

IN THE SUPREME COURT OF OHIO

Cheryl Boley, Executrix of the Estate of )  
Mary Adams, and Clayton Adams, )

Case No.: **09-0542**

Plaintiff-Appellant, )

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth Appellate  
District

-vs- )

Goodyear Tire and Rubber Company, )

Court of Appeals  
Case No. CA-08-091404

Defendant-Appellees. )

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS CHERYL BOLEY  
AND CLAYTON ADAMS

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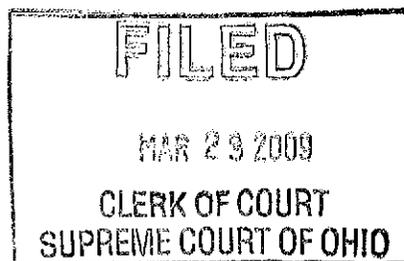


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EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC OR  
GENERAL INTEREST

This is a case of first impression in this Court, and this cause raises a critical issue for women and children of asbestos workers who were exposed to, and died from, asbestos related disease as a result of a family member bringing home asbestos on their clothes. The critical issue before this court is as follows: Whether Revised Code Section 2307.941(A) applies to “take home exposure” asbestos cases against the employer of a family member who was exposed to asbestos at their employer, brought asbestos home on their clothes, and subsequently caused a family member to be exposed to asbestos which caused that family member to contract an asbestos related disease.

In this case, the Court of Appeals found that Revised Code Section 2307.941(A) applies to “take home exposure” cases against a family member’s employer. The Court of Appeals found that Revised Code Section 2307.941(A) applies to “take home exposure” under the premises liability statute. However, the Statute specifically states, “The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for *exposure to asbestos on the premises owner’s property.*” *Id., emphasis added.* In this case, Mary Adams, Appellants’ decedent, was never exposed to asbestos on Appellee’s premises.

If Appellant’s decedent was an employee of Appellee, she would at least have a remedy through the workers compensation system, or through filing an intentional tort claim against Appellee. However, Appellants have no remedy for Appellants’ decedent’s exposure from asbestos brought home on her husband’s work clothes that he brought home while employed by Appellee. This lets the employers get a free pass, even if they knew of the hazards and did

nothing to protect someone like Plaintiff's decedent, and leaves people like Plaintiff's decedent with no recourse against companies like Appellee.

Revised Code Section 2307.941(A) should not be applied to take home exposure cases, and is why this Court must grant jurisdiction and review the erroneous and dangerous decision of the Court of Appeals.

#### STATEMENT OF THE CASE AND FACTS

This is a take home asbestos exposure case. Appellant's decedent, Mary Adams, was exposed to asbestos via washing her husband's asbestos contaminated work clothes. Appellant's decedent's husband was Clayton Adams. Clayton Adams worked at Appellee Goodyear Tire & Rubber Company's facility in St. Mary's, Ohio from 1973 until 1983. Clayton Adams was exposed to a myriad of asbestos-containing products while employed at Appellee's St. Mary's Ohio, facility, and brought asbestos home on his clothes that his wife washed. Mary Adams was diagnosed with malignant mesothelioma<sup>1</sup> on, or about, March 22, 2007. Mary Adams passed away from malignant mesothelioma on July 23, 2007.

On or about June 13, 2007, Appellants filed their complaint against numerous defendants, including Appellee. The *Complaint* alleged causes of action for strict products liability, negligence, failure to warn, breach of warranties, premises liability and numerous other torts against numerous Defendants related to Mary Adams exposure to asbestos. Included in this complaint was a cause of action for negligence asserted against Appellee. Appellant's decedent, Mary Adams, was deposed by Appellee and Appellants' counsel on June 25, 2007. At her deposition, on her death bed, Mary Adams stated that she would shake out and wash Clayton Adams clothes while he worked for Appellee. Clayton Adams clothes were dusty when Mary

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<sup>1</sup> The only know cause of malignant mesothelioma in the United States is asbestos exposure.

Adams would shake them out. Mary Adams would breathe the dust when she was shaking out Clayton Adams clothes.

Appellant's Decedent's husband, Clayton Adams was deposed over three days. In Clayton Adams' depositions, he described being exposed to everything from asbestos containing pipe insulation to asbestos-containing packing while employed by Appellee. Michael Boley, a coworker of Clayton Adams while he was employed by Appellee, was deposed in this matter on September 19, 2007. Mr. Boley described Clayton Adams being exposed to everything from asbestos-containing pipe insulation to asbestos cement pipe while Clayton Adams was employed by Appellee. Mr. Boley described Clayton Adams clothes as being dusty while he worked for Appellee, and described the whole operation at Appellee's facility as being dusty.

