IN THE SUPREME COURT OF OHIO

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

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Introduction[1]

There are two defendants-appellants' briefs on appeal: the Brief of Defendant-Appellant Owens-Illinois, Inc., and the brief of the other defendants-appellants. The Appellee's Merit Brief, filed July 31, 2007, largely ignores the arguments presented by Owens-Illinois, except to criticize Owens-Illinois's full presentation of the asbestos litigation crisis — a crisis of lawsuits manufactured for money, not of illness — that impelled the General Assembly to clarify the substance of the existing asbestos-claim-accrual law, and to create a new procedure to help implement it.

Owens-Illinois's brief explained the genesis of Am. Sub. H.B. 292 ("HB 292"):

> • Ohio's courts have been inundated with an "elephantine mass" of asbestos litigation, despite the 1980 asbestos-accrual statute providing that an asbestos claim accrues only when the plaintiff is "informed by a competent medical authority," or should know, of "bodily injury caused by exposure to asbestos" (R.C. 2305.10 (B)(5)), because these statutory terms had never been defined, either by the legislature or by the Ohio Supreme Court;
>
> • the mass of asbestos litigation was due in large part to claims by plaintiffs who were not injured by asbestos;
>
> • this mass of litigation clogged Ohio's courts, competing with and delaying claims of real asbestos injuries, draining resources necessary to compensate those who are truly ill with asbestos-caused disease, burdening the courts, driving defendants into bankruptcy, and causing far-reaching economic havoc to Ohio and its citizens; and
>
> • the legislature enacted HB 292 to do two things: (1) to provide definitions for the never-yet-defined terms used in the 1980 asbestos-claim-accrual statute, and (2) to provide a procedural

[1] Owens-Illinois has moved to strike the Appellee's Merit Brief and Appendix because they improperly include, and heavily rely on, extra-record materials (first created in 2006, after the trial court proceedings were concluded and the case was on appeal). This use of material outside the record not only violates fundamental appellate principles, but turns the merits arguments on their head: in asserting that a claim "vested" *before* HB 292's 2004 effective date, the plaintiff chiefly relies on a report created more than a year *after* HB 292's effective date. Owens-Illinois submits this reply brief without waiving its motion to strike.

> mechanism for automatic early scrutiny of asbestos claims, under which plaintiffs must make a prima facie evidentiary showing of a valid claim — under the newly-articulated definitions, or at least under prior law — to be entitled to proceed.

Owens-Illinois's brief also explained why HB 292's two aspects — supplying definitions for previously undefined statutory terms, and adding a procedure for early scrutiny of asbestos claims — may constitutionally apply to pending cases. The definitions pose no constitutional problem, because they clarified what had not previously been defined, and impaired no vested right, since no one has a vested entitlement to a particular reading of terms that lack any authoritative definition. The new procedure, requiring that plaintiffs make a prima facie evidentiary showing of the basis for their claims, poses no constitutional problem, since changes in procedure are routinely applied retrospectively to pending cases.

Finally, Owens-Illinois's brief explained why the present plaintiff-appellee had not made a prima facie showing, either under the newly-articulated definitions, or under prior law. When called upon in the trial court to show the basis for her claim, the plaintiff proffered only four documents: (1) an upper-GI test showing "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); Trial Court Record No. 132, Exs. A-D (filed Nov. 10, 2005) (same documents submitted again). These materials did not suggest bodily injury caused by asbestos.[2]

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[2] As discussed in detail in Owens-Illinois's brief, the upper-GI report, x-ray report, and death certificate, none of which even mentioned asbestos, did not show asbestos-caused injuries, for distal esophageal cancer has
(. . . continued)

Rather than responding, the Appellee's Merit Brief manufactures an alternative narrative, built on two key premises: (1) that before HB 292 there was a body of "common law" regarding accrual of asbestos claims, and (2) that under this body of common law the plaintiff had a "vested right" to pursue her claim. The bulk of the Appellee's Brief passionately argues that a new law may not retroactively disturb vested rights. But that proposition is tautological: that is what "vested" means. The controversy lies instead with the plaintiff's premises, which are untrue. Owens-Illinois largely joins the Reply Brief of the other defendants-appellants,[3] but also submits this reply brief to address these and other limited issues.

