ohio St.3d at 107. “[R]emedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570, citing *Van Fossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, 107, 522 N.E.2d 489.

*5 {¶ 13} Thus, to determine whether a law is unconstitutionally retroactive, a court must employ

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a two-part analysis: (1) a court must evaluate whether the General Assembly intended the statute to apply retroactively; and (2) the court must determine whether the statute is remedial or substantive.

*5 {¶ 14} In *Walls*, the court explained the first part of the analysis:

*5 “Because R.C. 1.48 establishes a presumption that statutes operate prospectively only, ‘[t]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply.’ *Van Fossen*, paragraph one of the syllabus. If there is no ‘ ‘ ‘ clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.’ ‘ ‘ *Id.* at 106, quoting *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753. If we can find, however, a ‘ clearly expressed legislative intent’ that a statute apply retroactively, we proceed to the second step, which entails an analysis of whether the challenged statute is substantive or remedial. *Cook*, 83 Ohio St.3d at 410; see, also, *Van Fossen*, paragraph two of the syllabus.”

*5 *Walls*, at ¶ 10. Thus, a court's inquiry into whether a statute may be constitutionally applied retroactively continues only after an initial finding that the General Assembly expressly intended that the statute be applied retroactively. *Van Fossen*, paragraph two of the syllabus.

*5 {¶ 15} In the case at bar, the General Assembly did express its intent for the legislation to apply retroactively. R.C. 2307.93 states that R.C. Chapter 2307 applies to cases pending as of the effective date of the legislation. Thus, we must consider whether the legislation is substantive or remedial.

*5 {¶ 16} “[A] statute is substantive when it does any of the following: impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations or liabilities as to a past transaction; creates a new right out of an act which gave no right and imposed no obligation when it occurred; creates a new right; gives rise to or takes away the right to sue or defend

actions at law.” *Van Fossen*, 36 Ohio St.3d at 107 (citations omitted); see, also, *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570. “In common usage, ‘substantive’ means ‘creating and defining rights and duties’ or ‘having substance: involving matters of major or practical importance to all concerned[.]’ MerriamWebster's Collegiate Dictionary (11 Ed.2003) 1245. A substantive law is the ‘part of the law that creates, defines, and regulates the rights, duties, and powers of parties.’ Black's Law Dictionary (7 Ed.1999) 1443.” *Gen. Elec. Lighting v. Koncelik*, Franklin App. Nos. 05AP-310 and 05AP-323, 2006-Ohio-1655, at ¶ 21

*6 {¶ 17} Conversely, “[r]emedial laws are those affecting only the remedy provided. These include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *Van Fossen*, 36 Ohio St.3d at 107 (footnotes omitted). “[L]aws which relate to procedures are ordinarily remedial in nature, including rules of practice, courses of procedure and methods of review.” *Van Fossen*, 36 Ohio St.3d at 108 (citations omitted). Remedial laws are “those laws affecting merely ‘the methods and procedure[s] by which rights are recognized, protected and enforced, not * * * the rights themselves.’ “ *Bielat*, 87 Ohio St.3d at 354, quoting *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205, 39 N.E.2d 148; see, also, *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 15. Remedial laws affect only the remedy provided, and include laws that “ ‘merely substitute a new or more appropriate remedy for the enforcement of an existing right.’ “ *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (2001), 91 Ohio St.3d 308, 316, 744 N.E.2d 751, quoting *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570; see, also, *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82, at ¶ 15 (stating that remedial provisions are just what the name denotes—those that affect only the remedy provided). “ ‘A statute undertaking to provide a rule of practice, a course of procedure or a method of review, is in its very nature and essence a remedial statute.’ “ *Lewis v. Connor* (1985), 21 Ohio St.3d 1, 3, 487 N.E.2d 285, quoting *Miami v.*

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Dayton (1915), 92 Ohio St. 215, 219, 110 N.E. 726. “Rather than addressing substantive rights, ‘remedial statutes involve procedural rights or change the procedure for effecting a remedy. They do not, however, create substantive rights that had no prior existence in law or contract.’ *Dale Baker Oldsmobile v. Fiat Motors of N. Am.*, (1986), 794 F.2d 213, 217.” *Euclid v. Sattler* (2001), 142 Ohio App.3d 538, 540, 756 N.E.2d 201; see, also, *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258, 259, 744 N.E.2d 708 (“Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, and generally come in the form of ‘rules of practice, courses of procedure, or methods of review.’”).

*6 {¶ 18} In *Van Fossen*, the Ohio Supreme Court determined that R.C. 4121.80(G) was unconstitutionally retroactive. The statute provided a definition of the term “substantially certain”: “ ‘Substantially certain’ means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.” Previously, the Ohio Supreme Court had defined substantial certainty as follows: “ ‘Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain * * * to occur * * *.’ ” *Id.* at 108-109, quoting *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 95, 472 N.E.2d 1046. The *Van Fossen* court stated that applying the new statute “ would remove appellees’ potentially viable, court-enunciated cause of action by imposing a new, more difficult statutory restriction upon appellees’ ability to bring the instant action.” *Id.* at 109. The court concluded that the statute “removes an employee’s potential cause of action against his employer by imposing a new, more difficult standard for the ‘intent’ requirement of a workers’ compensation intentional tort than that established [under common law].” *Id.*, paragraph four of the syllabus. The court concluded that this was a “new standard [that] constitute[d] a limitation, or denial of, a substantive right.” *Id.*

*7 {¶ 19} In *Kunkler*, the court determined that R.C. 4121.80(G)(1) was an unconstitutional,

substantive, retroactive law. The court rejected the argument that “the new statute merely reiterates the common-law definition of an intentional tort * * *.” *Id.* at 138. The court explained: “if the statute works no change in the common-law definition of intentional tort, the exercise in determining whether the statute applies to this case would be pointless.” *Id.* “Since the new statute purports to create rights, duties and obligations, it is (to that extent) substantive law.” *Id.*

*7 {¶ 20} In *Cook*, the court determined that the sexual offender registration requirements of R.C. Chapter 2950 were not unconstitutionally retroactive. The court noted that “under the former provisions, habitual sex offenders were already required to register with their county sheriff. Only the frequency and duration of the registration requirements have changed. * * * Further, the number of classifications has increased from one * * * to three * * *.” *Id.* at 411 (citations omitted). The court concluded that “the registration and address verification provisions of R.C. Chapter 2950 are de minimis procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950.” *Cook*, 83 Ohio St.3d at 412.

*7 {¶ 21} In *Bielat*, the court concluded that R.C. 1709.09(A) and 1709.11(D) constituted “remedial, curative statutes that merely provide a framework by which parties to certain investment accounts can more readily enforce their intent to designate a pay-on-death beneficiary.” *Id.* at 354. “[T]he relevant provisions of R.C. Chapter 1709 remedially recognize, protect, and enforce the contractual rights of parties to certain securities investment accounts to designate a pay-on-death beneficiary. Before the Act, Ohio courts did not consistently recognize and enforce similar rights.” *Id.* at 354-55. The new legislation “cure[d] a conflict between the pay-on-death registrations permitted in the Act and the formal requirements of our Statute of Wills.” *Id.* at 356.

*7 {¶ 22} In *Kilbane*, the court held that the settlement provisions in former R.C. 4123.65 were a course of procedure as part of the process for enforcing a right to receive workers compensation and, thus, was remedial legislation. The legislature

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had amended R.C. 4123.65 to remove the provision for Industrial Commission hearings on applications for settlement approval in State Fund claims.

*7 {¶ 23} Two Ohio common pleas court cases have concluded that H.B. 292 constitutes unconstitutional retroactive legislation when applied to cases pending before the legislation's effective date. In *In Re Special Docket No. 73958*, January 6, 2006, three Cuyahoga County Common Pleas Court judges determined that retroactively applying H.B. 292 violates Section 28, Article II of the Ohio Constitution because it requires "a plaintiff who filed his suit prior to the effective date of the statute to meet an evidentiary threshold that extends above and beyond the common law standard-the standard that existed at the time [the] plaintiff filed his claim." The court noted that Ohio common law required "a plaintiff seeking redress for asbestos-related injuries * * * to show that asbestos had caused an alteration of the lining of the lung without any requirement that he meet certain medical criteria before filing his claim," (citing *In re Cuyahoga County Asbestos Cases* (1998), 127 Ohio App.3d 358, 364, 713 N.E.2d 20),^{FN4} and that H.B. 292 imposed new requirements regarding the quality of medical evidence to establish a prima facie asbestos-related claim. The court stated that the legislation "can retroactively eliminate the claims of those plaintiffs whose right to bring suit not only vested, but also was exercised." Because the court found application of the act unconstitutional, it applied R.C. 2307.93(A)(3)(b) which states that "in the event a court finds the retroactive application of the act unconstitutional, 'the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.' " If the plaintiff does not meet the prior standard, the court should administratively dismiss the claims. See R.C. 2307.93(A)(3)(c).

FN4. The *Asbestos Cases* court explained the common law standard as follows:
"[I]n Ohio the asbestos-related pleural thickening or pleural plaque, which is an alteration to the lining of the lung,

constitutes physical harm, and as such satisfies the injury requirement for a cause of action for negligent failure to warn or for a strict products liability claim, even if no other harm is caused by asbestos. *Verbryke v. Owens-Corning Fiberglas Corp.* (1992), 84 Ohio App.3d 388, 616 N.E.2d 1162. The *Verbryke* court noted that 'even if Robert Verbryke's disease is asymptomatic it does not necessarily mean he is unharmed in the sense of the traditional negligence action.' *Verbryke*, supra, at 395, 616 N.E.2d at 1167." *Id.* at 364.

*8 {¶ 24} In *Thorton v. A-Best Products*, Cuyahoga C.P. Nos. CV-99-395724, CV-99-386916, CV-01-450637, CV-95-293526, CV-95-293588-072, CV-95-296215, CV-03-499468, CV-95-293312-002, CV-00-420647, CV-02-482141, the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive. The court determined that H.B. 292 is substantive, as opposed to remedial, legislation: "[T]he Act's imposition of new, higher medical standards for asbestos-related claims is a substantive alteration of existing Ohio law which will have the effect of retroactively eliminating the claims of plaintiffs whose rights to bring suit previously vested." While the court concluded that applying H.B. 292 to the plaintiffs' case would be unconstitutionally retroactive, it did not declare the legislation itself unconstitutional. The court found that the legislation cannot be unconstitutionally retroactive because R.C. 2307.93(A)(3)(a) precludes its application if to do so would violate Section 28, Article II of the Ohio Constitution.

*8 {¶ 1} The court rejected the defendants' argument that the Act did not create a new standard for asbestos-related claims-similar to the argument appellees raise in the case sub judice:

*8 "Under R.C. 2305.10, Defendants argue it was the law of Ohio that an asbestos personal injury claim does not accrue until the plaintiff has developed an asbestos-related bodily injury and has been told by 'competent medical authority' that his injury was caused by his exposure to asbestos.

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However, in 1982 the legislature did not define the terms 'competent medical authority' and 'injury' in R.C. 2305.10. Defendants argue that the Act does not change the requirements for the accrual of an asbestos-related injury. Rather, the Act establishes minimum medical requirements and prima facie provisions to provide definitions and substantive standards for the provisions included by the legislature in R.C. 2305.10."

*8 In rejecting the defendants' argument, the court noted that H.B. 292 requires the diagnosis of a "competent medical authority" and provides a specific definition of that phrase. "In contrast, R.C. 2305.10 does not define 'competent medical authority.' In the absence of a statutory definition, that meaning is supplied by common usage and common law." The court noted that no definition exists in the case law and thus, H.B. 292 requires medical experts "to 'jump additional hurdles' before they are permitted to walk into court."

