IN THE SUPREME COURT OF OHIO

Linda Ackison, Administratrix,	)	**Case Nos. 2007-0219 and 2007-0415 (consolidated)**
Plaintiff-Appellee,	)	
v.	)	**On Appeal from the Lawrence County Court of Appeals, Fourth Appellate District**
Anchor Packing Co., et al.,	)	
Defendants-Appellants.	)	**Court of Appeals Case No. 05 CA 46**

DEFENDANT-APPELLANT OWENS-ILLINOIS, INC.'S MOTION TO STRIKE

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Dated: September 7, 2007

Defendant-appellant Owens-Illinois, Inc. respectfully requests that the Court strike the Appellee's Merit Brief and Appendix to Appellee's Merit Brief, filed on July 31, 2007. It does so because the Appendix includes materials that are not part of the record in this case (indeed, post-dating the conclusion of the trial court proceedings), and these improper materials completely infect the Appellee's Brief. In support of this motion, Owens-Illinois states the following:

1. The Court accepted review in this appeal and directed the parties to brief this issue: "Can R.C. 2307.91, 2307.92, and 2307.93 be applied to cases already pending on September 2, 2004?" *Ackison v. Anchor Packing Co.*, 113 Ohio St.3d 1464, 864 N.E.2d 651 (Table), 2007-Ohio-1722.

2. The Appellee's Merit Brief frames the appeal as an "as applied" challenge to Amended Substitute House Bill 292 ("HB 292"), arguing that HB 292 is unconstitutional as applied to the *Ackison* claim, which was filed before September 2, 2004, HB 292's effective date. Appellee's Merit Brief at 6-7, 49, 50. The cornerstone of this "as applied" challenge is the repeated assertion that Mr. Ackison had an "accrued" or "vested" claim that "arose" before HB 292's effective date (because he was "diagnosed . . . by a board certified physician" with "symptoms of asbestosis") and that — even though he was "injured and symptomatic" and "suffered from a recognized compensable injury which had accrued and was filed prior to [HB 292]," so that his claim "arose" and he had "vested rights" in a "viable common law cause of action" — HB 292 "abrogates the valid common law claims . . . , violating his vested rights." Id. at 2, 7, 8, 11, 14, 27-30, 39-40, 48-49, 49-50.

3. This narrative is completely at odds with the Record. When called upon in the trial court to show the basis for the claim, the plaintiff proffered only four documents: (1) an

upper-GI report of "ulcerated distal esophagus cancer," with no mention of asbestos; (2) a chest x-ray report indicating circumscribed pleural plaques, with no mention of asbestos; (3) an affidavit stating that Mr. Ackison was a steelworker, with a preprinted boilerplate paragraph stating that he worked with or near unspecified asbestos products; and (4) a death certificate, listing congestive heart failure, aortic stenosis, type 2 diabetes, and esophageal mass, with no mention of asbestos. Trial Court Record No. 115, Exs. A-D (filed June 30, 2005); see also Trial Court Record No. 132, Exs. A-D (filed Nov. 10, 2005) (same documents submitted again).

4. The trial court found these materials were not prima facie evidence of bodily injury caused by asbestos, and administratively dismissed the complaint on December 2, 2005.

5. The plaintiff filed a notice of appeal on December 29, 2005.

6. Nothing in the Record suggested that the plaintiff had any bodily injury caused by asbestos, much less a "vested" claim.[1] On appeal in this Court, the plaintiff now attaches and relies on a new document, created in 2006 after the Record was closed, long after the claim assertedly "accrued," and long after HB 292's effective date. The Appendix to Appellee's Merit Brief lists its contents without supplying Record citations. Exhibit F to the Appendix is listed simply as "Medical Records of Danny Ackison." It contains some materials from Record No.

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[1] As discussed in detail in the Brief of Defendant-Appellant Owens-Illinois, Inc. (filed June 8, 2007), the upper-GI report, x-ray report, and death certificate, none of which mentioned asbestos, did not show asbestos-caused injuries, for distal esophageal cancer has causes other than asbestos (indeed, even the Dr. Frank letter, discussed below, says that Mr. Ackison's treating physicians attributed his esophageal cancer to his chronic heartburn, or reflux), pleural plaques have many causes other than asbestos, and the death certificate attributed his death to causes other than asbestos. Brief of Defendant-Appellant Owens-Illinois at 6-12, 17-18, 33 n.18, 36-38. The fourth document proffered by the plaintiff to the trial court, the affidavit, was so vague and incompetent as to mean nothing (id. at 38), but even if it were competent evidence of asbestos *exposure*, this Court has established that exposure is not bodily injury (id. at 27-28 & n.17, 33 n.18, citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 87, 447 N.E.2d 727, 730).