I. The Plaintiff's Premises Are Untrue.

A. Accrual Was a Matter of Statute, Not Common Law, Even Before HB 292.

The plaintiff's first premise is that before HB 292, a body of "common law" dictated when an asbestos claim accrued. Not so. Since 1980, asbestos accrual has been governed by a statutory standard: an asbestos claim accrues when the plaintiff is "informed by a competent medical authority," or should know, of "bodily injury caused by exposure to asbestos." R.C. 2305.10 (B)(5). The legislature meant something by these statutory terms, but did not expressly

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causes other than asbestos, pleural plaques have many causes other than asbestos, and the death certificate attributed the death to causes other than asbestos. Brief of Defendant-Appellant Owens-Illinois at 6-12, 17-18, 33 n.18, 36-38. The plaintiff's fourth document, 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).

[3] The Appellants' Reply Brief appends an unpublished decision, *Stroney v. Eagle-Picher Indus., Inc.* (Ohio App. 8th Dist. 1988), 1988 WL 113008 (Appendix, Ex. 3), and says that it "affirmed summary judgment against plaintiff because 'simply inquiring of the doctors' about why he was being treated would have apprised him of the diagnosis." Appellants' Reply Brief at 17. This assertion is incorrect. The dissent in *Stroney* would have so held, but the majority opinion reversed summary judgment, holding that the claim was not barred by the statute of limitation since the plaintiff had been aware of treatments and test results but not a diagnosis. But the majority opinion does demonstrate that even before HB 292, in some lower courts' view, a plaintiff did not have an accrued, vested claim by virtue of a medical report short of a diagnosis. Here, similarly, none of the documents the plaintiff proffered to the trial court as the basis for the claim included a diagnosis of asbestosis or even intimated that any condition was caused by asbestos. *Stroney* suggests that, on the basis of these documents, no claim had accrued.

define "competent medical authority," "bodily injury," or "caused by exposure to asbestos."

Nor did any binding "common-law" gloss on the statutory standards exist. If the legislature did not define the terms itself, only this Court had the power to promulgate a definitive judicial ("common-law") interpretation of the statutory terms. See *Hearing v. Wylie* (1962), 173 Ohio St. 221, 223-24, 180 N.E.2d 921, 922-23 (after Supreme Court had defined the term "injury" in workers' compensation statute, legislature could not redefine it retroactively) (overruled on other grounds); *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 109, 522 N.E.2d 489, 498 (after Supreme Court had defined the term "substantial certainty" in workers' compensation statute, legislature could not redefine it retroactively). A gloss by one lower court would not bind another lower court, or create a "vested right" to one court's non-authoritative standard. See *Wilson v. AC&S, Inc.,* 169 Ohio App.3d 720, 864 N.E.2d 682, 2006-Ohio-6704 ("[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") (internal quotation marks omitted).

It is unsurprising that, even though the plaintiff-appellee claims that a "common law standard" existed before HB 292, she does not identify precisely what that standard supposedly was. She argues that HB 292 imposes "new, stringent medical criteria" and "dramatically changes concepts of medical and scientific causation" by requiring "standards not previously required by any court, statute, or rule in Ohio." Appellee's Merit Brief at 1. But she does not identify any affirmative rules or standards that HB 292 displaced. What existed between the legislature's enactment of the accrual statute in 1980 and its enactment of HB 292 in 2004 was a vacuum of authority: no definitive interpretation of the 1980 terms by this Court, and no legislative guidance. Indeed, no lower courts even proposed precise interpretations of the 1980

terms. Instead, in the absence of authoritative guidance, the lower courts did not treat the 1980 accrual statute as serving a gatekeeping function, and turned almost no claims away. In essence, the plaintiff now argues that she had an entitlement to that vacuum — that since virtually no claim would in practice be turned away, there was a "common law standard" of hands-off lenience, and a claim "vested" by virtue of nothing more than having been filed.

The closest the plaintiff comes to identifying the content of the supposed "common law standard" is her assertion that "under Ohio common law, asbestos-related conditions were considered compensable when there was an 'alteration' of the lining of the lung, without any requirement of fulfilling certain medical criteria before a claim may be brought." Appellee's Merit Brief at 9. This assertion either begs the question or is wildly open-ended. It begs the question by starting with an assumption that the claimant has an "asbestos-related condition," when that is the key question to be answered. It is wildly open-ended by suggesting that anyone with any kind of lung change, *regardless of medical criteria*, has a vested right to assert an asbestos claim. Pneumonia? Vested asbestos claim. Emphysema? Vested asbestos claim. Bullet in the lung? Vested asbestos claim. Cystic fibrosis? Vested asbestos claim. If the plaintiff says this is not what she meant, and that something must link the lung alteration to asbestos, she would violate her rule that the entitlement to sue is "regardless of medical criteria."

