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IN THE SUPREME COURT OF OHIO

APPEAL FROM
FOURTH DISTRICT COURT OF APPEALS
LAWRENCE COUNTY, OHIO

LINDA ACKISON, Administratrix	:	Case Nos. 2007-0219; 2007-0415
Plaintiff-Appellee,	:	[Lawrence County Case No. 05CA-46]
v.	:	
ANCHOR PACKING CO., et al.,	:	
Defendants-Appellants.	:	

BRIEF OF AMICUS OHIO AFL-CIO IN SUPPORT OF PLAINTIFF-APPELLEE ACKISON

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I. STATEMENT OF THE CASE AND FACTS

Amicus Ohio AFL-CIO hereby adopts and incorporates by reference the statement of the case and facts contained in the brief of Plaintiff-Appellee Ackison.

II. ARGUMENT

PROPOSITION OF LAW:

OHIO CONSTITUTION ARTICLE II, SECTION 28, PROHIBITS APPLYING NEWLY ENACTED STATUTORY REQUIREMENTS TO BAR A PENDING CAUSE OF ACTION.

On May 5, 2004, Plaintiff Linda Ackison filed a tort complaint. The complaint alleged that Defendants were responsible for numerous asbestos-related injuries suffered by Danny Ackison, and also alleged that Defendants were responsible for Mr. Ackison's death due to those injuries. At the time the complaint was filed, it stated legally valid tort claims.[1]

After the complaint was filed, on Sept. 2, 2004, H.B. 292[2] became effective. According to its title, the purpose of H.B. 292 was, among other things, "to establish minimum medical requirements for filing certain asbestos claims, [and] to specify a plaintiff's burden of proof in tort actions involving exposure to asbestos." As the title indicates, H.B. 292 created new standards for asbestos-related claims. The legislature indicated that the new standards created by H.B. 292 apply to pending claims such as the one which had previously been filed by Mrs. Ackison. R.C. 2307.93(A)(2).

If not for the new standards created by H.B. 292, there

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[1] Plaintiff filed causes of action for both negligence and product liability.

[2] Am. Sub. H.B. 292, enacted by the 125th General Assembly, is referred to in this brief as H.B. 292.

would be no question about Mrs. Ackison's ability to pursue her case against the defendants. It was solely based on the new requirements created by H.B. 292 that the trial court determined to dismiss Plaintiff's complaint.

Requiring a pending case, such as the present one, to comply with the newly-enacted requirements of H.B. 292 violates Oh. Const. Art. II, Sec. 28, which prohibits retroactive laws. Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100.

As the Court of Appeals recognized in the present case, at para. 26,

> 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.

Defendants argue that applying the newly created requirements to pending cases does not violate Oh. Const. Art. II, Sec. 28 because the new requirements have a procedural, rather than a substantive, effect. This argument ignores this Court's holding in Van Fossen that application of a "new, more difficult standard . . . constitutes a limitation, or denial of, a substantive right" and therefore violates Art. II, Sec. 28. Van Fossen, syl. 4.

H.B. 292 creates additional requirements beyond those which existed at common law. These additional requirements result in a "new, more difficult standard." Therefore they are substantive

changes which cannot be applied to pending cases.

One example of the new, more difficult standard created by H.B. 292 involves what a plaintiff, such as Mrs. Ackison, must establish to state a valid claim for an injury resulting from asbestos exposure. Under common law, a plaintiff only had to establish an "alteration" to the lining of the lung.[3] By contrast, under the new law created by H.B. 292, a plaintiff must show that the exposure was a "substantial contributing factor." R.C. 2307.92(A).

Requiring that asbestos exposure be a "substantial contributing factor" is a new, more difficult standard than the common law standard. In order to be a "substantial contributing factor", the exposure must be a "predominant cause of the physical impairment." R.C. 2307.91(FF)(1) (emphasis added). By contrast, under common law the exposure must only be "a cause." Horton v. Harwick Chem. Corp. (1995), 73 Ohio St.3d 679, 686

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[3] The common law standard, as set forth in In re Cuyahoga Cty. Asbestos Cases (Ohio App. 8 Dist. 1998), 127 Ohio App.3d 358, 364, is:

> in 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,

(emphasis added).

An additional reason why H.B. 292 creates a new, more difficult standard is that H.B. 292 creates additional requirements which medical evidence must satisfy in order for the medical evidence to be considered valid. R.C. 2307.91(Z), R.C. 2307.92(B)(3). These additional requirements for medical evidence are more stringent than would apply under common law. As the lower court recognized at para. 28 of its opinion:

> 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. 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.

As the lower court recognized in the present case, to apply the new, more difficult requirements created by H.B. 292 to retroactively eliminate Mrs. Ackison's previously valid claim would violate Oh. Const. Art. II, Sec. 28.

III. CONCLUSION

Oh. Const. Art. II, Sec. 28 exists because "[r]etroactive laws and retrospective application of laws have received the near universal distrust of civilizations." Van Fossen at 104. In the present case, using the new, more difficult standard created by H.B. 292 to bar Mrs. Ackison's previously-filed claim would be the exact type of retroactive use of the law which Oh. Const. Art. II, Sec. 28 exists to prevent.

Because use of the "new, more difficult standard" created by H.B. 292 would retroactively bar Mrs. Ackison's previously filed tort suit in violation of Oh. Const. Art. II, Sec. 28, this Court should affirm the Court of Appeals' decision.

Respectfully submitted,

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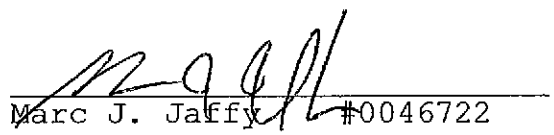

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APPENDIX A

O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, 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 want of conformity with the laws of this state.

APPENDIX B

Excerpts from R.C. 2307.91:

Requirements for prima-facie showing of physical impairment for certain tort actions involving asbestos exposure

* * *

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

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

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

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

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

the state in which that examination, test, or screening was conducted;

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

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

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

revenues from providing those services.

* * *

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

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

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

* * *

APPENDIX C

Excerpts from R.C. 2307.92:

Requirements for prima-facie showing of physical impairment for certain tort actions involving asbestos exposure

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

(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307. 93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

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

of the following:

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

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

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

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

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

(b) Either of the following:

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

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

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

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

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

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

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

* * *

APPENDIX D

Excerpts from R.C. 2307.93:

Filing of report and test results supporting physical impairment claim; defendant's challenge of evidence; dismissal

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

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

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

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

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

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to

support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

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

* * *