

ORIGINAL

IN THE SUPREME COURT OF OHIO

CHERYL BOLEY, Executrix of the)
Estate of Mary Adams, and Clayton Adams)
Appellant,)

v.)

GOODYEAR TIRE AND RUBBER)
COMPANY,)
Appellee.)

CASE NO. 09-0542

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

(Court of Appeals
Case No. CA-08-091404)

**MEMORANDUM OF APPELLEE THE GOODYEAR TIRE &
RUBBER COMPANY SUPPORTING JURISDICTION AND
URGING SUMMARY AFFIRMANCE**

Richard D. Schuster (0022813)
(COUNSEL OF RECORD)
Nina I. Webb-Lawton (0066132)
Matthew M. Daiker (0077773)
Michael J. Hendershot (0081842)
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel.: (614) 464-6400
Fax: (614) 464-6350
RDSchuster@vorys.com

Thomas W. Bevan (0054063)
(COUNSEL OF RECORD)
Patrick M. Walsh (0075961)
John D. Mismas (0077434)
BEVAN AND ASSOCIATES LPA, INC.
10360 Northfield Road
Northfield, Ohio 44067
Tel.: (330) 650-0088
Fax: (330) 467-4493

COUNSEL FOR APPELLANT,
CHERYL BOLEY, Executrix of the Estate
of Mary Adams, and Clayton Adams

COUNSEL FOR APPELLEE,
THE GOODYEAR TIRE &
RUBBER COMPANY

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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC
AND GREAT GENERAL INTEREST**

Appellant is right about one thing—this case raises an issue of public and great general interest. Appellant is wrong in contending that the Eighth District Court of Appeals erred by affirming summary judgment for Appellee based on a plain reading of R.C. 2307.941(A)(1). Therefore, the Court should accept jurisdiction and summarily affirm the Eighth District.

This case raises a matter of public and great general interest because the question of premises owners' duties to plaintiffs who were never on the premises poses the threat of a new wave of asbestos liability. Second-hand exposure cases against premises holders are what the Michigan Supreme Court has tagged "the latest frontier of asbestos litigation." *In re Certified Question from Fourteenth Dist. Ct. App. of Tex.* (Mich.2007), 740 N.W.2d 206 219 (citation omitted).

The Ohio General Assembly anticipated this new trend and answered a question legislatively that would soon sweep the nation's judiciaries. Indeed, the high courts of Georgia, New York, Michigan, and Delaware have already decided that premises owners owe no duty to individuals who were not present on the premises owner's property, but who claim injury from asbestos originally on the property that was carried offsite by a third party.¹ The General Assembly, in R.C. 2307.941, declared the same no-duty policy for Ohio. The issue in this appeal is of great importance nationwide, not only in Ohio.

¹ See *Riedel v. ICI Americas Inc.* (Del.2009), ___ A.2d ___, 2009 WL 536540; *In re Certified Question from Fourteenth Dist. Ct. App. of Tex.* (Mich.2007), 740 N.W.2d 206; *In re New York City Asbestos Litig.* (N.Y.2005), 840 N.E.2d 115, FN70; *CSX Transp., Inc. v. Williams* (Ga.2005), 608 S.E.2d 208.

The take-home exposure statute is also of public and great general interest because it is an integral part of an asbestos reform bill that “extensively revised state laws governing asbestos litigation and was in response to the legislative finding that the ‘[previous] asbestos personal injury litigation system [was] unfair and inefficient, imposing a severe burden on litigants and taxpayers alike.’” *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶3 (quoting 2004 H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3988).

Because asbestos litigation has far-reaching public and private costs, this Court has already considered four questions posed by H.B. 292 (R.C. 2307.91-98). *In re Special Docket*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596 (appealability of constitutional ruling); *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217 (appealability of prima facie ruling); *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, reconsideration denied, 116 Ohio St.3d 1442, 2007-Ohio-6518, 877 N.E.2d 992 (preemption by Federal Employees’ Liability Act); *Ackison*, 2008-Ohio-5243 (constitutionality of retroactive portions of H.B. 292). Despite these rulings, the Court has yet to consider the question raised here—does R.C. 2307.941(A) eliminate the liability of premises owners for take-home asbestos exposure.