In fact, the two cases she cites, for this supposed common law gloss on the Ohio accrual statute, do not say this. As discussed in Owens-Illinois's opening brief at 32-35, neither *Verbryke v. Owens-Corning Fiberglas Corp.* (6th Dist. 1992), 84 Ohio App.3d 388, 616 N.E.2d 1162, nor *In re Cuyahoga County Asbestos Cases* (8th Dist. 1998), 127 Ohio App.3d 358, 364, 713 N.E.2d 20, 24, addressed the "bodily injury" requirement of R.C. 2305.10 (B)(5), but only the Restatement (Second) of Torts (disagreeing with other courts' interpretation of the

Restatement, and distinguishing other States' laws as "requir[ing] bodily injury," while overlooking that Ohio's statute did too). The courts were not entitled to adopt a common-law standard for accrual of an asbestos claim that was independent of, or at war with, Ohio's statutory standard. Nor could these lower courts establish a definitive interpretation of Ohio's statute, beyond the power of the legislature to clarify.[4] But the standard they proposed — that for Restatement purposes an alteration of the lung caused by asbestos may be considered a harm — at least required that the alteration be *caused by asbestos.* Nothing in the records Mrs. Ackison submitted to the trial court even suggested that his condition was caused by asbestos. The word "asbestos" appeared only in an incompetent affidavit concerning asbestos *exposure*, and it is established that exposure is not injury. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 87, 447 N.E.2d 727, 730.

B. <u>The Plaintiff-Appellee Had No "Vested Right" Before HB 292.</u>

The constant theme of Appellee's Merit Brief is that her claim "arose," "accrued," or was "vested" before HB 292 came into effect. In part she does so by naked assertion. In part she does so by misrepresenting her prima facie submission to the trial court. (E.g., she states that in 2001 "Mr. Ackison was diagnosed with asbestosis [sic] related pleural thickening," id. at 2, apparently referring to the ILO report that noted circumscribed pleural thickening (a condition with many different causes, see Brief of Defendant-Appellant Owens-Illinois at 12), that did not even purport to be a "diagnosis," and that did not mention "asbestos" or "asbestosis" at all.) And in part she asserts that her claim "accrued," "arose," or "vested" before September 2, 2004 by relying on a letter by Dr. Arthur Frank that was not created until 2006 and that is outside the

[4] As discussed above, these lower court decisions could not constitute a definitive statement of Ohio's common law, for other lower courts could reach different conclusions (like the decisions in other states), none of which would be authoritative until such time as the Ohio Supreme Court issued a definitive construction.

Record, which closed in 2005. See Defendant-Appellant Owens-Illinois, Inc.'s Motion to Strike, dated Sept. 7, 2007. Each of these bases is patently improper.

Most fundamentally, the plaintiff turns the ultimate question (was there a vested claim?) into a premise (since my claim vested, HB 292 cannot apply retrospectively). That premise is incorrect. The plaintiff's having *asserted* a claim does not make it *vested.* There was a "vested" claim of asbestos-caused injury, before HB 292's effective date, only if there was a genuine *basis* for asserting such a claim at that time. The only bases offered by the plaintiff — (1) the upper-GI test showing "ulcerated distal esophagus cancer," with no mention of asbestos; (2) the chest x-ray report indicating circumscribed pleural plaques, with no mention of asbestos; (3) the incompetent affidavit stating at best that Mr. Ackison was exposed to asbestos in his work as a steelworker; and (4) the death certificate, listing congestive heart failure, aortic stenosis, type 2 diabetes, and esophageal mass, with no mention of asbestos — are no bases for a genuine claim.

II. <u>The Appellee's Specific Challenges to HB 292 are Invalid.</u>

The plaintiff makes a series of specific challenges to the operation of HB 292, arguing that retroactive application of HB 292's medical criteria would be unconstitutional because three provisions "substantially alter substantive rights:"

- First, the requirement that claims be supported by "competent medical authority," as defined in R.C. 2307.91(Z). (She also argues that there are alternative ways for a claim to accrue under R.C. 2305.10(B)(5), making a "competent medical authority" unnecessary.)