*8 {¶ 26} In the case at bar, applying R.C. Chapter 2307 to appellants' cause of action would remove their potentially viable, common law cause of action by imposing a new, more difficult statutory standard upon their ability to maintain the asbestos-related claims. The statute requires a plaintiff filing certain asbestos-related claims to present "competent medical authority" to establish a prima facie case. The statute specifically defines "competent medical authority" and places limits on who qualifies as "competent medical authority." Previously, no Ohio court had placed such restrictions on what constituted competent medical authority. Instead, courts generally accepted medical authority that complied with the Rules of Evidence. This represents a change in the law, not simply a change in procedure or in the remedy provided. Therefore, the change is substantive and applying R.C. Chapter 2307 to appellants' asbestos-related claims would be unconstitutional. The legislation creates a new standard for maintaining an asbestos claim that was pending before the legislation's effective date and prohibits appellants from maintaining this cause of action unless they comply with the new statutory requirements. Because these requirements represent

a substantive change in the law, they are not mere remedial requirements. Instead, they are substantive changes and may not be constitutionally applied retroactively. However, because the legislation contains a savings provision, the legislation itself is not unconstitutional. Thus, we conclude that applying H.B. 292 to appellants asbestos-related claims would be an unconstitutionally retroactive application.

*9 {¶ 27} We disagree with appellees' assertion that the General Assembly, by enacting H.B. 292, simply "clarified" the law regarding asbestos-related litigation and R.C. 2305.10. In *Nationwide Mut. Ins. Co. v. Kidwell* (1996), 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309, we observed that the General Assembly has the authority to clarify its prior acts. See *Martin v. Martin* (1993), 66 Ohio St.3d 110, 609 N.E.2d 537, fn. 2; *Ohio Hosp. Assn. v. Ohio Dept. of Human Serv.* (1991), 62 Ohio St.3d 97, 579 N.E.2d 695, fn. 4; *State v. Johnson* (1986), 23 Ohio St.3d 127, 131, 491 N.E.2d 1138; *Hearing v. Wylie* (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921. We explained:

*9 "When the Ohio General Assembly clarifies a prior Act, there is no question of retroactivity. If, however, the clarification substantially alters substantive rights, any attempt to make the clarification apply retroactively violates Section 28, Article II, Ohio Constitution. In *Hearing [v. Wylie]* (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921], the court wrote as follows:

*9 'Appellee has argued that the change made by the General Assembly in Section 4123.01, Revised Code, was not an amendment but was merely a clarification of what the General Assembly had always considered the law to be. There is, therefore, according to appellee, no question of retroactiveness so far as the application of the amendment to this action is concerned.

*9 With this contention we cannot agree. The General Assembly was aware of the decisions of this court interpreting the word, "injury ." Those interpretations defined substantive rights given to the injured workmen to be compensated for their injuries. Those substantive rights were substantially altered by the General Assembly when it amended the definition of "injury." To attempt to make that substantive change applicable to actions pending at

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the time of the change is clearly an attempt to make the amendment apply retroactively and is thus violative of Section 28, Article II, Constitution of Ohio.' (Emphasis added.) *Id.*, 173 Ohio St. at 224, 19 O.O.2d at 43-44, 180 N.E.2d at 923."

*9 *Nationwide Mut. Ins. Co. v. Kidwell* (1996), 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309.

*9 {¶ 28} In the case sub judice, H.B. 292 does not simply "clarify" prior legislation. Rather, H.B. 292 represents entirely new legislation that changes the legal requirements for filing an asbestos-related claim. Before the legislation, a plaintiff was not required to set forth a prima-facie case. To the extent the legislation attempts to change the definition of "competent medical authority" in R.C. 2305.10, it is unconstitutional retroactive legislation when applied to cases pending before the effective date. Before the legislation's effective date, "competent medical authority" did not have the same stringent requirements that the legislation imposes. Instead, whether a plaintiff presented "competent medical authority" generally was determined by examining the rules of evidence. By purporting to change the definition of "competent medical authority" as used in R.C. 2305.10,^{FN5} the legislation effects a substantive change in the meaning of that phrase.

FN5. We also question whether H.B. 292's definition of "competent medical authority" applies to R.C. 2305.10. The definition itself states that "competent medical authority" means a medical doctor who is providing a diagnosis for purposes of establishing a prima facie case under R.C. 2307.92; it does not state that it means a medical doctor who is providing a diagnosis for purposes of determining whether a claim accrued under R.C. 2305.10.

*10 {¶ 20} Consequently, we conclude that H.B. 292 cannot constitutionally be retroactively applied to appellants' asbestos-related claims. We therefore remand the case to the trial court so that it can evaluate appellants' cause of action under Ohio

common law.

*10 {¶ 30} Accordingly, we hereby sustain appellants' first assignment of error, reverse the trial court's judgment and remand the matter for further proceedings. Our disposition of appellants' first assignment of error renders their remaining assignments of error moot and we will not address them. See App.R. 12(A)(1)(c).

***10 JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.**

JUDGMENT ENTRY

*10 It is ordered that the judgment be reversed and the matter remanded for further proceedings consistent with this opinion. Appellant shall recover of appellees costs herein taxed.

*10 The Court finds there were reasonable grounds for this appeal.

*10 It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

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

HARSHA, P.J.: Concurr in Judgment Only.
ABELE, J. & McFARLAND, J.: Concur in Judgment & Opinion.

APPENDIX

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Wilson v. AC&S, Inc. Ohio App. 12 Dist., 2006.
Court of Appeals of Ohio, Twelfth District, Butler
County.
WILSON, Appellee,
v.
AC&S, INC., et al., Appellants.
No. CA2006-03-056.
No. CA2006-03-056.
Decided Dec. 18, 2006.

Background: Wife, individually and as personal representative of husband's estate, brought asbestos personal injury and wrongful death claims against companies engaged in mining, processing, manufacturing, or selling, or distributing asbestos or asbestos-containing products or machinery, alleging husband's exposure to asbestos or asbestos-containing products or machinery in his work at steel plant had caused his lung disease and other ailments. The Court of Common Pleas, Butler County, No. CV2001-12-3029, ruled that statutes addressing asbestos liability claims could be applied retroactively to wife's action. Wife appealed.

Holding: The Court of Appeals, Young, J., held that statutes addressing prima facie showing of asbestos liability were remedial, and thus, retroactive application of statutes did not violate state constitutional provision generally prohibiting retroactive laws.

Reversed and remanded.

[1] Constitutional Law 92 ⇐45

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions

92k45 k. Judicial Authority and Duty in General. Most Cited Cases
The decision as to whether or not a statute is constitutional presents a question of law.

[2] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Questions of law are reviewed de novo, independently, and without deference to the trial court's decision.

[3] Constitutional Law 92 ⇐48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
Ohio statutes enjoy a strong presumption of constitutionality.

[4] Constitutional Law 92 ⇐48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases



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Constitutional Law 92 ⇌48(3)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(3) k. Doubtful Cases; Construction to Avoid Doubt. Most Cited Cases

An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.

[5] Constitutional Law 92 ⇌48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.

[6] Constitutional Law 92 ⇌48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

The presumption of validity of a legislative enactment cannot be overcome unless it appears that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.

[7] Constitutional Law 92 ⇌92

92 Constitutional Law

92VI Vested Rights

92k92 k. Constitutional Guaranties in General. Most Cited Cases

Constitutional Law 92 ⇌186

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k186 k. Constitutional Prohibitions in General. Most Cited Cases

The Ohio Constitution generally prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments. Const. Art. 2, § 28.

[8] Constitutional Law 92 ⇌188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

The Retroactivity Clause of the Ohio Constitution nullifies those new laws that reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective. Const. Art. 2, § 28.

[9] Constitutional Law 92 ⇌186

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k186 k. Constitutional Prohibitions in General. Most Cited Cases

Constitutional Law 92 ⇌188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

Retroactivity of laws itself is not always forbidden by the Ohio Constitution, and although the language of the Ohio Constitution provides that the General Assembly "shall have no power to pass retroactive laws," there is a crucial distinction between statutes that merely apply retroactively or retrospectively,

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and those that do so in a manner that offends the Ohio Constitution. Const. Art. 2, § 28.

[10] Constitutional Law 92 ↪188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

A “retroactive law,” within meaning of Ohio constitutional provision generally prohibiting retroactive laws, is a law made to affect acts or facts occurring, or rights accruing, before it came into force. Const. Art. 2, § 28.

[11] Constitutional Law 92 ↪188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively, and if so, the court moves on to the question of whether the statute is substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial, rendering it constitutionally retroactive. Const. Art. 2, § 28.

[12] Constitutional Law 92 ↪190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ↪2

313A Products Liability

313AI Scope in General

313AI(A) Products in General

313Ak2 k. Constitutional and Statutory

Provisions. Most Cited Cases

General Assembly expressly intended that statutes, requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure

to asbestos was substantial contributing factor to the medical condition, would be applied retroactively, as element for determining whether statutes were unconstitutionally retroactive. Const. Art. 2, § 28; R.C. §§ 2307.91, 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

General Assembly expressly intended that statutes, requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition, would be applied retroactively, as element for determining whether statutes were unconstitutionally retroactive. Const. Art. 2, § 28; R.C. §§ 2307.91, 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[13] Constitutional Law 92 ↪190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

A retroactive statute is “substantive,” and therefore unconstitutionally retroactive, if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction. Const. Art. 2, § 28.

[14] Constitutional Law 92 ↪186

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k186 k. Constitutional Prohibitions in General. Most Cited Cases

One of the primary purposes of the Retroactivity Clause in the Ohio Constitution, which generally prohibits retroactive laws, is to prevent the legislature from invading or interfering with the vested rights of individuals. Const. Art. 2, § 28.

[15] Constitutional Law 92 ↪190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights

--- N.E.2d ----, 2006 WL 3703350 (Ohio App. 12 Dist.), 2006 -Ohio- 6704
(Cite as: --- N.E.2d ----)

and Obligations. Most Cited Cases

A "vested right," which is protected by Retroactivity Clause of Ohio Constitution, which clause generally prohibits retroactive laws, may be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right. Const. Art. 2, § 28.

[16] Constitutional Law 92 ⇌190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

"Vested right," which is protected by Retroactivity Clause of Ohio Constitution, which clause generally prohibits retroactive laws, is one which it is proper for the state to recognize and protect, and which an individual cannot be deprived of arbitrarily without injustice, or without his or her consent. Const. Art. 2, § 28.

[17] Constitutional Law 92 ⇌190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

A right cannot be considered a "vested right," as would be protected by Retroactivity Clause of Ohio Constitution, which clause generally prohibits retroactive laws, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of existing laws. Const. Art. 2, § 28.

[18] Constitutional Law 92 ⇌105

92 Constitutional Law

92VI Vested Rights

92k105 k. Rights of Action and Defenses. Most Cited Cases

After a cause of action has accrued, it cannot be taken away or diminished by legislative action.

[19] Constitutional Law 92 ⇌92

92 Constitutional Law

92VI Vested Rights

92k92 k. Constitutional Guaranties in General. Most Cited Cases

Constitutional Law 92 ⇌277(1)

92 Constitutional Law

92XII Due Process of Law

92k277 Property and Rights Therein Protected

92k277(1) k. In General. Most Cited Cases
There is no property right or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority.

[20] Constitutional Law 92 ⇌190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

When the Ohio Supreme Court interprets a key word or phrase in a statute, those interpretations define substantive rights given to persons who are affected by the statute, and if those substantive rights are substantially altered by the General Assembly when it amends the definition of that key word or phrase, then the amendment cannot be made to apply retroactively to any action pending at the time of the change, since such a retroactive application of a substantive provision would violate the Retroactivity Clause of the Ohio Constitution. Const. Art. 2, § 28.