Take-home exposure liability for premises owners is a matter of public and great general interest because any property owner who has owned a building built before 1972 is potentially liable. The General Assembly decided to eliminate take-home exposure liability for premises owners as part of the comprehensive asbestos reforms in H.B. 292. Ohio litigants and property owners deserve a final word on the subject from this Court.

STATEMENT OF THE CASE AND FACTS

Appellee agrees with the statement of case and facts.

ARGUMENT

This appeal involves pure statutory construction of a law with only one plausible interpretation. Indeed, the Court's task is so straightforward, it should summarily affirm the Eighth District's ruling. Still, the Court should accept jurisdiction because the statute will arise in any case alleging take-home asbestos exposure against a premises owner. And, as shown by the litigation below, plaintiffs have not accepted the unmistakable meaning of the statute. Without a ruling from this Court, the risk remains that a lower court will subvert the General Assembly's intent via tortured reasoning like that on display in Appellant's jurisdictional brief.

Revised Code 2307.941 is aimed at the very question Appellant's think it avoids—whether a premises owner has a tort duty to a plaintiff who was not on the premises owner's property, but who was injured from exposures to asbestos carried offsite. Appellant's only rebuttals are an impossible reading of the statute and an argument incompatible with the settled principle that the judiciary defers to legislative policy choices absent constitutional problems. Appellant has raised no constitutional challenge to R.C. 2307.941.

I. Revised Code 2307.941(A)(1) bars all claims for take-home exposure against the premises owner.

The relevant part of the statute leaves no doubt what the General Assembly intended. “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.” R.C. 2307.941(A)(1). Appellant’s own brief concedes that Ms. Adams “is not claiming” that she “was exposed on Appellee’s premises.” [Memo. Jur., at 3] The plain text and Appellant’s undisputed concession that any exposure occurred off premises means that the Eighth District ruled as it had to: Appellant’s claim was barred by R.C. 2307.941(A)(1).

This Court’s task—like the Eighth District’s—is to “give effect to the intent of the law-making body” that enacted a statute. *Tomasik v. Tomasik*, 111 Ohio St.3d 481, 2006-Ohio-6109, 857 N.E.2d 127, at ¶13 (internal citation and quotation marks omitted). Because R.C. 2307.941(A) is unambiguous, the Court “need not interpret it; [it] must simply apply it.” *Tomasik*, 2006-Ohio-6109, at ¶15 (internal citation and quotation marks omitted). Stated otherwise, because R.C. 2307.941(A) has a certain meaning, this Court’s “duty is to enforce the statute as written.” *Fazio v. Hamilton Mut. Ins. Co.*, 106 Ohio St.3d 327, 2005-Ohio-5126, 835 N.E.2d 20, at ¶40. This duty remains even if the Court doubts the wisdom of the law because courts are “constrained to apply the law as it is written, not as [they] might have wished it had been written.” *State v. McPherson* (4th Dist.2001), 142 Ohio App.3d 274, 281,755 N.E.2d 426.

The Court only deviates from the duty to apply statutes as written if the statute has been challenged as unconstitutional. See *Skilton v. Perry Loc. Sch. Dist. Bd. of Ed.*,

102 Ohio St.3d 173, 2004-Ohio-2239, 807 N.E.2d 919, at ¶17 (“Absent a constitutional deficiency, courts are, and must be, limited to interpreting and applying a statute as written.”). Appellant has mounted no constitutional challenge to R.C. 2307.941 in this Court, or in the Eighth District. Therefore, the Court should apply R.C. 2307.941(A) in accord with its plain meaning—as a bar to take-home exposure cases against premises owners.

Appellant has asked that this Court answer a refreshingly straightforward question: does R.C. 2307.941(A) apply to asbestos exposures where an employer “exposed the employee to asbestos and that family member brought the asbestos home * * * causing other family members to become exposed * * * ?” [Memo. Jur., at 4] Appellee agrees that this Court should answer the question, but submits that the answer is so straightforward that the Court should summarily affirm the Eighth District.² See S.Ct.Prac.R. III(6)(C)(2) (court may respond to discretionary appeal by “enter[ing] judgment summarily”). This Court routinely affirms cases with one-paragraph decisions based on its own precedent. See, e.g., *In re Strum*, ___ Ohio St.3d ___, 2009-Ohio-1060, ___ N.E.2d ___; *Staley v. AC & S, Inc.*, 120 Ohio St.3d 457, 2009-Ohio-0005, 900 N.E.2d 192. When a statute plainly compels the result in a case, summary affirmance is likewise appropriate.