- Second, the requirement that asbestos be a "substantial contributing factor," as defined in R.C.2307.91(FF), to the medical condition at issue.

- Third, the requirement to show "substantial occupational exposure to asbestos" (as defined in R.C. 2307.91(GG)). (This requirement is applicable only to claims for smoker/lung cancer (see R.C. 2307.92(C)(1)(c)(i)), and wrongful death (see R.C. 2307.92(D)(1)(c)(i)), and then only as an alternative test for showing sufficient asbestos exposure.).

Each of these challenges is invalid.

A. The "Competent Medical Authority" Requirement is Valid.

HB 292's requirement that asbestos claims be supported by "competent medical authority" impairs no vested rights. Since 1980 Ohio statutes provided that claims for asbestos-related injury did not accrue until a "competent medical authority" advised of asbestos-caused injury, or the claimant should have so known. R.C. 2305.10. But the term "competent medical authority" was not defined in the 1980 statute, nor was it ever defined by the Ohio Supreme Court. HB 292 defined this term for the first time, and that definition applies equally to R.C. 2305.10. See R.C. 1.42 (rule of construction requires that phrases with a particular meaning assigned by legislative definition be construed accordingly). The legislature is free to define previously-undefined terms, and the new definitions may be applied retroactively without constitutional problem. See, e.g., *Wilson v. AC & S, Inc.* (12th Dist.), 2006 WL 3703350, 2006-Ohio-6704, ¶ 17, 88, 105 (upholding HB 292 because it does not violate the Constitution for the legislature to define previously-undefined statutory terms).

Blatt v. Lynn (Mich. App. 1999), 1999 WL 33441163, is similar. An amendment defined "serious impairment of a bodily function" for the first time and made it a question for the court. The plaintiff was injured before the amendment but sued after it took effect. The court rejected his argument that the amended definition would "abrogate[] his vested rights:"

> A statute is remedial or procedural if it is designed to correct an existing oversight in the law or redress an existing grievance or is intended to reform or extend existing rights. When a statute is uncertain, any amendment adopted which serves to clarify that uncertainty is ordinarily given retroactive effect. . . . [T]he statutory amendment is procedural. The statute does not create or abolish substantive rights, but rather assigns the trial court the role of determining whether the plaintiff has alleged facts which establish a serious impairment of body function or permanent serious disfigurement, and clarifies the meaning of the term "serious impairment of body function."

Id. at *2-3. As in *Blatt,* HB 292 does not create or abolish new substantive rights, but clarifies and defines the meaning of "competent medical authority," and provides procedures for the trial court to determine whether there has been a diagnosis by competent medical authority.

The Appellee argues that, before HB 292, accrual of a claim did not require that a "competent medical authority" advise of an asbestos-caused injury, but also could occur if the claimant "should have known." She concludes that HB 292 expanded prior law by making a "competent medical authority" necessary in every case. This conclusion is flawed. Under the accrual statute, an asbestos claim is for "bodily injury caused by exposure to asbestos." Claimants may be advised by a competent medical authority that they have such an injury, or what they diligently should know may be imputed to them (i.e., they cannot duck accrual by refusing to see or listen to doctors, or by listening only indirectly), but in either case their claims turn on "bodily injury caused by exposure to asbestos." It is not as though under the "should know" route there is no substance to what one should know. When claimants are called upon to show the basis for such claims, they must demonstrate what they should have known, and what diligent claimants (i.e., those on notice that they should make inquiries) reasonably should know is what a competent authority would tell them if they asked. By requiring plaintiffs to use a competent medical authority to make a prima facie showing of what they knew or should have known, HB 292 did nothing radical.

Do plaintiffs have a "vested" right to assert a claim under whatever standards claimants were allowed to get away with in the past, however generous or flabby those standards were? The General Assembly's undisputed findings show that non-treating, non-diagnosing, non-professional, inaccurate, even fraudulent screeners have supplied the backup for untold claims. The legislature had the power to correct this scandal, when neither prior statute nor Ohio

Supreme Court precedent had occupied the field. See *Wilson v. AC & S, Inc.* (12th Dist.), 2006 WL 3703350, 2006-Ohio-6704, ¶82 (there is no "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"). Indeed, the scandal shows that asbestos litigation has frequently been the product of fraud, and surely the Ohio Constitution does not give claimants a vested right to rely on fraud.