115, but adds another document, created in January 2006, that is not in the Record: a letter to the plaintiff's lawyers from Dr. Arthur Frank. The Appendix also includes a Curriculum Vitae of Dr. Frank (Exhibit L, not in the Record).[2]

7. The Appellee's Merit Brief relies heavily on the extra-record Dr. Frank materials as the foundation for its argument that Mr. Ackison had an asbestos-caused injury, creating a "vested right" that HB 292 purportedly infringed. For example, it calls Dr. Frank "Appellee's testifying expert," Appellee's Merit Brief at 17, 19, even though Dr. Frank never testified, and his document was not created until 2006, after the trial court proceedings had ended. Dr. Frank was never mentioned in the Common Pleas or Appellate Court proceedings, but was first introduced in the Appellee's papers in this Court. There is no legitimate basis to place this extra-record document before the Court, much less to argue that a document first created in 2006 caused a right to "vest" before September 2, 2004.

8. In addition, the Appellee's Merit Brief and Appendix are full of extra-record factual assertions and materials regarding *Wilson v. AC&S, Inc.* (12th Dist.), 169 Ohio App.3d 720, 864 N.E.2d 682, 2006-Ohio-6704. See Brief at 4-6, 17, 23, 42, 44; Appendix Exs. H, I, J, M, N. The Court accepted review in the present *Ackison* case in part because of a legal conflict between the Fourth District's decision in *Ackison* and the Twelfth District's decision in *Wilson* (see *Ackison v. Anchor Packing Co.*, 113 Ohio St.3d 1464, 864 N.E.2d 651 (Table), 2007-Ohio-1722), but it did not accept review of *Wilson*. In fact, on April 17, 2007 this Court dismissed the

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[2] Contrary to Supreme Court Rule VII.2.B.5, the pages of the Appendix are not consecutively numbered, but only grouped in "Exhibits."

If the plaintiff-appellee instead meant the Appendix to be a Supplement under Rule VII, it would still be expressly limited to "portions of the record," and require consecutive page numbering. See Rule VII.3, 4.

appeal of the *Wilson* decision on the plaintiff's motion. *Wilson v. AC&S, Inc.*, No. 2007-0178 (Entry dated April 17, 2006).[3] Not only is the *Wilson* record not part of the present Record on Appeal, but some of the materials submitted in the Appellee's Appendix were not even in the *Wilson* record. See, e.g., Appendix, Exhibit M (Curriculum Vitae of Samuel P. Hammar, dated August 2006).

9. It is well settled that a party may not rely on extra-record evidence. When one attempts to do so, the Court will strike the offending material and disregard arguments based on it. See *State ex rel. Blair v. Balraj* (1994), 69 Ohio St.3d 310, 313, 631 N.E.2d 1044, 1047 (granting motion to strike extra-record material attached to party's brief; rule specifying appendix contents did not "provide for new evidence not considered in the court of appeals").

10. In the present case, the extra-record materials should be stricken from the Appellee's Appendix. They should also be stricken from the Appellee's Merit Brief, but they are so intertwined into the argument that they cannot be stricken without striking the brief itself.

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[3] Having failed to serve the defendants, the plaintiff moved to dismiss the *Wilson* appeal, and at the same time suggested that the Court should consider the *Wilson* appeal by accepting review in *Ackison*. See *Wilson v. Certainteed Corp.*, No. 2007-0178, Appellant Barbara Wilson's Application for Dismissal in Response to the Court's Order for a Rule to Show Cause (filed April 10, 2007). The defendants pointed out that the plaintiff could not have it both ways, and that the Court's acceptance of review in *Ackison* on the basis of conflict would bring only the *Ackison* case, and not *Wilson*, before the Court. Id., Appellees' Response to Appellant's Motion for Dismissal (filed April 12, 2007). The Court simply dismissed the *Wilson* appeal, without accepting the plaintiff's suggestion to review it in conjunction with *Ackison*. See *Wilson v. AC&S, Inc.*, No. 2007-0178 (Entry dated April 17, 2006).

Wherefore, defendant-appellant Owens-Illinois respectfully requests that the Court strike the extra-record materials from the Appellee's Appendix, as well as the Appellee's Merit Brief, and at a minimum direct the Appellee to resubmit corrected papers, with an opportunity for reply.

Dated: September 7, 2007

Respectfully submitted,

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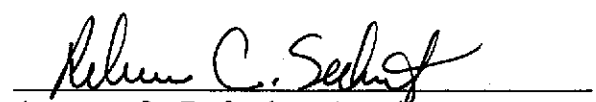

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