Appellant resists the obvious answer to her proposition of law with three arguments, (1) the language of R.C. 2397.941(A) only covers claims for exposures on a premises, (2) R.C. 2307.941(A) is inapplicable to her claims because it covers only premises liability actions, and (3) if it applies, R.C. 2307.941(A)(1) deprives her of a

² The Eighth District answered the question only nine days after oral argument. [See Memo. Jur., at 4]

remedy. Each argument is imaginative, but wrong. Appellant's contentions do not change the obvious answer to the question posed in this appeal, and do not suggest that the Court should do anything but summarily affirm the Eighth District's decision.

A. Appellant misreads the statute when she suggests it does not cover claims of take-home exposure.

Seizing on the introductory language to R.C. 2307.941, Appellant maintains that the statute applies only to exposures on a defendant's premises. Revised Code 2307.941(A) and (A)(1) read:

(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.

According to Appellant, the language in section (A)—“relief for exposure to asbestos on the premises owner's property”—means the statute has no bearing on claims for take-home exposures. This argument misreads the statute in two ways.

First, the argument that the phrase “on the premises owner's property” in section (A) requires the plaintiff to be on the defendant's premises to trigger application of the statute is incorrect. When read as a whole, section (A) must refer to the presence of asbestos on the premises, not the presence of the individual on the premises. Section (A) mentions the location of the asbestos, but not the exposed person. Subsection (A)(1) then deals with the location of the exposed person. Under subsection (A)(1), unless that plaintiff's exposure occurred on the premises, all tort claims are barred against the premises owner.

Second, Appellant's reading of section (A) would remove any meaning from subsection (A)(1) because that subsection's only purpose is to eliminate claims for take-home exposure. Indeed, Appellant does not even offer a possible reading of this subsection; she simply ignores it. Appellant's position contravenes this Court's settled jurisprudence against interpretation that reads a section out of a statute.

“Statutory language ‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.’” *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶26 (citation omitted). “The 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.” *Ford Motor Co. v. Ohio Bur. of Employment* (1991), 59 Ohio St.3d 188, 190, 571 N.E.2d 727 (emphasis sic) (internal quotations and citations omitted).

Appellant would have the Court shed those authorities and delete subsection (A)(1) from the statute by reading only section (A). Under that interpretation, subsection (A)(1) would never apply in any case, because the very fact that would trigger application of subdivision (A)(1)—exposure somewhere other than the defendant's premises—would also render the statute inapplicable under Appellant's impossible reading of section (A). An interpretation that renders part of a statute meaningless in all circumstances and in every case is not an interpretation, it is a plea for judicial legislation.

This Court rejected a similar call for judicial lawmaking in *Erb v. Erb* (2001), 91 Ohio St.3d 503, 747 N.E.2d 230. There, a public pension fund argued that a statute prohibited it from making payment under a spousal-support order because the statute did not specifically allow payment to a spouse. The Court rejected this argument because another section of the statute expressly prohibited direct payments to specific creditors. The Court reasoned that if the pension fund could make payments only to specified persons, the section prohibiting payments to certain creditors would be rendered superfluous. *Id.* at 508 (“[I]f only those expressly listed in R.C. Chapter 742 could receive direct payments from the fund, then there would be no reason for the General Assembly to enact R.C. 742.47 to prevent creditors from receiving payments directly from the fund * * * .”).