Appellant is not claiming that Mary Adams was exposed on Appellee's premises. She was never exposed on Appellee's premises, and there is no evidence to support that Mary Adams was exposed to asbestos at any of Appellee's facilities.

On or about December 14, 2007, Appellee filed its Motion for Summary Judgment. In their Motion for Summary Judgment, Appellee mainly relied on R.C. 2307.941(A), a premises liability statute. R.C. 2307.941(A) is part of what is known as House Bill 292, Ohio's asbestos tort reform act. Appellants filed their brief in opposition to Appellee's Motion for Summary Judgment on February 14, 2008, pointing out that this was a negligence cause of action against Appellee and not a premises liability case. Appellee filed their reply brief on February 29, 2008, again claiming that this case fell under R.C. 2307.941. On March 11, 2008, Appellants filed their sur-reply. Oral arguments were had on March 19, 2008. At the oral argument, counsel for Appellee relied on R.C. 2307.941 to make his argument. On April 1, 2008, the trial court granted Appellee's Motion for Summary Judgment. The trial court did not issue an opinion, and

merely granted Appellee's Motion for Summary Judgment. On April 8, 2008, the trial court journalized the order granting Appellee's Motion for Summary Judgment. Appellants timely filed their appeal on May 5, 2008.

Briefs were filed in the Eighth District Court of Appeals in this case. Oral arguments were had on January 27, 2009. On February 5, 2009, the Eighth District Court of Appeals issued its opinion affirming the Trial Courts position, and holding that Appellants' claims against Appellee were precluded by R.C. 2307.941. On February 17, 2009, the opinion of the Eighth District Court of Appeals was journalized.

In support of its position on this issue, the Appellants present the following argument.

ARGUMENT IN SUPPORT OF APPELLANTS' PROPOSITION OF LAW

Proposition of Law No. I

Revised Code Section 2307.941(A) does not apply to "take home exposure" asbestos cases against a family member's employer who exposed the employee to asbestos and that family member brought asbestos home on their clothing causing other family members to become exposed to asbestos, and develop an asbestos related disease.

In Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St. 3d 312, 315, the Ohio Supreme Court stated that "Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability." The Court went on to further state that "[i]n Ohio, the status of the person who enters upon the land of another (i.e., trespasser, licensee, or invitee) continues to define the scope of the legal duty that the landowner owes the entrant." Id., citing Shump v. First Continental-Robinwood Assoc. (1994), 71 Ohio St. 3d 414, 417. A landowner owes a duty to an invitee to exercise ordinary care for the invitee's safety and protection. Id. at 317. [A] landowner owes no duty to a licensee or trespasser except to refrain from willful, wanton or reckless conduct which is likely to injure him. Id.

Here, Appellants' decedent was never a trespasser, licensee, or invitee. As stated by the Ohio Supreme Court, a premises liability claim is based on "the legal duty that the landowner owes the entrant." *Id.* at 315. Here, Appellants' decedent never entered upon the land of Appellee. Quite to the contrary, this is a take home exposure case, where all of Appellants' decedent's exposure occurred at home while washing her husband's asbestos contaminated clothing. This basic, fundamental element of a premises liability claim, i.e. being on the premises, is missing in the current situation. Therefore, this is not a premises liability claim. This is a common law negligence claim.

The Court of Appeals misinterpreted the meaning of R.C. 2307.941. A full reading of R.C. 2307.941 clearly indicates that the statute is not applicable to the case at bar. R.C. 2307.941 is a premises liability statute, and is titled as such. As Appellants have already demonstrated, this is not a premises liability case. Further, the very language of R.C. 2307.941 makes it abundantly clear that the statute does not apply in this case. R.C. 2307.941 states in pertinent part:

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

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

*Id.*, *emphasis added*. Section A of R.C. 2307.941 makes it abundantly clear that the statute only applies "to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property." *Id.* All other sections of the statute are sub servant to this overriding section of the statute. Here, the

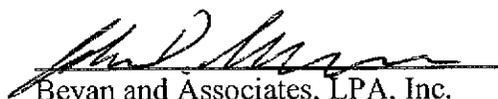
injured party, Mrs. Adams, was never exposed to asbestos on Appellee's premises. Therefore, R.C. 2307.941 cannot apply where a person was never on the premises owner's property.