[21] Constitutional Law 92 ⇌190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ⇌2

313A Products Liability

313AI Scope in General

313AI(A) Products in General

313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

--- N.E.2d ---, 2006 WL 3703350 (Ohio App. 12 Dist.), 2006 -Ohio- 6704
(Cite as: --- N.E.2d ---)

Statute defining "substantial contributing factor," for purposes of making prima facie showing, in asbestos liability case, that exposure to asbestos was substantial contributing factor to the exposed person's medical condition, did not substantially alter Ohio Supreme Court's interpretation of "substantial factor," which interpretation adopted the definition of "substantial factor" in the Restatement (Second) of Torts, and thus, retroactive application of the statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(1), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

Statute defining "substantial contributing factor," for purposes of making prima facie showing, in asbestos liability case, that exposure to asbestos was substantial contributing factor to the exposed person's medical condition, did not substantially alter Ohio Supreme Court's interpretation of "substantial factor," which interpretation adopted the definition of "substantial factor" in the Restatement (Second) of Torts, and thus, retroactive application of the statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(1), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

[22] Constitutional Law 92 ↪191

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k191 k. Laws Relating to Remedies. Most Cited Cases

Products Liability 313A ↪2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statute defining "competent medical authority," for purposes of making prima facie showing, in asbestos liability case, that a competent medical

authority determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred, was remedial or procedural rather than substantive, and thus, retroactive application of statute, to actions pending on date the statute became effective, did not violate Ohio Constitution's general prohibition of retroactive laws; before enactment of statute, neither General Assembly nor Ohio Supreme Court had defined "competent medical authority." Const. Art. 2, § 28; R.C. §§ 2305.10, 2307.91(Z), (FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

Statute defining "competent medical authority," for purposes of making prima facie showing, in asbestos liability case, that a competent medical authority determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred, was remedial or procedural rather than substantive, and thus, retroactive application of statute, to actions pending on date the statute became effective, did not violate Ohio Constitution's general prohibition of retroactive laws; before enactment of statute, neither General Assembly nor Ohio Supreme Court had defined "competent medical authority." Const. Art. 2, § 28; R.C. §§ 2305.10, 2307.91(Z), (FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[23] Constitutional Law 92 ↪190

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ↪2

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statute imposing "but for" requirement, to establish prima facie case of asbestos liability, that a competent medical authority determined with a reasonable degree of medical certainty that without

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the asbestos exposure the physical impairment of the exposed person would not have occurred, was consistent with state's long-standing definition of "proximate cause" and with Ohio Supreme Court's interpretation of "substantial factor," which interpretation adopted the definition of "substantial factor" in Restatement (Second) of Torts, which definition incorporated "cause," and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

Statute imposing "but for" requirement, to establish prima facie case of asbestos liability, that a competent medical authority determined with a reasonable degree of medical certainty that without the asbestos exposure the physical impairment of the exposed person would not have occurred, was consistent with state's long-standing definition of "proximate cause" and with Ohio Supreme Court's interpretation of "substantial factor," which interpretation adopted the definition of "substantial factor" in Restatement (Second) of Torts, which definition incorporated "cause," and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(FF)(2), 2307.92(B, C, D), 2307.93(A)(1, 2, 3); Restatement (Second) of Torts § 431 cmt. a.

[24] Negligence 272 ↻379

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases

Negligence 272 ↻384

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and

Distinctions

272k384 k. Continuous Sequence; Chain of Events. Most Cited Cases

The "proximate cause" of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred.

[25] Constitutional Law 92 ↻190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Products Liability 313A ↻2

313A Products Liability

313AI Scope in General

313AI(A) Products in General

313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Statute requiring prima facie showing, in asbestos liability case brought by smoker or in wrongful death case based on asbestos exposure, either of substantial occupational exposure to asbestos or of exposure equal to "25 fiber per cc years," did not displace any statute or Ohio Supreme Court case law, and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(GG), 2307.92(C)(1)(c), (D)(1)(c), 2307.93(A)(1, 2, 3).

Statute requiring prima facie showing, in asbestos liability case brought by smoker or in wrongful death case based on asbestos exposure, either of substantial occupational exposure to asbestos or of exposure equal to "25 fiber per cc years," did not displace any statute or Ohio Supreme Court case law, and thus, retroactive application of statute, to actions pending when statute became effective, did not violate general constitutional prohibition of retroactive laws. Const. Art. 2, § 28; R.C. §§ 2307.91(GG), 2307.92(C)(1)(c), (D)(1)(c), 2307.93(A)(1, 2, 3).

[26] Constitutional Law 92 ↻191

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92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

A retroactive statute is "remedial," and therefore does not violate general constitutional prohibition of retroactive laws, if it is one that affects only the remedy provided; this includes laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. Const. Art. 2, § 28.

[27] Constitutional Law 92 ⇌ 191

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

A "remedial" statute, which can be applied retroactively without violating general constitutional prohibition of retroactive laws, is one that merely affects the methods and procedure by which rights are recognized, protected and enforced, not the rights themselves. Const. Art. 2, § 28.

[28] Constitutional Law 92 ⇌ 191

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

Products Liability 313A ⇌ 2

313A Products Liability

313AI Scope in General

313AI(A) Products in General

313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition were "remedial" rather than substantive, and thus, retroactive application of the statutes to actions pending on date the statutes became effective, as was expressly intended by General Assembly, did not violate Ohio

Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such ambiguities had resulted in extraordinary volume of cases that had strained state's courts and had threatened to overwhelm the judicial system. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition were "remedial" rather than substantive, and thus, retroactive application of the statutes to actions pending on date the statutes became effective, as was expressly intended by General Assembly, did not violate Ohio Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such ambiguities had resulted in extraordinary volume of cases that had strained state's courts and had threatened to overwhelm the judicial system. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[29] Constitutional Law 92 ⇌ 193

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k192 Curative Acts

92k193 k. In General. Most Cited Cases

Products Liability 313A ⇌ 2

313A Products Liability

313AI Scope in General

313AI(A) Products in General

313Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing

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factor to the medical condition were curative, and thus, retroactive application of the statutes to actions pending on date the statutes became effective did not violate Ohio Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such clarifications were meant to address problem of overwhelming volume of asbestos liability cases filed by plaintiffs who were not sick, which cases compromised the ability of plaintiffs who were sick to receive compensation. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

Statutes requiring a plaintiff bringing asbestos liability claim to make prima facie showing that the exposed person has physical impairment resulting from a medical condition and that such person's exposure to asbestos was substantial contributing factor to the medical condition were curative, and thus, retroactive application of the statutes to actions pending on date the statutes became effective did not violate Ohio Constitution's general prohibition of retroactive laws; statutes clarified the meaning of ambiguous phrases like "bodily injury caused by exposure to asbestos" and "competent medical authority," and such clarifications were meant to address problem of overwhelming volume of asbestos liability cases filed by plaintiffs who were not sick, which cases compromised the ability of plaintiffs who were sick to receive compensation. Const. Art. 2, § 28; R.C. §§ 2305.10(B)(5), 2307.91(E), 2307.92(B, C, D), 2307.93(A)(1, 2, 3).

[30] Constitutional Law 92 ⇨193

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k192 Curative Acts

92k193 k. In General. Most Cited Cases

Retroactive curative laws do not violate the general constitutional prohibition of retroactive laws. Const. Art. 2, § 28.

[31] Constitutional Law 92 ⇨70.3(4)

92 Constitutional Law

92III Distribution of Governmental Powers and

Functions

92III(B) Judicial Powers and Functions

92k70 Encroachment on Legislature

92k70.3 Inquiry Into Motive, Policy, Wisdom, or Justice of Legislation

92k70.3(4) k. Wisdom. Most Cited

Cases

It is not a court's function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation.

[32] Constitutional Law 92 ⇨70.3(3)

92 Constitutional Law

92III Distribution of Governmental Powers and Functions

92III(B) Judicial Powers and Functions

92k70 Encroachment on Legislature

92k70.3 Inquiry Into Motive, Policy, Wisdom, or Justice of Legislation

92k70.3(3) k. Policy. Most Cited

Cases

The Ohio General Assembly, and not the Supreme Court, is the proper body to resolve public policy issues.

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS Case No. CV2001-12-3029

Price Waicukauski & Riley, L.L.C., William N. Riley, and Christopher Moeller, for appellee.

Motley, Rice, L.L.C., John J. McConnell, and Vincent L. Greene, for appellee.

Vorys, Sater, Seymour & Pease, L.L.P., Richard D. Schuster, and Nina I Webb-Lawton; Rosemary D. Welsh, for appellants 3M Company, Oglebay Norton Company, Certainteed Corporation, and Union Carbide.

Oldham & Dowling and Reginald S. Kramer, for appellant CBS Corporation.

Baker & Hostetler L.L.P., Robin E. Harvey, and Angela M. Hayden, for appellants Uniroyal, Inc., and Georgia-Pacific.

Gallagher Sharp, Kevin C. Alexanderson, John A. Valenti, and Colleen Mountcastle, for appellant Ingersoll-Rand Corporation.

Buckley King, L.P.A., and Jeffrey W. Ruple, for

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(Cite as: --- N.E.2d ----)

appellant Cleaver-Brooks.

Sutter, O'Connell & Farchione Co., L.P.A., Matthew C. O'Connell, and Douglas R. Simek, for appellants Riley Stoker Corporation and Garlock Sealing Technologies, L.L.C.

McCarthy, Lebit, Crystal & Liffman, Co., L.P.A., and David A. Schaefer, for appellant Rapid American Corporation.

Jim Petro, Attorney General, and Holly J. Hunt, Assistant Attorney General, for amicus curiae Ohio Attorney General Jim Petro.

Bunda, Stutz & DeWitt, and Robert Bunda, for amicus curiae Owens-Illinois, Inc. Price Waicukauski & Riley, L.L.C., William N. Riley, and Christopher Moeller, for appellee. Motley, Rice, L.L.C., John J. McConnell, and Vincent L. Greene, for appellee. Vorys, Sater, Seymour & Pease, L.L.P., Richard D. Schuster, and Nina I Webb-Lawton; Rosemary D. Welsh, for appellants 3M Company, Oglebay Norton Company, Certainteed Corporation, and Union Carbide. Oldham & Dowling and Reginald S. Kramer, for appellant CBS Corporation. Baker & Hostetler L.L.P., Robin E. Harvey, and Angela M. Hayden, for appellants Uniroyal, Inc., and Georgia-Pacific. Gallagher Sharp, Kevin C. Alexanderson, John A. Valenti, and Colleen Mountcastle, for appellant Ingersoll-Rand Corporation. Buckley King, L.P.A., and Jeffrey W. Ruple, for appellant Cleaver-Brooks. Sutter, O'Connell & Farchione Co., L.P.A., Matthew C. O'Connell, and Douglas R. Simek, for appellants Riley Stoker Corporation and Garlock Sealing Technologies, L.L.C. McCarthy, Lebit, Crystal & Liffman, Co., L.P.A., and David A. Schaefer, for appellant Rapid American Corporation. Jim Petro, Attorney General, and Holly J. Hunt, Assistant Attorney General, for amicus curiae Ohio Attorney General Jim Petro. Bunda, Stutz & DeWitt, and Robert Bunda, for amicus curiae Owens-Illinois, Inc. WILLIAM W. YOUNG, Judge.

*1 {¶ 1} This matter is before us on an appeal ^{FN1} by numerous appellants who are challenging a decision of the Butler County Court of Common Pleas' finding that the asbestos claim of plaintiff-appellee, Barbara Wilson, individually and as personal representative of the estate of Chester Wilson, is governed by the law as it existed prior to

the effective date of 2004 Am.Sub.H.B. No. 292 ("H.B. 292").

*1 {¶ 2} From 1964 to his retirement in April 2000, Chester Wilson was employed by A.K. Steel Corporation, formerly known as Armco Steel Corporation, located in Butler County, Ohio. Mr. Wilson worked in various jobs around the plant, including the position of furnace tender. On August 4, 2000, Mr. Wilson, who was a two-or-three-pack-a-day smoker, was diagnosed with lung cancer.

*1 {¶ 3} On December 14, 2001, Mr. Wilson filed a complaint against a number of companies (hereinafter "appellants" ^{FN2}) that have been engaged in the mining, processing, manufacturing, or sale, and distribution of asbestos or asbestos-containing products or machinery. Mr. Wilson alleged that he had been exposed to asbestos or asbestos-containing products or machinery in his occupation and that appellants were responsible for his lung disease and related physical ailments from which he suffered.

*1 {¶ 4} On April 15, 2003, Mr. Wilson died of lung cancer. Thereafter, Mr. Wilson's wife, Barbara Wilson, was substituted as the party in interest for the deceased Mr. Wilson.

*1 {¶ 5} On September 2, 2004, H.B. 292 went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B) through (D) and 2307.93(A)(1).

*1 {¶ 6} In March 2005, appellee filed a motion, with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. Appellants filed a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow her case to proceed and requesting that appellee's case be administratively dismissed.