The holding in *Erb* finds support in several other decisions. See, e.g., *United Tel. Cred. Union v. Roberts*, 115 Ohio St.3d 464, 2007-Ohio-5247, 875 N.E.2d 927, at ¶10 (rejecting interpretation that would render portion of statute superfluous); *State ex rel. Brinda v. Lorain County Bd. of Elec.*, 115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205, at ¶29 (same); *Ohio Assn. of Pub. Sch. Employees, AFSCME/AFL-CIO v. Stark County Bd. of Educ.* (1992), 63 Ohio St.3d 300, 305, 587 N.E.2d 293 (same); *Ford, Motor Co. v. Ohio Bureau of Employment Servs.* (1991), 59 Ohio St.3d 188, 190, 571 N.E.2d 727 (same). See also R.C. 1.47(B) (“In enacting a statute it is presumed that * * * [t]he entire statute is intended to be effective * * * .”).

Appellant may disagree with the General Assembly’s policy choice, but she cannot ask this Court to delete a statute from the Revised Code unless she raises a

constitutional objection. Appellant has not so challenged the statute in this Court or in the lower appellate court.

B. Appellant erroneously reads R.C. 2307.941 as applying only to premises claims despite language that it covers all asbestos claims.

Appellant also asks this Court to delete portions of the statute and excuse her from the reach of R.C. 2307.941 by arguing that the statute covers only premises liability claims, not negligence claims. [Memo. Jur., at 5] Appellant's argument fails for three reasons.

First, there is no distinction between premises liability and negligence in R.C. 2307.941(A). That section applies to "all tort actions for asbestos claims." "Tort action" and "asbestos claim" are defined elsewhere in the statute. These definitions sweep in all claims involving asbestos personal injury. R.C. 2307.91(II) (tort action is "a civil action for damages for injury, death, or loss to person"); R.C. 2307.91(C) (asbestos claim is "any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos"). Regardless of whether Appellant labels her claim negligence or premises liability, it is a "tort action" for an "asbestos claim" subject to R.C. 2307.941.

Second, the references to "premises" in the statute are to "premises owners" or "the premises," not "premises claims." As shown, the language of R.C. 2307.941(A) and the definitions in R.C. 2307.91 cover all claims, not only the subset "premises claims." The label does not matter because the statute covers both premises liability claims and negligence claims. Revised Code 2307.941 defines the duty a premises owner owes and leaves no doubt that the owner is not liable for exposures that occur off site. This

statutory limit on the scope of a premises owner's duty governs all species of negligence cases, whether specifically called premises claims or not.

Third, Appellant assumes that premises claims are not negligence claims. Appellant's own authority shows that premises claims are simply a subspecies of negligence claims. *Gladon v. Greater Cleveland Regional Transit Auth.* describes a premises case in the language of negligence. (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287, 291 ("In Ohio, the status of the person who enters upon the land of another * * * continues to define the scope of the legal duty that the landowner owes the entrant.") (emphasis added) (opinion of Cook., J.). More recently, when this Court considered a premises liability question, it again used familiar negligence language. "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶14 (emphasis added).³ Revised Code 2307.941(A)(1) defines the duty of care for take-home exposure cases. That no-duty determination applies to all negligence cases, even the subset sometimes called premises liability.

C. Appellant's argument that R.C. 2307.941 deprives her of a remedy is wrong and was not properly raised.

Appellant suggests that R.C. 2307.941 leaves her with no remedy for the take-home asbestos exposure. [Memo. Jur., at 2] Although that contention could mount a constitutional challenge to the statute, Appellant has asked this Court only to decide what the statute means, not whether it complies with the Ohio Constitution. Appellant does

³ See also, *Lykins v. Fun Spot Trampolines* (12th Dist.), 172 Ohio App.3d 226, 2007-Ohio-1800, 874 N.E.2d 811, at ¶22 (stating that plaintiff's negligence claim was based upon premises liability); *Chansky v. Whirlpool Corp.* (2d Dist.), 164 Ohio App.3d 641, 2005-Ohio-6397, 843 N.E.2d 833, at ¶12 (discussing premises liability as defining scope of duty of care in plaintiff's negligence case).

not challenge R.C. 2307.941 on constitutional grounds, nor did she raise a constitutional challenge in the Eighth District.