Owens-Illinois does not suggest that particular plaintiffs are dishonorable. They may have perfectly legitimate claims. If so, they have only to come forward with a proper showing in order to proceed. Nor does Owens-Illinois doubt that Mr. Ackison was truly sick or that he died. But his proffered medical records did not suggest that his illness was asbestos-related. There is no constitutional imperative that any plaintiffs be able to take claims to a jury — or to exert hydraulic settlement pressure — just because they would like to.

B. <u>The "Substantial Contributing Factor" Requirement is Valid.</u>

Under R.C. 2307.92, a claimant must make a prima facie showing that asbestos exposure was a "substantial contributing factor" to a medical condition causing physical impairment.[5] "Substantial contributing factor" is further defined in R.C. 2307.91(FF) as meaning that both (1) asbestos exposure was the predominant cause of the injury, and (2) asbestos exposure was a but-for cause (i.e., without the exposure the impairment would not have occurred).

These requirements were already rooted in Ohio law before HB 292, posing no question of retroactivity. Ohio law has always required proof of proximate cause, including proof that the injury would not have occurred without the action of the defendant:

> Proximate Cause is an act or failure to act which in the natural and continuous sequence directly produces the (death) (injury) (physical harm), and without

[5] A claimant with mesothelioma does not have to make any prima facie showing. R.C. 2307.92(E).

> which it would not have occurred. Cause occurs when the (death) (injury) (physical harm) is the natural and foreseeable result of the act or failure to act.

OJI 11.10(2). See also, e.g., *Aiken v. Industrial Comm'n* (1944), 143 Ohio St. 113, 117, 119, 53 N.E.2d 1018, 1020, 1021:

> The definition and determination of 'proximate cause' in the field of torts is applicable here. While the determination of the proximate cause of an ultimate result sometimes presents a difficult problem in a particular case, general principles controlling the settlement of such questions are well established. 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. . . . The rule is well settled by numerous cases that to establish the relation of cause and effect between an injury to a workman and his death . . . , the evidence must be such as to remove the case from the realm of speculation and conjecture; there must be competent evidence tending to show a proximate causal connection between the injury and the subsequent death.

Rather than being novel, HB 292's definition of "substantial contributing factor" is simply a legislative recognition and codification of this ancient requirement.

Nor do R.C. 2307.91(FF) and 2307.92(B-D) conflict with *Horton v. Harwick Chemical Corp.*(1995), 73 Ohio St. 3d 679, 653 N.E.2d 1196, as the Appellee contends. As the 12th District appellate court has held (*Wilson v. AC & S, Inc.* (12th Dist.), 2006 WL 3703350, 2006-Ohio-6704, ¶ 107-114), these sections address a different issue than the one addressed in *Horton*. In *Horton,* this Court rejected the "frequency, regularity, and proximity" test of *Lohrmann v. Pittsburgh Corning Corp.* (4th Cir. 1986), 782 F.2d 1156 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*" — specific causation 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).

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. Since *Horton* did not address this issue at all, this section of HB 292 cannot conflict with *Horton*.

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 HB 292, Section 5 (uncodified, but available at http://www.legislature.state.oh.us/bills.cfm?ID=125_HB_292) (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).

C. The "Substantial Occupational Exposure" Requirement, Though Not Presented Here, is Valid.

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)), is not implicated in the present case, which the Appellee concedes is limited to the application of HB 292 to nonmalignacy claims. See Appellee's Merit Brief at 1 n.1. In any event, this section does not "reimpose" the *Lohrmann* test that this 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 legislature 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 a specific product or defendant, at issue in *Horton*.

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 show 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 things). This legislative clarification and specification of "exposure" is not unconstitutionally retroactive.

Conclusion

For these reasons, the reasons stated in Owens-Illinois's opening brief, and the reasons

stated by its fellow defendants-appellants, Owens-Illinois respectfully requests that the Court hold it constitutional to apply HB 292 to this case, and to other cases that were pending when it came into effect.

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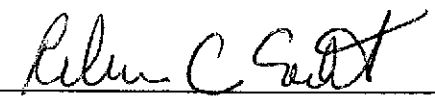
Respectfully submitted,



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