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*1 {¶ 7} On August 30, 2005, the trial court held a hearing on the parties' various assertions regarding appellee's asbestos claim. At the hearing, appellee acknowledged that her evidence was insufficient to establish the prima facie showing required under H.B. 292. Nevertheless, appellee argued that H.B. 292 should not apply to her asbestos claim because applying the new law to her claim would amount to an unconstitutional retroactive application of the law.

*1 {¶ 8} On February 24, 2006, the trial court issued an order holding that the retroactive application of H.B. 292 was substantive rather than merely remedial in its effect and therefore violates Section 28, Article II of the Ohio Constitution. Consequently, the trial court announced its intention to "adjudicate substantive issues in asbestos cases filed before September 2, 2004 according to the law as it existed prior to [H.B. 292]'s enactment, and [to] administratively dismiss, without prejudice, any claim that fails to meet the requisite evidentiary threshold." The trial court journalized its order on March 7, 2006.

*2 {¶ 9} Appellants now appeal from the trial court's March 7, 2006 order ^{FN3} and assign the following as error:

*2 {¶ 10} Assignment of Error No. 1:

*2 {¶ 11} "The trial court erred in interpreting R.C. 2307.92 and concluding that the statute would violate the Ohio Constitution."

*2 {¶ 12} Appellants argue that the trial court erred in concluding that retrospectively applying certain provisions in H.B. 292 to this case would violate the ban on retroactive legislation in Section 28, Article II of the Ohio Constitution. We agree with this argument.

I

*2 {¶ 13} **OVERVIEW OF OHIO'S PERSONAL INJURY ASBESTOS LITIGATION SYSTEM-PAST and PRESENT**

A

*2 {¶ 14} *Ohio's Personal Injury Asbestos Litigation System-Pre-H.B. 292*

*2 {¶ 15} In 1980, the General Assembly amended R.C. 2305.10 to state when a cause of action for an asbestos-related personal injury arises or accrues under Ohio law. 138 Ohio Laws, Part II, 3412. R.C. 2305.10(B)(5) now states:

*2 {¶ 16} "[A] cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first."

*2 {¶ 17} Prior to September 2, 2004, the General Assembly had never defined the terms "bodily injury caused by exposure to asbestos" or "competent medical authority."

B

*2 {¶ 18} *Ohio's Asbestos Litigation Crisis*

*2 {¶ 19} Asbestos claims have created a vastly increased amount of litigation in the state and federal courts in this country, which the United States Supreme Court has characterized as "an elephantine mass" of cases. H.B. 292, Section 3(A); *Ortiz v. Fibreboard Corp.* (1999), 527 U.S. 815, 821, 119 S.Ct. 2295, 144 L.Ed.2d 715.

*2 {¶ 20} The extraordinary volume of nonmalignant asbestos cases continues to strain federal and state courts. H.B. 292, Section 3(A). Over 600,000 people in the United States have filed asbestos claims for asbestos-related personal injuries through the end of 2000, and it is estimated that there are currently more than 200,000 active asbestos cases in courts nationwide.

*2 {¶ 21} One report suggests "that at best, only

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one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date." Id. Another study estimates that \$54 billion have already been spent on asbestos litigation. Id. Estimates of the total costs of all asbestos claims range from \$200 to 265 billion. Id.

*2 {¶ 22} Before 1998, Ohio, Mississippi, New York, West Virginia, and Texas accounted for nine per cent of all filings of asbestos claims. However, between 1998 and 2000, these same five states handled 66 percent of all asbestos filings. As a result, Ohio has now become a haven for asbestos claims and is one of the top five state-court venues for asbestos filings. Id.

*3 {¶ 23} There are at least 35,000 asbestos personal-injury cases pending in Ohio state courts. Id. If the 233 Ohio state-court general jurisdictional judges started trying these asbestos cases today, each would have to try over 150 cases before retiring the current docket. H.B. 292, Section 3(A). That figure conservatively computes to at least 150 trial weeks, or more than three years per judge to retire the current docket. Id.

*3 {¶ 24} "The current docket, however, continues to increase at an exponential rate." Id. For example, in 1999 there were approximately 12,800 pending asbestos cases in Cuyahoga County. Id. However, by the end of October 2003, there were over 39,000 pending asbestos cases. Id. Approximately 200 new asbestos cases are filed in Cuyahoga County every month. Id.

*3 {¶ 25} Asbestos personal-injury litigation has already contributed to the bankruptcy of more than 70 companies nationwide, including nearly all manufacturers of asbestos textile and insulation products. Id. "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." Id.

*3 {¶ 26} The General Assembly has recognized "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." Id. Indeed, 89 percent of asbestos claims come from people who do not have cancer, and 66 to 90 percent of these noncancer claimants are not sick. Id. Furthermore, according to one study, 94 percent of the 52,900 asbestos claims filed in the year 2000 involved claimants who are not sick. Id.

*3 {¶ 27} Tragically, plaintiffs with asbestos claims are receiving less than 43 cents on every dollar awarded, and 65 per cent of the compensation paid, thus far, has gone to claimants who are not sick. Id.

C

*3 {¶ 28} *Amended Substitute House Bill 292*

*3 {¶ 29} H.B. 292 was signed into law on June 3, 2004, and took effect on September 2, 2004. The key portions of the law are codified in R.C. 2307.91 to 2307.98. The basic purpose of the law is to resolve this state's asbestos-litigation crisis.

1

*3 {¶ 30} *Legislative Intent in Enacting H.B. 292*

*3 {¶ 31} Section 3(B) of H.B. 292 states:

*3 {¶ 32} "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.”

2

*4 {¶ 33} R.C. 2307.92: *Prima Facie Showing of Minimum Medical Requirements*

*4 {¶ 34} R.C. 2307.92 establishes the minimum medical requirements that a plaintiff with an asbestos claim must meet in order to maintain the action and requires the plaintiff to make a prima facie showing of those minimum requirements. The provisions of R.C. 2307.92 categorize asbestos claimants into three distinct categories: (1) claimants who are advancing an asbestos claim based on “a non-malignant condition,” R.C. 2307.92(B); (2) claimants who are advancing an asbestos claim based upon “lung cancer of an exposed person who is a smoker,” R.C. 2307.92(C)(1); and (3) claimants who are advancing an asbestos claim that is based upon “a wrongful death * * * of an exposed person[.]” R.C. 2307.92(D)(1).

*4 {¶ 35} The case sub judice involves a claimant, i.e., appellant, who is acting as the personal representative of her late husband, who was a smoker. Appellant claims that her late husband's lung cancer was caused by his exposure to asbestos. Appellant is also bringing a wrongful-death claim. Therefore, appellant's claims would be governed by R.C. 2307.92(C)(1) and (D)(1), assuming that the relevant provisions of H.B. 292 can be applied retroactively to this case.

*4 {¶ 36} R.C. 2307.92(C)(1) prohibits any person from bringing or maintaining 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 R.C. 2307.93(A), 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. The prima facie showing must include all of the following minimum requirements:

*4 {¶ 37} “(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;

*4 {¶ 38} “(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. * * *

*4 {¶ 39} “(c) Either of the following:

*4 {¶ 40} “(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

*4 {¶ 41} “(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 * * *.”

*4 {¶ 42} R.C. 2307.92(D)(1) requires a similar prima facie showing to be made by a claimant who is bringing or maintaining an asbestos claim that is based upon a wrongful death.

3

*4 {¶ 43} R.C. 2307.93: *Filing of Prima Facie Evidence*

*4 {¶ 44} R.C. 2307.93(A)(1) requires the plaintiff in an asbestos action to file, within 30 days after filing the complaint or other initial pleading, “a written report and supporting test results constituting prima-facie [sic] evidence of the exposed person's physical impairment that meets the minimum requirements specified in [R.C. 2307.92(B), (C), or (D)], whichever is applicable.” The defendant in the case has 120 days from the date the specified type of prima facie evidence is proffered to challenge the adequacy of that evidence. R.C. 2307.93(A)(1).

*5 {¶ 45} If the defendant in an asbestos action challenges the adequacy of the prima facie evidence of the exposed person's physical impairment as provided in R.C. 2307.93(A)(1), the trial court,

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using the standard for resolving a motion for summary judgment, must determine whether the proffered prima facie evidence meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D). R.C. 2307.93(B).

*5 {¶ 46} If the trial court finds that the plaintiff failed to make the requisite prima facie showing, the court must administratively dismiss the plaintiff's claim without prejudice. R.C. 2307.93(C). Any plaintiff whose case has been administratively dismissed may move to reinstate his or her case if the plaintiff makes a prima facie showing that meets the requirements of R.C. 2307.92(B), (C), or (D). R.C. 2307.93(C).

*5 {¶ 47} R.C. 2307.93(A)(2) provides that with respect to any asbestos claim that is pending on the effective date of the statute, the plaintiff must file the written report and supporting test results described in R.C. 2307.93(A)(1) within 120 days following the effective date of the statute. The trial court, upon plaintiff's motion and for good cause shown, may extend the 120-day period in which the written report and supporting test results must be filed.

4

*5 {¶ 48} *The "Savings Clause" in R.C. 2307.93(A)(3)(b)*

*5 {¶ 49} R.C. 2307.93(A)(3) contains a "savings clause," which provides that for any cause of action arising before the effective date of this section, the provisions set forth in R.C. 2307.92(B), (C), and (D) are to be applied unless the court finds that "[a] substantive right of a party to the case has been impaired" and that "that impairment is otherwise in violation of Section 28 of Article II of the Ohio Constitution." If the court makes both of those findings, it must apply the law that is in effect prior to the effective date of R.C. 2307.93. See R.C. 2307.93(A)(3)(b).

*5 {¶ 50} If the court finds that the plaintiff has failed to provide sufficient evidence to support his or her cause of action under R.C. 2307.93(A)(3)(b),

the court must administratively dismiss the plaintiff's claim without prejudice, and with the court retaining jurisdiction over the case. R.C. 2307.93(A)(3)(c). Any plaintiff whose case has been administratively dismissed may move to reinstate the case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action under the law that was in effect when the plaintiff's cause of action arose. Id.

5

*5 {¶ 51} *H.B. 292's Definition of Key Phrases*

*5 {¶ 52} H.B. 292 defines at least one phrase not previously defined by either the General Assembly or the Ohio Supreme Court, namely, "competent medical authority."

*5 {¶ 53} R.C. 2307.91(Z) defines "competent medical authority" as meaning 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 R.C. 2307.92. The medical doctor must also be a "board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist," R.C. 2307.91(Z)(1), who "is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person." R.C. 2307.91(Z)(2).

*6 {¶ 54} Furthermore, as the basis for the diagnosis, the medical doctor must not have relied, in whole or in part, on 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 (1) 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; (2) that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process; or (3) that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or

screening. R.C. 2307.91(Z)(3)(a) through (c).

*6 {¶ 55} Additionally, the medical doctor must not spend more than 25 percent of his or her 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 must not earn more than 20 percent of its revenues from providing those services. R.C. 2307.91(Z)(4).

*6 {¶ 56} “[B]odily injury caused by exposure to asbestos” is defined, for purposes of R.C. 2305.10 and R.C. 2307.92 to 2307.95, as “physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.” “Substantial contributing factor,” in turn, is defined to mean that “[e]xposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim[.]” and that “[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.” R.C. 2307.91(FF)(1) and (2).

*6 {¶ 57} Finally, R.C. 2307.91(G)(G) defines “substantial occupational exposure to asbestos” as meaning “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 * * * (1) [h]andled raw asbestos fibers; (2) [f]abricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process; (3) [a]ltered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers; or (4) [w]orked in close proximity to other workers engaged in any of the activities described in [R.C. 2307.91(GG)(1), (2), or (3)] in a manner that exposed the person on a regular basis to asbestos fibers.”

II

*6 {¶ 58} **RETROACTIVE APPLICATION**

OF R.C. 2307.91, 2307.92, and 2307.93

*6 {¶ 59} Appellants assert that the trial court erred in finding that the retroactive application of several provisions of H.B. 292 to appellee's asbestos claim violates the Ohio Constitution. We agree with appellants' argument.