Regardless, the statute does not deprive her of a remedy. After the trial court awarded summary judgment to Appellee, Appellant proceeded to trial against other defendants—those who manufactured the products that contained the asbestos to which Ms. Adams was allegedly exposed. As this Court noted in *Groch*, a statute that forecloses a remedy against some defendants, but not others, does not eliminate a plaintiff's right to a remedy. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-0546, 883 N.E.2d 377, at ¶151. Moreover, because it is “state law which determines what injuries are recognized and what remedies are available,” R.C. 2307.941 can permissibly define the remedies available under Ohio law without impermissibly depriving Appellant of a remedy. *Id.* at ¶150 (internal punctuation and citation omitted).⁴

Even if Appellant had properly raised a constitutional challenge to R.C. 2307.941, that challenge would fail.

II. Revised Code 2307.941(A) represents the General Assembly's policy choice for certain asbestos cases, and this Court cannot disregard that choice.

Each of Appellant's arguments entreats the Court to disregard the General Assembly's policy decision declaring that property owners owe no duty to personal injury plaintiffs exposed at a different location to asbestos that originated on the owner's property. Appellant's arguments all suggest that the General Assembly is somehow prohibited from making this policy choice.

⁴ The remainder of R.C. 2307.941, although not involved in this appeal, imposes liability on premises owners for onsite asbestos exposure.

This Court recognizes that the judiciary defers to the General Assembly on matters of policy. See, e.g., *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, at ¶28 (“[t]he General Assembly is the policy-making body in our state”); *Uddin v. Embassy Suites Hotel*, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638, 640, at ¶13 (“We have held that the determination of Ohio’s public policy remains the province of the General Assembly”) (O’Connor, J., dissenting from decision to dismiss as improvidently granted). “Public-policy arguments . . . are better directed to the General Assembly.” *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, at ¶19. “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, 834 N.E.2d 791, at ¶14.

Appellant suggests that the common law hems in the General Assembly’s latitude when deciding the public policy of the state. Specifically, she contends that the common law of premises liability somehow limited the legislature’s authority to pass R.C. 2307.941. Like the statutory interpretation argument, this contention is plainly wrong.

Appellant places curious importance on the common law distinctions between trespassers, licensees, and invitees in premises cases. [Memo. Jur., at 4] The suggestion, apparently, is that the General Assembly cannot alter these classifications when it enacts legislation by broadly declaring that property owners have no liability for offsite asbestos exposure. This Court has already observed that the General Assembly can pass laws that abandon these common law distinctions. *Fryberger v. Lake Cable Recreation Ass’n, Inc.* (1988), 40 Ohio St.3d 349, 350, 533 N.E.2d 738 (interpreting statute that eliminated trespasser-invitee-licensee categories for owners of certain publicly accessible property).

Appellant also suggests that the General Assembly could not pass a law defining the duty of premises owners for acts that occur offsite. [Memo. Jur., at 5] This Court has also implicitly rejected that idea. See *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324 (holding that the General Assembly did not exempt political subdivisions from liability for offsite injuries related to onsite activity).

The General Assembly has decided that property owners have no liability to those who claim injury from offsite asbestos exposure. That is a permissible policy choice and this Court should end any doubt that the General Assembly has declared it as the public policy of Ohio.

CONCLUSION

The case raises a matter of public and great general interest because it affects the potential liability of anyone who owns property built in 1972 or earlier. Appellant seeks only an interpretation of R.C. 2307.941(A). Appellee agrees that this Court should announce a definitive interpretation of that statute, but respectfully submits that only one interpretation is possible. Because that interpretation is self-evident, the Court should summarily affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,

Richard D. Schuster (by Mike Hendershot)

Richard D. Schuster (0022813)
(COUNSEL OF RECORD)

Nina I. Webb-Lawton (0066132)

Matthew M. Daiker (0077773)

Michael J. Hendershot (0081842)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

P.O. Box 1008

Columbus, Ohio 43216-1008

Tel.: (614) 464-6400

Fax: (614) 464-6350

RDSchuster@vorys.com

COUNSEL FOR APPELLEE,
THE GOODYEAR TIRE &
RUBBER COMPANY

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum was sent by first-class U.S. mail,
postage prepaid, this 21 day of April, 2009 to:

Thomas W. Bevan
Patrick M. Walsh (0075961)
John D. Mismas (0077434)
BEVAN AND ASSOCIATES LPA, INC.
10360 Northfield Road
Northfield, Ohio 44067



Michael J. Hendershot