Furthermore, the case law makes it clear that a court is to apply a statute as it is written. If the statute were to apply in the current case, then R.C. 2307.941(A) should state: The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos *from* the premises owner's property. *Id.*, *emphasis added*. However, that is not what the statute says. R.C. 2307.941(A) clearly and unequivocally states: "The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos *on* the premises owner's property." *Id.*, *emphasis added*. As the Ohio Supreme Court has stated, "[u]nambiguous statutes are to be applied according to plain meaning of words used, and courts are not free to delete or insert other words." State ex rel. Burrows v. Indus. Comm. (1997), 78 Ohio St.3d 78, 81. It is clear from the plain meaning of the words used that the statute does not apply in this case. Therefore, the Eighth District Court of Appeals erred in concluding that R.C. 2307.941(A)(1) applied in this case, and in affirming the order granting the motion for summary judgment filed by Appellee in the Trial Court.

#### CONCLUSION

For the reasons discussed above, this case involves matters of public and general interest. Appellants request that this Court grant jurisdiction, and allow this case, so that the important issue presented in this case will be reviewed on the merits.

Respectfully submitted,

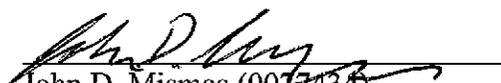
  
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**PROOF OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent to all parties of record by U.S. Mail, postage prepaid this 23<sup>rd</sup> day of March, 2009:

  
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**Appendix**

Boley v. Goodyear Tire and Rubber Company (8th Dist. 2009), Case No. CA-08-091404

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 91404

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**CLAYTON ADAMS, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**GOODYEAR TIRE AND RUBBER CO., ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-627038

**BEFORE:** Cooney, A.J., Gallagher, J., and Boyle, J.

**RELEASED:** February 5, 2009

**JOURNALIZED:** FEB 17 2009

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COLLEEN CONWAY COONEY, A.J.:

Plaintiff-appellant, Cheryl Boley (“Boley”), as the Executrix of the Estate of Mary and Clayton Adams, appeals the trial court’s granting summary judgment in favor of defendant-appellee, Goodyear Tire & Rubber Company (“Goodyear”). Finding no merit to the appeal, we affirm.

In June 2007, Mary and Clayton filed suit against Goodyear and numerous other defendants alleging causes of action for negligence, strict liability, breach of warranties, loss of consortium, statutory products liability, punitive damages, and fraudulent concealment that related to Mary’s asbestos exposure.<sup>1</sup>

Clayton (Mary’s husband) worked at Goodyear from 1973 to 1983. While at Goodyear, Clayton was exposed to asbestos-containing products and brought asbestos home on his clothing that Mary washed. Clayton’s clothing was dusty so Mary would shake it out before washing. She would breathe in the dust while shaking out the clothing. She was diagnosed with mesothelioma in March 2007 and died in July 2007.<sup>2</sup>

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<sup>1</sup>Boley was substituted as the personal representative of Clayton and Mary’s estate. In May 2008, Boley amended the complaint naming her as the Executrix of Clayton and Mary’s estate and added wrongful death as the ninth claim for relief.

<sup>2</sup>These types of “secondhand” exposure or “take home” cases involve claims by members of a worker’s household for mesothelioma or other asbestos-related diseases where the cause of the disease is alleged to have been exposure to asbestos dust that

In December 2007, Goodyear moved for summary judgment, arguing that the Adams' claims are barred by R.C. 2307.941(A)(1) and that their negligence claim fails because Goodyear did not owe Mary a duty of care. In February 2008, Clayton opposed Goodyear's motion, individually and as the Executor of Mary's Estate, arguing that their claim against Goodyear was for negligence and not premises liability. After a hearing, the trial court granted Goodyear's motion. The trial court also certified that there was no just reason for delay.

Boley now appeals, raising two assignments of error for our review. In the first assignment of error, Boley argues that the trial court erred in granting Goodyear's motion for summary judgment based on R.C. 2307.941(A)(1). In the second assignment of error, she argues that the trial court erred in granting summary judgment on Mary's negligence claim.

#### Standard of Review

Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

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the worker brought home.

“Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274.”

Once the moving party satisfies its burden, the nonmoving party “may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

#### R.C. 2307.941—Liability of Premises Owner

As the Ohio Supreme Court stated in *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596, the General Assembly enacted Amended Substitute House Bill 292 (“H.B. 292”) in response to the asbestos litigation crisis in Ohio.<sup>3</sup> The key provisions are codified in R.C. 2307.91

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<sup>3</sup>H.B. 292 became effective on September 2, 2004.

through 2307.98 and clarify when a plaintiff has an accrued cause of action for asbestos injury and specifies what medical evidence entitles a plaintiff to the trial court's immediate attention. See, also, *In re Special Docket No. 73958*; Cuyahoga App. Nos. 87777 and 87816, 2008-Ohio-4444.