A

*7 {¶ 60} *Standard of Review; Presumption of Constitutionality*

*7 [1][2] {¶ 61} The decision as to whether or not a statute is constitutional presents a question of law. *Andreyko v. Cincinnati*, 153 Ohio App.3d 108, 791 N.E.2d 1025, 2003-Ohio-2759, ¶ 11. “Questions of law are reviewed de novo, independently, and without deference to the trial court's decision.” (Footnote omitted.) *Id.*

*7 [3][4][5][6] {¶ 62} “[Ohio] statutes enjoy a strong presumption of constitutionality. ‘An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.’ *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, * * * paragraph one of the syllabus. ‘A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.’ *Id.* at 147, 128 N.E.2d 59 * * *. ‘That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.’ *Xenia v. Schmidt* (1920), 101 Ohio St. 437, 130 N.E. 24, * * * paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600 * * *; *Dickman*, 164 Ohio St. at 147 * * *.” *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570.

B

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*7 {¶ 63} *Test for Unconstitutional Retroactivity*

721 N.E.2d 28.

*7 {¶ 64} The test for determining whether a statute may be applied retroactively was summarized in *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 721 N.E.2d 28:

*7 [7][8] {¶ 65} "Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments. *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99 * * *. The retroactivity clause nullifies those new laws that 'reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].' *Miller v. Hixson* (1901), 64 Ohio St. 39, 51 * * *.

*7 [9][10] {¶ 66} " * * * [R]etroactivity itself is not always forbidden by Ohio Law. Though the language of Section 28, Article II of the Ohio Constitution provides that the General Assembly 'shall have no power to pass retroactive laws,' Ohio courts have long recognized that there is a crucial distinction between statutes that merely apply retroactively (or 'retrospectively') and those that do so in a manner that offends our Constitution. See, e.g., *Rairden v. Holden* (1864), 15 Ohio St. 207, 210-211; *State v. Cook*, 83 Ohio St.3d [404,] 410, 700 N.E.2d 570, * * *. [T]he words 'retroactive' and 'retrospective' have been used interchangeably in the constitutional analysis for more than a century. Id. Both terms describe a law that is 'made to affect acts or facts occurring, or rights accruing, before it came into force.' *Black's Law Dictionary* (6 Ed.1990) 1317.

*8 [11] {¶ 67} "The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively. R.C. 1.48; * * * *Cook*, 83 Ohio St.3d at 410 * * *, citing *Van Fosse [v. Babcock & Wilson Co.]* (1988)], 36 Ohio St.3d 100 * * *, at paragraph one of the syllabus. If so, the court moves on to the question of whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial[. rendering it constitutionally retroactive]." (Emphasis sic.) *Bielat*, 87 Ohio St.3d at 352-353,

C

*8 {¶ 68} *Legislature's Express Intention of Retroactive Application*

*8 [12] {¶ 69} As to the first prong of the *Van Fossen, Cook, and Bielat* test for determining whether a statute can be constitutionally applied retroactively, we note that the trial court and all parties to this action agree that the General Assembly expressly intended for the provisions in R.C. 2307.91 to 2307.93 to apply retroactively. For example, R.C. 2307.93(A)(2) and (3)(a) require a plaintiff with an asbestos claim pending on the effective date of that section to comply with the requirements of filing a prima facie case set forth in R.C. 2307.92. Thus, it is clear that the General Assembly expressly intended for the provisions in R.C. 2307.91 through 2307.93 to apply retroactively. The remaining question that we must address is whether those provisions are "remedial" or "substantive."

D

*8 {¶ 70} *Substantive Retroactive Statutes*

*8 [13] {¶ 71} "[A] retroactive statute is substantive-and therefore *unconstitutionally* retroactive-if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28, citing *Cook*, 83 Ohio St.3d at 410-411, 700 N.E.2d 570.

1

*8 {¶ 72} *Vested Rights*

*8 [14][15] {¶ 73} One of the primary purposes of the retroactivity clause in Section 28, Article II of the Ohio Constitution is to prevent the legislature from invading or interfering with the "vested rights"

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of individuals. See *Bielat*, 87 Ohio St.3d at 357, 721 N.E.2d 28. “A ‘vested right’ may be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right.” *Washington Cty. Taxpayers Assn. v. Peppel* (1992), 78 Ohio App.3d 146, 155, 604 N.E.2d 181.

*8 [16][17] {¶ 74} “A vested right is one which it is proper for the state to recognize and protect, and which an individual cannot be deprived of arbitrarily without injustice[.]” *State v. Muqdad* (2000), 110 Ohio Misc.2d 51, 55, 744 N.E.2d 278, or without his or her consent. *Scamman v. Scamman* (1950), 56 Ohio Law Abs. 272, 90 N.E.2d 617, 619 . A right cannot be considered “vested” unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of existing laws. *Roberts v. Treasurer* (2001), 147 Ohio App.3d 403, 411, 770 N.E.2d 1085; see, also, *In re Emery* (1978), 59 Ohio App.2d 7, 11, 391 N.E.2d 746.

*9 {¶ 75} Appellee argues that retroactive application of the provisions of H.B. 292 will unconstitutionally impair Mr. Wilson's “vested right in his cause of action.” We disagree with this argument.

*9 [18] {¶ 76} Initially, we agree with appellee's assertion that after a cause of action has accrued, it cannot be taken away or diminished by legislative action. *State ex rel Slaughter v. Indus. Comm.* (1937), 132 Ohio St. 537, 540-541, 9 N.E.2d 505; *Pickering v. Peskind* (1930), 43 Ohio App. 401, 407-408, 183 N.E. 301. See, also, *Faller v. Mass. Bonding & Ins. Co.* (1929), 7 Ohio Law Abs. 586, 168 N.E. 394, 395-396 (“When a new limitation is made to apply to existing rights or causes of action, a reasonable time must be allowed before it takes effect, in which such rights may be asserted, or in which suit may be brought on such causes of action”).

*9 {¶ 77} However, retroactive application of the provisions in H.B. 292 does not take away appellee's vested right in proceeding with her cause of action for bodily injury caused by exposure to asbestos. Appellee still has the right to proceed with

that cause of action and to recover for an injury caused by her husband's exposure to asbestos. The relevant provisions of H.B. 292 merely affect the methods and procedure by which that cause of action is recognized, protected, and enforced, not the cause of action itself. *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28.

*9 {¶ 78} For example, R.C. 2307.91(Z) defines the term “competent medical authority” and lists the requirements that have to be met to allow a court to determine that a medical doctor is competent to provide a diagnosis for purposes of constituting prima facie evidence of an exposed person's physical impairment that meets the requirements specified in R.C. 2307.92. Appellee cites the new definition of this term to demonstrate that her vested right in her accrued cause of action has been unconstitutionally impaired.

*9 {¶ 79} However, because this statute “pertains to the competency of a witness to testify * * * it is of a remedial or procedural [rather than substantive] nature.” *Denicola v. Providence Hosp.* (1979), 57 Ohio St.2d 115, 117, 387 N.E.2d 231. Since the provision is procedural or remedial rather than substantive, it does not offend the Ohio Constitution. See *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28.

*9 {¶ 80} Both the trial court and appellee have argued in these proceedings that H.B. 292 should not be applied to cases that were pending on the date the statute became effective, because the new statute requires plaintiffs who bring an asbestos claim “to meet an evidentiary threshold that extends above and beyond the common law standard-the standard that existed at the time [Mr. Wilson] filed his claim.” As an example of the common law standard, the trial court cited *In re Cuyahoga County Asbestos Cases* (1998), 127 Ohio App.3d 358, 713 N.E.2d 20, which held that a plaintiff seeking redress for asbestos-related injuries had a compensable claim where he could show that asbestos had caused an alteration of the lining of the lung. *Id.* at 364, 713 N.E.2d 20. We find this reasoning unpersuasive.

*10 [19] {¶ 81} While a vested right may be

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created by the common law, see *Weil*, 139 Ohio St. 198, 39 N.E.2d 148, it is well settled that “there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority.” *Leis v. Cleveland R. Co.* (1920), 101 Ohio St. 162, 128 N.E. 73, syllabus.

*10 {¶ 82} Furthermore, as the Ohio Attorney General has pointed out in his amicus curiae brief, “[i]t is difficult to maintain * * * that someone has a vested right to a standard that is not the law of the entire State, and is certainly not binding on other appellate districts across the State.”

*10 {¶ 83} Additionally, a right cannot be considered “vested” unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of existing laws. *Roberts*, 147 Ohio App.3d at 411, 770 N.E.2d 1085. In this case, it appears that appellee had nothing more than a mere expectation of future benefit founded upon an anticipated continuance of the law. *Id.*

*10 {¶ 84} In light of the foregoing, we conclude that appellee has failed to demonstrate that the retroactive application of H.B. 292 will deprive or diminish any vested right held by her or her late husband.

2

*10 {¶ 85} *Accrued Substantive Rights*

*10 {¶ 86} The term “accrued substantive rights” has often been used synonymously with the term “vested rights.” See, e.g., *Bielat*, 87 Ohio St.3d at 357, 721 N.E.2d 28. The term “accrued” in its usual or customary meaning is defined as “‘to come into existence as an enforceable claim: vest as a right.’” *State ex rel. Estate of McKenney v. Indus. Comm.*, 110 Ohio St.3d 54, 55, 850 N.E.2d 694, 2006-Ohio-3562, ¶ 8, quoting Webster’s Third New International Dictionary (1986) 13. The term “substantive right” has been defined as “a right that can be protected or enforced by law.” Black’s Law Dictionary (8th Ed.2004) 1349.

*10 {¶ 87} Appellee asserts that R.C. 2307.91(FF)’s definition of “substantial contributing factor” represents a “dramatic departure” from the definition of “substantial factor” in the Ohio Supreme Court’s decision in *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, and that R.C. 2307.91(GG)’s definition of “substantial occupational exposure to asbestos” reimposes the “frequency, regularity, and proximity” test of *Lohrmann* that the Ohio Supreme Court rejected in *Horton*. Therefore, appellee contends, these provisions of H.B. 292 should not be applied retroactively to cases that were filed before the effective date of that statute because their retroactive application would impair the substantive rights of persons with asbestos claims. We disagree with this argument.

*10 [20] {¶ 88} As appellants themselves acknowledge, the General Assembly is not free to make retroactive changes to the settled meaning of a law. When the Ohio Supreme Court interprets a key word or phrase in a statute, those interpretations define substantive rights given to persons who are affected by the statute. *Hearing v. Wylie* (1962), 173 Ohio St. 221, 224, 180 N.E.2d 921, overruled on other grounds by *Village v. Gen. Motors Corp.* (1984), 15 Ohio St.3d 129, 472 N.E.2d 1079. If those substantive rights are substantially altered by the General Assembly when it amends the definition of that key word or phrase, then the amendment cannot be made to apply retroactively to any action pending at the time of the change, since such a retroactive application of a substantive provision would violate Section 28, Article II of the Ohio Constitution. See *Hearing v. Wylie*.^{FN4}

*11 [21] {¶ 89} Appellee argues that the definitions of “substantial contributing factor” and “substantial occupational exposure to asbestos” in R.C. 2307.91(FF) and (GG), respectively, constitute an attempt by the Ohio General Assembly to make an impermissible retroactive change to the settled law in this state regarding the meaning of those phrases. We disagree with this argument.

*11 {¶ 90} In *Horton*, the Ohio Supreme Court was asked to “set forth the appropriate summary judgment standard for causation in asbestos cases.”

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Id. at 682, 653 N.E.2d 1196. The *Horton* court stated as follows:

*11 {¶ 91} “For each defendant in a multidefendant asbestos case, the plaintiff has the burden of proving exposure to the defendant’s product and that the product was a substantial factor in causing the plaintiff’s injury.” Id., paragraph one of the syllabus.

*11 {¶ 92} In defining the phrase “substantial factor,” the court in *Horton* adopted the definition of that phrase contained in Restatement of the Law 2d, Torts (1965), Section 431, Comment a :

*11 {¶ 93} “ ‘The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in a popular sense, in which there always lurks the idea of responsibility, rather than the so-called “philosophical sense,” which includes every one of the great number of events without which any happening would not have occurred.’ ” *Horton*, 73 Ohio St.3d at 686, 653 N.E.2d 1196.

*11 {¶ 94} *Horton* rejected the standard for proving “substantial causation” set forth in *Lohrmann v. Pittsburgh Corning Corp.* (C.A.4, 1986), 782 F.2d 1156, which had held that “[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.” Id. at 1162-1163.

*11 {¶ 95} R.C. 2307.91(FF) defines “substantial contributing factor” to mean both of the following: “ (1) that exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim, and (2) that 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.” Contrary to what appellee argues, we conclude that R.C. 2307.91(FF) ’s definition of “substantial contributing factor” comports with the definition of “substantial factor”

found in *Horton*.

*11 {¶ 96} In support of her position, appellee focuses on the phrase “a cause” in Comment a of Section 431 of the Restatement and asserts that the “predominant cause” requirement in R.C. 2307.91(FF)(1) conflicts with the rule adopted by *Horton*. However, appellee is ignoring the language in Comment a that states that the word “cause” is being used “ ‘in its popular sense, in which there always lurks the idea of responsibility, rather than the so-called ‘philosophical sense,’ which includes every one of the great number of events without which any happening would not have occurred.’ ” *Horton*, 73 Ohio St.3d at 686, 653 N.E.2d 1196, quoting Comment a of Section 431 of the Restatement of the Law 2d, Torts (1965).

*12 {¶ 97} Furthermore, Comment c to Section 431 states:

*12 {¶ 98} “A number of considerations which in themselves or in combination with one another are important in determining whether the actor’s conduct is a substantial factor in bringing about harm to another are stated in [section] 433.”

*12 {¶ 99} Section 433 of the Restatement of the Law 2d, Torts (1965) states:

*12 {¶ 100} “The following considerations are in themselves or in combination with one another important in determining whether the actor’s conduct is a substantial factor in bringing harm to another:

*12 {¶ 101} “(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it[.]”

*12 {¶ 102} The “Comment on Clause (a)” of Section 433 states, in relevant part:

*12 {¶ 103} “d. There are frequently a number of events each of which is not only a necessary antecedent to the other’s harm, but is also recognizable as having an appreciable effect in bringing it about. Of these the actor’s conduct is

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only one. Some other event which is a contributing factor in producing the harm may have such a *predominant* effect in bringing it about as to make the effect of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor." (Emphasis added.)

*12 {¶ 104} When all of the foregoing is considered, it is apparent that the "predominant cause" element in R.C. 2307.91(FF) is consistent with Section 431, Comment *a* of the Restatement of the Law 2d, Torts, adopted in *Horton*. See *Horton*, 73 Ohio St.3d at 686, 653 N.E.2d 1196.

*12 [22] {¶ 105} We also reject appellee's argument that R.C. 2307.91(FF) is in conflict with *Horton* because it contains a requirement that a "competent medical authority" determine with a reasonable degree of medical certainty that without the asbestos exposures, the physical impairment of the exposed person would not have occurred. R.C. 2307.91(FF)(2). R.C. 2305.10 has always used the term "competent medical authority." Prior to H.B. 292, neither the General Assembly nor the Ohio Supreme Court had defined the phrase, and, therefore, it was appropriate for the General Assembly to define that phrase. Additionally, defining the term "competent medical authority" is clearly a procedural, rather than a substantive, act. See *Denicola*, 57 Ohio St.2d at 117, 387 N.E.2d 231

*12 [23][24] {¶ 106} Furthermore, including a "but for" component in the definition of "substantial contributing factor" contained in R.C. 2307.91(FF)(2) (i.e., the competent medical authority must determine with a reasonable degree of medical certainty that the physical impairment would not have occurred without or "but for" the asbestos exposures) is consistent with this state's long-standing definition of "proximate cause," to wit: "Briefly stated, the proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred." *Aiken v. Industrial Comm.* (1944), 143 Ohio St. 113, 117, 28 O.O. 50, 53 N.E.2d 1018 . We also find the "but for" requirement consistent with Section 431, Comment *a* of the Restatement of

the Law 2d, Torts, adopted in *Horton*, 73 Ohio St.3d at 686, 653 N.E.2d 1196, which uses the word "cause" in its "popular sense, in which there always lurks the idea of responsibility, rather than the so-called 'philosophical' sense, which includes every one of the great number of events without which any happening would not have occurred.' "

*13 {¶ 107} We also agree with the following arguments presented by Owens-Illinois, Inc., in its amicus curiae brief, regarding these issues:

*13 {¶ 108} "R.C. 2307.91(FF) and 2307.92(B-D) [do not] conflict with *Horton v. Harwick Chemical Corp.*, as [appellee] contend[s]. These sections address a different issue than the one addressed in *Horton*. In *Horton*, the Ohio Supreme Court rejected the 'frequency, regularity, and proximity' test of *Lohrmann* for determining 'whether a particular product was a substantial factor in producing the plaintiff's injury.' *Horton*, 73 Ohio St.3d at 683, 653 N.E.2d at 1200 (emphasis added). As the Court made clear, it was addressing the standard for proving the liability of 'each defendant in a multidefendant asbestos case' and the causative role of 'exposure to *the defendant's product*-as opposed to the causative role of asbestos generally-at the proof (summary judgment) stage. *Id.* at 686, 653 N.E.2d at 1202 (emphasis added). The Court declined to require a plaintiff to 'prove that he was exposed to a *specific product* on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that *the product* was a substantial factor in causing his injury.' *Id.* (emphasis added).

*13 {¶ 109} "R.C. 2307.92, by contrast, does not concern proof or whether exposure to an individual defendant's individual product caused an injury. Instead, it concerns only the threshold, prima facie showing of collective exposure to asbestos, and whether that collective exposure was sufficient to cause the injury. The prima facie showing serves only to identify whether the case genuinely involves asbestos-related injury, and not the further and more difficult question whether a particular product or particular defendant is responsible. [Footnote Omitted.] Since *Horton* did not address this issue at

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all, this section of HB 292 cannot conflict with *Horton*.

*13 {¶ 110} “There is a section of HB 292 that contravenes *Horton*, but it is expressly made only prospective, raising no retroactivity issues. R.C. 2307.96, which governs the standard for proving ‘that the conduct of [a] particular defendant was a substantial factor in causing the injury,’ was expressly intended to reject *Horton* and to adopt the ‘frequency, regularity, and proximity’ test of *Lohrmann*. See H.B. 292, Section 5 * * * (discussing the reasons the legislature disagreed with the Court about the value of the *Lohrmann* test). The General Assembly was careful to make this section *prospective* only. See R.C. 2307.96(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.’) (emphasis added). [Footnote omitted.]

*13 {¶ 111} “ * * *

*13 [25] {¶ 112} “Finally, HB 292’s requirement (in smoker/lung cancer and wrongful death cases only) of a prima facie showing either of ‘substantial occupational exposure’ to asbestos or of exposure equal to 25 fiber per cc years (R.C. 2307.92(C)(1)(c), 2307.92(D)(1)(c)), does not ‘reimpose’ the *Lohrmann* test that the Ohio Supreme Court had rejected in *Horton*. This is true for the same reasons discussed above: First, the ‘substantial occupational exposure’ provisions were not intended to ‘reimpose’ the *Lohrmann* test. The General Assembly knew how to adopt *Lohrmann*, and when it did so, it respected the boundaries of its power and did so prospectively. Second, these provisions again address the prima facie case (whether the claimant had sufficient collective exposure to asbestos generally to state a colorable claim of asbestos-related injury), and not the issue of proof regarding an individual product or defendant, which was the issue in *Horton*.

*14 {¶ 113} “Rather than addressing the question at issue in *Horton* (how a plaintiff may prove that a particular defendant, out of all the parties to whose products the plaintiff was exposed, is liable for its

role in causing an injury), the ‘substantial occupational exposure’ provisions are one of two alternative means by which a plaintiff may satisfy a prima facie asbestos exposure threshold in lung cancer and wrongful death cases. Since 1980 it has been the law in Ohio by statute that an asbestos claim requires ‘injury caused by exposure to asbestos.’ R.C. 2305.10. HB 292 merely defines two alternative ways to [make a prima facie] show[ing of] exposure, displacing no statute or Supreme Court case law: either by a direct showing under a quantitative standard (25 fiber per cc years) or by a showing of ‘substantial occupational exposure’ (five years’ work in a job in which the worker either handled raw asbestos, or fabricated asbestos-containing products, or worked with asbestos-containing products, or worked close to others who did these thing). This legislative clarification and specification of ‘exposure’ is not unconstitutionally retroactive.”

*14 {¶ 114} In light of the foregoing, we conclude that applying R.C. 2307.91(FF) and (GG) to actions filed before the effective date of H.B. 292 does not violate Section 28, Article II of the Ohio Constitution.

3

*14 {¶ 115} *Imposition of New or Additional Burdens, Duties, etc.*

*14 {¶ 116} As to the issue of whether retroactive application of the relevant provisions of H.B. 292 would impose “new or additional burdens, duties, obligations, or liabilities as to a past transaction,” we first note that appellants contend that this branch of the test for unconstitutional retroactivity “concerns vested rights in past acts, such as business activity or contracts, and has no obvious application to tort actions.”

*14 {¶ 117} However, it appears that this branch of the test for unconstitutional retroactivity has a wider application than business activity or contracts. For instance, in *Bielat*, the court stated, “The retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new

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duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].’” *Bielat*, 87 Ohio St.3d at 352-353, 721 N.E.2d 28, quoting *Miller*, 64 Ohio St. at 51, 59 N.E. 749.

*14 {¶ 118} Nevertheless, we conclude that the retroactive application of the relevant provisions of H.B. 292 does not impose any “new or additional burdens, duties, obligations, or liabilities” on persons seeking to bring an asbestos claim. The changes made by H.B. 292, such as defining “competent medical authority,” are procedural or remedial, and not substantive. Therefore, the retroactive application of H.B. 292 does not offend the Ohio Constitution. See *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28.

E

*14 {¶ 119} *Remedial Retroactive Statutes*

*14 [26][27] {¶ 120} A retroactive statute is remedial and therefore *constitutionally* retroactive if it is one that affects “only the remedy provided, and include[s] laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *Cook*, 83 Ohio St.3d at 411, 700 N.E.2d 570, citing *Van Fossen*, 36 Ohio St.3d at 107, 522 N.E.2d 489. A remedial statute is one that merely affects “ ‘the methods and procedure by which *rights are recognized, protected and enforced, not * * * the rights themselves.*’ (Emphasis added.)” *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28, quoting *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205, 39 N.E.2d 148. “A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even when it is applied retroactively.” *Cook*, 83 Ohio St.3d at 411, 700 N.E.2d 570.

1

*15 {¶ 121} *Remedial Provisions of H.B. 292*

*15 [28] {¶ 122} We conclude that the provisions in H.B. 292 at issue in this case, i.e., R.C. 2307.91

through 2307.93, constitute remedial provisions that merely affect “the methods and procedure by which rights are recognized, protected and enforced, not * * * the rights themselves.” *Weil*, 139 Ohio St. at 205, 39 N.E.2d 148. These provisions “merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *Cook*, 83 Ohio St.3d at 411, 700 N.E.2d 570.

*15 {¶ 123} The relevant provisions of H.B. 292 remedially changed the law in this state by clarifying the meaning of ambiguous phrases like “bodily injury caused by exposure to asbestos” and “competent medical authority.” The ambiguity in these phrases resulted in an extraordinary volume of cases that strain the courts in this state and threatens to overwhelm our judicial system. See Section 3(A)(3) of H.B. 292. The extraordinary volume of cases has led to circumstances in which the plaintiffs in asbestos actions are receiving less than 43 cents on every dollar awarded, and 65 percent of the compensation paid, thus far, has gone to claimants who are not sick. *Id.* at Section 3(A)(2). Thus, the remedial legislation in the relevant provisions of H.B. 292 serves to avoid a multiplicity of suits and the accumulation of costs and promotes “the interests of all parties.” *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28, quoting *Rairden v. Holden*, 15 Ohio St. at 211.