With respect to premises defendants, R.C. 2307.941 was enacted to address claims against a premises owner for exposure to asbestos on the premises owner's property and states in pertinent part:

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

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

In the first assignment of error, Boley does not challenge the constitutionality of R.C. 2307.941. Rather, she argues that R.C. 2307.941 does not apply to Mary's case. She contends that R.C. 2307.941(A) “makes it abundantly clear” that the statute only applies to damages resulting from asbestos exposure while the individual is on the premises owner's property. Because Mary was never exposed to asbestos on Goodyear's property, Boley contends that R.C. 2307.941 cannot apply to Mary's case. We find this argument unpersuasive.

When interpreting a statute, “a court’s paramount concern is the legislative intent in enacting the statute. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. Words used in a statute must be taken in their usual, normal or customary meaning. It is the duty of the court to give effect to the words used and not to insert words not used. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation.” *State ex rel. Richard v. Bd. of Trustees of the Police & Firemen’s Disability & Pension Fund*, 69 Ohio St.3d 409, 411-412, 1994-Ohio-126, 632 N.E.2d 1292. (Internal citations and quotations omitted.)

Furthermore, “[t]he presumption always is, that every word in a statute is designed to have some effect, and hence the rule that, ‘in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to every part of it.’” *Turley v. Turley* (1860), 11 Ohio St. 173, 179, citing *Commonwealth v. Alger* (Mass. 1851), 7 Cush. 53, 89. (Emphasis in original.) See, also, R.C. 1.47(B), which provides that: “[i]n enacting a statute, it is presumed that \*\*\* [t]he entire statute is intended to be effective.”

We find that Boley's interpretation of R.C. 2307.941 would render the statute meaningless. That is, R.C. 2307.941(A)(1) could never apply in any case because the very fact that would trigger the application of subdivision (A)(1), exposure somewhere other than the defendant's premises, would also render the statute inapplicable under Boley's interpretation of R.C. 2307.941(A).

When R.C. 2307.941(A) is read as a whole, it is clear that the focus is on the presence of asbestos on the premises, not the presence of the individual on the premises: "[t]he following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for *exposure to asbestos on the premises owner's property[.]*" (Emphasis added.)

The individual's presence is not discussed until R.C. 2307.941(A)(1), where it states that: "[a] premises owner is not liable for any injury to any *individual* resulting from asbestos exposure unless that *individual's alleged exposure occurred while the individual was at the premises owner's property.*" (Emphasis added.)

Thus, in order to read R.C. 2307.941(A)(1) in a manner that gives effect to the intent of the General Assembly and does not lead to an absurd result (such as only applying when the individual is exposed to asbestos on defendant's premises), we find that the phrase "on the premises owner's

property” in subsection (A) refers to the origin of the asbestos itself and, pursuant R.C. 2307.941(A)(1), unless the individual’s exposure occurred on the premises, all tort claims against the premises owner are barred. See *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶28, where the Ohio Supreme Court stated that: “[w]e must construe the applicable statute and rule to avoid such unreasonable or absurd results.”

In the instant case, it is clear that Mary’s asbestos exposure did not occur on Goodyear’s premises. Rather, her exposure occurred at home when she shook out the dust from her husband’s clothing before washing it. The dust came from her husband’s workplace. Because R.C. 2307.941(A)(1) bars recovery for injury where the individual was not exposed to asbestos on the defendant’s property, we find that Mary’s claims fail as a matter of law.

#### Negligence

In the second assignment of error, Boley argues that the trial court erred in granting summary judgment on Mary and Clayton’s negligence claim.

In Ohio, to establish an actionable negligence claim, one must establish (1) the existence of a duty; (2) a breach of that duty; and (3) injury resulting proximately therefrom. *Mussivand v. David* (1989), 45 Ohio St. 3d 314,

318-319, 544 N.E.2d 265, citing *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125, 247 N.E. 2d 732. The existence of a duty of care is a question of law for the court to determine. *Id.*

“Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.” *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98, 543 N.E.2d 1188.

Furthermore, the existence of a duty also depends on the foreseeability of injury. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E. 2d 707; *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335, 190 N.E. 924. “The test for foreseeability is whether a reasonably prudent person, under the same or similar circumstances as the defendant, should have anticipated that injury to the plaintiff or to those in like situations is the probable result of the performance or nonperformance of an act.” *Commerce & Industry Ins.*

However, based on our analysis of R.C. 2307.941(A)(1), Goodyear does not owe Mary a duty of care since her exposure did not occur on Goodyear’s premises. Thus, the negligence claim must also fail as a matter of law.

Because Mary's claims are barred by R.C. 2307.941(A)(1) and Goodyear does not owe Mary a duty of care, we find that the trial court did not err in granting Goodyear summary judgment.

Therefore, the first and second assignments of error are overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

  
COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and  
MARY J. BOYLE, J., CONCUR