2

*15 {¶ 124} *Curative Statutes*

*15 [29][30] {¶ 125} Our conclusion that the provisions in R.C. 2307.91 through 2307.93 are remedial “is strengthened by our state’s recognition of the validity of retrospective *curative* laws.” (Emphasis sic.) *Bielat*, 87 Ohio St.3d at 355, 721 N.E.2d 28. “[T]he language that immediately follows the prohibition of retroactive laws contained in Section 28, Article II of our Constitution expressly permits the legislature to pass statutes that ‘ ‘authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers, by *curing omissions, defects, and errors in instruments and proceedings, arising out of their*

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want of conformity with the laws of this state.” ’ (Emphasis added.) *Burgett v. Norris* (1874), 25 Ohio St. 308, 316, quoting Section 28[, Article II of the Ohio Constitution]. *Burgett* recognized that curative acts are a valid form of retrospective, remedial legislation when it held that “[i]n the exercise of its plenary powers, the legislature * * * could cure and render valid, by remedial retrospective statutes, that which it could have authorized in the first instance.” *Id.* at 317.” *Bielat*, 87 Ohio St.3d at 355-356, 721 N.E.2d 28.

*15 {¶ 126} By enacting the disputed provisions of H.B. 292, the General Assembly was curing and rendering valid, by a remedial retrospective statute, that which it could have authorized in the first instance. See *Bielat*, 87 Ohio St.3d at 354-355, 721 N.E.2d 28, citing *Burgett*. Specifically, the relevant provisions of H.B. 292 clarify the meaning of such potentially ambiguous phrases as “competent medical authority” and “bodily injury caused by exposure to asbestos.”

*16 {¶ 127} As we have indicated, the ambiguity of those phrases has produced an extraordinary volume of cases that strains our courts and that threatens to overwhelm the judicial system in this state. Because of the overwhelming number of asbestos cases that have been filed by persons who may have been exposed to asbestos but who are not sick, the ability of defendants to compensate those plaintiffs who have been exposed to asbestos and who *are* sick has been seriously compromised. See Section 3(A)(2) and(5) of H.B. 292.

*16 {¶ 128} To resolve this problem, the General Assembly saw fit to enact more precise definitions of ambiguous terms like “competent medical authority” and “bodily injury caused by exposure to asbestos” to ensure that only those parties who actually have been harmed by exposure to asbestos receive compensation for their injuries. Thus, as the Ohio Constitution and *Burgett* expressly permit, the relevant provisions of H.B. 292 cure an omission, defect, or error in the proceedings involving asbestos personal injury litigation in this state. See *Bielat*, 87 Ohio St.3d at 356, 721 N.E.2d 28.

F

*16 {¶ 129} *Appellee's Concluding Arguments*

*16 {¶ 130} Finally, appellee raises the following argument in her conclusion:

*16 {¶ 131} “H.B. 292 takes away the remedy for the enforcement of the vested right of certain asbestos plaintiffs, including [decedent] Chester Wilson [who is now represented by appellee], and only promotes the interests of the [appellants]. After passage of H.B. 292, asbestos plaintiffs who cannot meet the new requirements set forth in H.B. 292 have no remaining remedy in a cause of action that arose and vested well before the enactment of the statute.” We find this argument unpersuasive.

*16 {¶ 132} As the Ohio Supreme Court has recently stated:

*16 [31][32] {¶ 133} “ ‘ “It is not a court’s function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation.” ’ *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779 * * *, ¶ 14, quoting *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 48 * * *. ‘The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.’ *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985 * * *, ¶ 14.” *State ex rel. Triplett v. Ross*, 111 Ohio St.3d 231, 2006-Ohio-4705, ¶ 55.

*16 {¶ 134} In light of the foregoing, appellants’ assignment of error is sustained.

III

*16 {¶ 135} The trial court’s judgment is reversed, and this cause is remanded for further proceedings consistent with this opinion and in accordance with the law of this state.

*16 Judgment reversed and cause remanded.

POWELL, P.J., and BRESSLER, J., concur.
Powell, P.J., and Bressler, J., concur.

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FN1. This matter is sua sponte removed from the accelerated calendar.

Section 28, Article II, Constitution of Ohio.
" *Hearing*, 173 Ohio St. at 224, 180 N.E.2d 921.

FN2. The defendants-appellants in this case are 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide, CBS Corporation, Ingersoll-Rand Corporation, Uniroyal, Inc., Georgia-Pacific Corporation, Cleaver-Brooks, Riley Stoker Corporation, Garlock Sealing Technologies, LLC, and Rapid American Corporation. The companies named as defendants in Mr. Wilson's original complaint included these plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference, we shall refer to all of these defendants as "appellants," even though several of them have been dismissed from this action and are not parties to this appeal.

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FN3. This court initially dismissed appellants' appeal on the grounds that the order appealed from was not a final appealable order. However, upon appellants' application for reconsideration, we reinstated appellants' appeal on the grounds that the entry appealed from is a provisional remedy as contemplated pursuant to R.C. 2307.93(A)(3), and that because the decision appealed from directly interprets R.C. 2307.93(A)(3), it is a final order pursuant to R.C. 2505.02.

FN4. *Hearing v. Wylie* states: "The General Assembly was aware of the decisions of this court interpreting the word 'injury.' Those interpretations defined substantive rights given to injured workmen to be compensated for their injuries. Those substantive rights were substantially altered by the General Assembly when it amended the definition of 'injury.' To attempt to make that substantive change applicable to actions pending at the time of the change is clearly an attempt to make the amendment apply retroactively and is thus violative of

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engaged in the mining, processing or manufacturing, or sale and distribution of asbestos or asbestos-containing products or machinery. Appellee alleged that he had been exposed to asbestos or asbestos-containing products or machinery in his occupation, and that appellants were jointly and severally liable for his "asbestos-related lung injury, disease, illness and disability and other related physical conditions."

FN3. The companies named as defendants in Staley's original complaint included the companies listed in fn. 2, plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference, we shall refer to all of these defendants as "appellants" even though several of them have been dismissed from this action and are not parties to this appeal.

*1 {¶ 4} On September 2, 2004, Amended Substitute House Bill 292 (hereinafter "H.B. 292") went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D) and 2307.93(A)(1).

*1 {¶ 5} In December 2005, appellee filed a motion, with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. In March 2006, appellants filed a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow his case to proceed, and requesting that appellee's case be administratively dismissed pursuant to R.C. 2307.93(C).

*1 {¶ 6} In April 2006, the trial court held a hearing on the parties' various assertions regarding appellee's asbestos claim. At the hearing, appellee acknowledged that his evidence was insufficient to

make the prima facie showing required under H.B. 292. Nevertheless, appellee argued that H.B. 292 should not apply to his asbestos claim since applying the new law to his case would constitute an unconstitutional retroactive application of the law.

*1 {¶ 7} On June 1, 2006, the trial court issued an "Amended Order of Administrative Dismissal" with respect to appellee's asbestos claim. The trial court began its analysis by adopting its recent decision in *Wilson v. AC & S, Inc.* (Mar. 7, 2006), Butler Cty. C.P. No. CV2001-12-3029, and finding "that the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case." However, the trial court then found that "the prima facie proceeding required by R.C. 2307.92 is procedural and may be applied retrospectively." As a result of these findings, the trial court announced its intention to "review the prima facie materials [filed] in this case according to the law as it existed prior to H.B. 292's effective date of September 2, 2004."

*2 {¶ 8} The trial court concluded that the prima facie evidence presented by appellee-by appellee's own admission-failed "to meet the criteria for maintaining an asbestos-related bodily injury claim that existed prior to September 2, 2004." Consequently, the trial court administratively dismissed appellee's case, without prejudice, pursuant to R.C. 2307.93(C).

*2 {¶ 9} Appellants now appeal from the trial court's June 1, 2006 order, raising the following assignment of error:

*2 {¶ 10} "THE TRIAL COURT ERRED IN ITS INTERPRETATION THAT R .C. 2307.92 VIOLATES THE OHIO CONSTITUTION."

*2 {¶ 11} Appellants argue that the trial court erred in determining that it could not apply the procedural requirements outlined in R.C. 2307.92 without violating the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution. We agree with this argument.

*2 {¶ 12} The trial court, citing its recent decision in *Wilson*, Butler Cty. C.P. No. CV2001-12-3029,

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found "that the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case." The trial court did not define what it meant when it used the phrase "medical criteria provisions of H.B. 292," but presumably, the court was referring to the "minimum medical requirements" listed throughout R.C. 2307.92, and the definitions of certain key terms in R.C. 2307.91, like "competent medical authority." See, e.g., R.C. 2307.91(Z) (defining "competent medical authority").

*2 {¶ 13} However, in *Wilson v. AC & S, Inc.*, Butler App. No. CA2006-03-056, 2006-Ohio6704, this court reversed the trial court's decision. In *Wilson*, this court held that R.C. 2307.91, 2307.92, and 2307.93 were procedural or remedial provisions rather than substantive ones, and, therefore, their retroactive application to cases filed before the effective date of those provisions (i.e., September 2, 2004), did not violate the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution.

*2 {¶ 14} In light of our decision in *Wilson*, the trial court erred when it found that "the medical criteria provisions of H.B. 292 cannot be applied retrospectively to this case[.]" and when it decided to "review the prima facie materials [filed] in this case according to the law as it existed prior to H.B. 292's effective date of September 2, 2004."

*2 {¶ 15} The trial court's decision to administratively dismiss appellee's case pursuant to R.C. 2307.93(C) was correct. Appellee conceded during these proceedings that he did not make the prima facie showing required under R.C. 2307.92 and 2307.93. For the reasons stated in our decision in *Wilson*, those provisions apply to appellee's case. Because appellee could not make the requisite prima facie showing, the trial court was obligated to dismiss appellee's asbestos claim without prejudice pursuant to R.C. 2307.93(C).

*2 {¶ 16} However, if appellee seeks to reinstate his case pursuant to R.C. 2307.93(C), then he must make the prima facie showing that meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D), whichever is applicable. See R.C. 2307.93(C) ("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"). Appellee may *not* rely on the law as it existed prior to September 2, 2004, as the trial court indicated in its decision.

*3 {¶ 17} Appellants' assignment of error is sustained.

*3 {¶ 18} The trial court's June 1, 2006 order is affirmed in part and reversed in part, and this cause is remanded to the trial court with instructions to issue a new order consistent with this opinion and in accordance with the law of this state.

YOUNG and BRESSLER, JJ., concur.

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Stahlheber v. Du Quebec, LTEEOhio App. 12 Dist., 2006.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Butler County.

Deborah STAHLHEBER, Administratrix of the Estate of Cecil Sizemore, Deceased, Plaintiff-Appellee,

v.

Lac D'Amiante DU QUEBEC, LTBE, et al., Defendants-Appellants.
No. CA2006-06-134.

Decided Dec. 28, 2006.

Civil Appeal from Butler County Court of Common Pleas, Case No. CV2003-05-1292.

Young, Reverman & Mazzei Co., L.P.A., Richard E. Reverman, Cincinnati, OH, and Motley Rice LLC, Vincent L. Greene IV, Providence, RI, for plaintiff-appellee.

Vorys, Sater, Seymour and Pease LLP, Richard D. Schuster, Nina I. Webb-Lawton, Columbus, OH, and Vorys, Sater, Seymour and Pease LLP, Rosemary D. Welsh, Cincinnati, OH, for defendants-appellants, American Standard, Inc., Oglebay Norton Company, Certainteed Corporation, 3M Company, and Union Carbide Corporation.

Baker & Hostetler LLP, Robin E. Harvey, Angela M. Hayden, Cincinnati, OH, for defendants-appellants, Uniroyal, Inc. and Georgia-Pacific Corp.

Baker & Hostetler LLP, Randall L. Soloman, Edward L. Papp, Diane Feigi, Cleveland, OH, for defendant-appellant, Maremont Corporation.

Evanchan & Palmisano, Nicholas L. Evanchan, Ralph J. Palmisano, John Sherrod, Akron, OH, for defendant-appellant, Foster Wheeler Energy

Corporation.

Ulmer & Berne LLP, Bruce P. Mandel, James N. Kline, Kurt S. Siegfried, Robert E. Zulantz III, Cleveland, OH, for defendant-appellant, Ohio Valley Insulating Company, Inc.

McCarthy, Lebit, Crystal & Liffman Co., L.P.A., David A. Schaefer, Cleveland, OH, for defendant-appellant, Rapid American Corporation.

Jim Petro, Ohio Attorney General, Holly J. Hunt, Constitutional Offices Section, Columbus, OH, for amicus curiae, Ohio Attorney General Jim Petro.

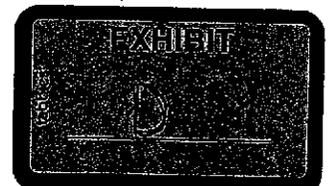
BRESSLER, J.

*1 {¶ 1} This matter is before us on an appeal ^{FN1} by numerous defendants-appellants ^{FN2} who are challenging an order of the Butler County Court of Common Pleas finding that certain provisions in Amended Substitute House Bill 292 could not be applied prospectively to the asbestos claim of plaintiff-appellee, Deborah Stahlheber, Administratrix of the Estate of Cecil Sizemore, but administratively dismissing appellee's claim, anyway, pursuant to R.C. 2307.93(C).

FN1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

FN2. The defendants-appellants in this case are: American Standard, Inc., 3M Company, Oglebay Norton Company, Certainteed Corporation, Union Carbide, Uniroyal, Inc., Georgia-Pacific Corporation, Maremont Corporation, Foster Wheeler Energy Corporation, Ohio Valley Insulating Company, Inc., and Rapid American Corporation.

*1 {¶ 2} From 1952 to 1979, Cecil Sizemore worked as a truck driver and forklift operator at the Nicolet Industry Plant in Hamilton, Ohio. Sizemore was exposed to asbestos during the period in which



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he worked at the plant. Sizemore died on May 14, 2001.

*1 {¶ 3} On May 13, 2003, appellee, Sizemore's daughter, acting as the administratrix of the Estate of Cecil Sizemore (hereinafter "decedent"), filed a complaint against a number of companies (hereinafter "appellants" ^{FN3}) that have been engaged in the mining, processing or manufacturing, or sale and distribution of asbestos or asbestos-containing products or machinery. Appellee alleged that decedent had been exposed to asbestos or asbestos-containing products or machinery in his occupation, and that appellants were jointly and severally liable for decedent's "asbestos-related lung injury, disease, illness and disability and other related physical conditions."

FN3. The companies named as defendants in Staley's original complaint included the companies listed in fn. 2, plus a number of other companies who were eventually dismissed as defendants to this action. For ease of reference, we shall refer to all of these defendants as "appellants" even though several of them have been dismissed from this action and are not parties to this appeal.

*1 {¶ 4} On September 2, 2004, Amended Substitute House Bill 292 (hereinafter "H.B. 292") went into effect. The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. Among other things, these provisions require a plaintiff bringing an asbestos claim to make a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D).

*1 {¶ 5} Appellee advanced two claims in her action against appellants: (1) that decedent had contracted asbestosis ^{FN4} as a result of his exposure to asbestos in his workplace; and (2) that appellants were also liable under a theory of wrongful death.

FN4. " 'Asbestosis' means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers." R.C. 2307.91(D).

*1 {¶ 6} In March 2006, appellee filed a motion with several exhibits attached, seeking to establish the prima facie showing required under H.B. 292. Appellants responded with a memorandum in opposition, asserting that appellee's proffered evidence failed to establish a sufficient prima facie showing to allow her case to proceed, and requesting that appellee's case be administratively dismissed pursuant to R.C. 2307.93(C).

*1 {¶ 7} On April 24, 2005, the trial court held a hearing on the parties' various arguments regarding appellee's asbestos-related claims. Appellee conceded at the hearing that based on decedent's death certificate, which had been filed in the case, "there is no evidence * * *, at the moment, that [decedent's] death was caused as a result of an [asbestos-related] disease." Appellee requested the trial court to administratively dismiss both her asbestosis and wrongful death claims until she had an opportunity to gather additional evidence in support of them. Appellee also asked the trial court to find that the retroactive application of H.B. 292 to her case would be unconstitutional, as the trial court had found in previous cases. See *Wilson v. AC & S, Inc.* (Mar. 7, 2006), Butler Cty. C.P. No. CV2001-12-3029.

*2 {¶ 8} On June 1, 2006, the trial court issued an "Amended Order of Administrative Dismissal" with respect to appellee's asbestos claim. Initially, the trial court found that pursuant to R.C. 2307.93(A)(3)(a), applying R.C. 2307.92 to appellee's case "would impair [her] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." Consequently, the trial court announced its intention to review the prima facie materials that had been filed in the case according to the law as it existed prior to September 2, 2004.

*2 {¶ 9} However, the trial court concluded that the prima facie evidence presented by appellee failed "to meet the criteria for maintaining an

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asbestos-related bodily injury claim that existed prior to September 2, 2004." Consequently, the trial court administratively dismissed appellee's case without prejudice pursuant to R.C. 2307.93(C).

*2 {¶ 10} Appellants now appeal from the trial court's June 1, 2006 order, raising the following assignment of error:

*2 {¶ 11} "THE TRIAL COURT ERRED IN ITS INTERPRETATION THAT R .C. 2307.92 VIOLATES THE OHIO CONSTITUTION."

*2 {¶ 12} Appellants argue that the trial court erred in determining that it could not apply certain provisions of H.B. 292, including R.C. 2307.92, without violating the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution. We agree with this argument.

*2 {¶ 13} Initially, appellee contends that the order from which appellants are appealing is not a final appealable order. We disagree with this contention.

*2 {¶ 14} R.C. 2505.02, which governs "final orders," states in pertinent part:

*2 {¶ 15} "(A) As used in this section:

*2 {¶ 16} " * * *

*2 {¶ 17} "(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to * * * 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.

*2 {¶ 18} "(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:

*2 {¶ 19} " * * *

*2 {¶ 20} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

*2 {¶ 21} "(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.

*2 {¶ 22} "(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."

*2 {¶ 23} In this case, the proceedings in the trial court constituted a "provisional remedy" under R.C. 2505.02(A)(3) since they involved a proceeding for "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." Additionally, the order being appealed is one "that grants or denies a provisional remedy[.]" in that the trial court (1) found that appellee had not made a sufficient prima facie showing under R.C. 2307.92, and (2) made a finding under R.C. 2307.93(A)(3). See R.C. 2505.02(A)(3) and (B)(4).

*3 {¶ 24} The order appealed from is also one that "determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy." R.C. 2505.02(B)(4)(a). Specifically, the trial court found that pursuant to R.C. 2307.93(A)(3)(a), applying R.C. 2307.92 to appellee's case "would impair [appellee's] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." As a result, the trial court concluded that the law in effect prior to the effective date of H.B. 292, i.e., September 2, 2004, must be applied to this action. Consequently, the order appealed from meets both of the requirements listed in R.C. 2505.02(B)(4)(a).

*3 {¶ 25} Finally, in light of all of the facts and circumstances of these proceedings, appellants "would not be afforded a meaningful or effective remedy" by having to wait to file an appeal "following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). Therefore, we conclude that the order from which the instant appeal was taken was

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final and appealable. This court has reached the same conclusion in similar, recent cases. See, e.g., *Wilson v. AC & S, Inc.* (Dec. 18, 2006), Butler App. No. CA2006-03-056, 2006-Ohio-6704, at fn. 3.

*3 {¶ 26} As to the issues raised in appellants' assignment of error, we first note that in *Wilson*, this court held that R.C. 2307.91, 2307.92, and 2307.93 are procedural or remedial provisions rather than substantive ones, and, therefore, their retroactive application to cases filed before the effective date of those provisions, i.e., September 2, 2004, did not violate the ban on retroactive legislation contained in Section 28, Article II of the Ohio Constitution.

*3 {¶ 27} In light of our decision in *Wilson*, the trial court erred when it found, pursuant to R.C. 2307.93(A)(3)(a), that applying R.C. 2307.92 to appellee's case "would impair [her] substantive rights in such a way as to violate Section 28, Article II of the Ohio Constitution." The trial court also erred when it "review[ed] the prima facie materials that had been filed in the case according to the law as it existed prior to September 2, 2004."

*3 {¶ 28} The trial court's decision to administratively dismiss appellee's case pursuant to R.C. 2307.93(C), on the other hand, was correct. Since appellee did not make the requisite prima facie showing, the trial court was obligated to dismiss both of appellee's asbestos claims (for asbestosis and wrongful death) without prejudice pursuant to R.C. 2307.93(C).

*3 {¶ 29} If appellee seeks to reinstate her case pursuant to R.C. 2307.93(C), then she must make the prima facie showing that meets the minimum requirements specified in R.C. 2307.92(B), (C), or (D), whichever is applicable; however, she may not rely on the law as it existed prior to September 2, 2004, contrary to what the trial court had indicated in its decision. See R.C. 2307.93(C) ("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").

*4 {¶ 30} Appellants' assignment of error is sustained.

*4 {¶ 31} The trial court's June 1, 2006 order is affirmed in part and reversed in part, and this cause is remanded to the trial court with instructions to issue a new order consistent with this opinion and in accordance with the law of this state.

POWELL, P.J., and YOUNG, J., concur.
Ohio App. 12 Dist., 2006.
Stahlheber v. Du Quebec, LTEE
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COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

2007 FEB 26 PM 1:04

LINDA ACKISON, as Administratrix
of the Estate of Danny
Ackison,

LES PROOS
CLERK OF COURTS
LAWRENCE COUNTY

Plaintiff-Appellant,

: Case No. 05CA46

vs.

ANCHOR PACKING CO., et al.,

: ENTRY ON MOTION TO CERTIFY
CONFLICT

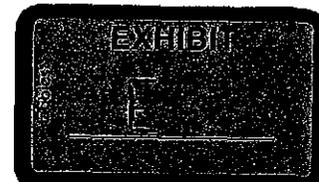
Defendants-Appellees.

Appellees¹ filed a Motion to Certify Conflict, pursuant to App.R. 25, asserting that this court's Decision and Judgment Entry in Ackison v. Anchor Packing Co., Lawrence App. No. 05CA46, 2006-Ohio-7099, conflicts with the Twelfth District's decisions in Wilson v. AC & S, Inc., Butler App. No. CA2006-03-056, 2006-Ohio-6704, Staley v. AC & S, Inc., Butler App. No. CA2006-06-133, 2006-Ohio-7033, and Stahlheber v. Du Quebec, LTEE, Butler App. No. CA2006-06-134, 2006-Ohio-7034.

Section 3(B)(4), Article IV of the Ohio Constitution permits an appellate court to certify an issue to the Ohio Supreme Court for review and final determination when "the judges of a court of appeals find that a judgment upon which they have agreed is in Conflict with a judgment pronounced upon the same question by any other court of appeals of the state."

In Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596 613 N.E.2d 1032, 1034, the Ohio Supreme Court clarified the requirements that an appellate court must find before certifying

¹ See our prior opinion for the full list of appellees.



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a judgment as being in Conflict.

"First, the certifying court must find that its judgment is in Conflict with the judgment of a court of appeals of another district and the asserted Conflict must be 'upon the same question.' Second, the alleged Conflict must be on a rule of law--not facts. Third, the journal entry or opinion must clearly set forth that rule of law which the certifying court contends is in Conflict with the judgment on the same question by other district courts of appeals."

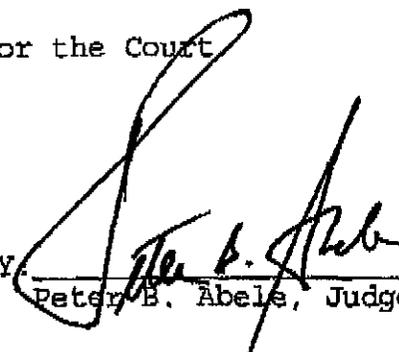
In Wilson, the Twelfth District concluded that R.C. 2307.91 to 2307.93 did not constitute unconstitutional retroactive legislation. Staley and Stahlheber followed the holding in Wilson. In Ackison, we held that the statutes, as applied to Ackison's claims, constituted unconstitutional retroactive legislation. Our holding conflicts with the Twelfth District's decisions. Therefore, we grant appellees' motion to certify conflict. We certify the following issue to the Ohio Supreme Court: "Can R.C. 2307.91, 2307.92, and 2307.93 be applied to cases already pending on September 2, 2004?"

McFarland, P.J. & Harsha, J.: Concur

MOTION GRANTED.

For the Court

BY


Peter B. Abele, Judge