

IN THE SUPREME COURT OF OHIO

09-1070

JACK E. REIDEL,

Plaintiff-Appellee,

v.

CONSOLIDATED RAIL CORORATION, et al.,

Defendant-Appellant,

DANNY SIX,

Plaintiff-Appellee,

v.

NORFOLK SOUTHERN RAILWAY COMPANY, et al.,

Defendant-Appellant,

JOSEPHINE WELDY, as representative of the Estate of Jack E. Weldy,

Plaintiff-Appellee,

v.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendant-Appellant.

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

Court of Appeals Case No. 91237

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

Court of Appeals Case No. 91238

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

Court of Appeals Case No. 91239

FILED JUN 12 2009 CLERK OF COURT SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS-APPELLANTS CONSOLIDATED RAIL CORPORATION, AMERICAN PREMIER UNDERWRITERS, INC., AND NORFOLK SOUTHERN RAILWAY COMPANY

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

These consolidated cases present a crucial question that has not been previously addressed by this Court, namely whether the administrative dismissal provisions of the Ohio Asbestos Statute (referenced as “H.B. 292”) apply to “mixed” asbestos/non-asbestos based claims, and whether a trial court can sever asbestos claims from the non-asbestos claims.¹ In this case, there is no dispute that the Appellees do not meet the H.B. 292 criteria for asbestos exposure, a point they conceded to the trial court. In addition, it does not appear that there is any dispute that the injuries alleged in this case fall within the ambit of H.B. 292 (covering asbestos claimants who bring a wrongful-death action, and for claimants who are smokers suffering from lung cancer). See R.C. 2307.92(C) and (D).

Nevertheless, the trial court and the Court of Appeals in effect permitted Appellees to end-run the statute through the inclusion of dubious and rote claims of other, non-asbestos exposures. Although this Court, in recent decisions, has endorsed the goals of H.B. 292 in upholding its constitutionality against supremacy clause and retroactivity challenges, *see, e.g., Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919 (H.B. 292 applicable to FELA actions); *Akison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 118 (upholding retroactive application of H.B. 292), the Court of Appeals has now crafted an exception where “mixed” exposure claims are involved. It creates a wholly unworkable scheme whereby an asbestos plaintiff, who has suffered one distinct injury (*i.e.* lung cancer in a smoker) can avoid having to go through the prima facie requirements by tacking on vague and unsubstantiated allegations of non-asbestos exposures.

¹ For purposes of this Memorandum, a “mixed” exposure means that the plaintiff is claiming a single injury due to exposure to asbestos and other substances, such as diesel locomotive exhaust, sand, silica and solvents.

The court of appeals' decision, if permitted to stand, endorses a result that is not contemplated by the statutory scheme of H.B. 292, which is meant to streamline Ohio's ever-burgeoning asbestos docket by administratively "parking" those claims where a plaintiff cannot satisfy the prima facie elements. The statutory language of H.B. 292 is clear on its face and requires that Appellees demonstrate that the asbestos claims asserted in their tort action satisfy the criteria set forth therein. Specifically, R.C. 2307.92(B) provides:

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 . . . 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.

R.C. 2307.92(B).

The term "tort action" is clearly defined in the Ohio Revised Code as "a civil action for damages for injury, death, or loss to person." R.C. 2307.91(II). Furthermore, it expressly defined the meaning of "a civil action," as used in the definition of a tort action, as "all suits or claims of a civil nature in a state or federal court." R.C. 2307.91(M) (emphasis added). Clearly, the statutory language applies to any and all claims of a civil nature that make up Appellees' tort action.

If the court of Appeals' decision is permitted to stand, it would create a situation where Appellees would have an initial trial on the other causative factors (which would necessarily require a discussion of the involvement of asbestos since it also may have contributed to Appellees' injuries), and then down the road, if Appellees can show that they now meet the prima facie requirements, there would be a second trial on the same injuries with the same evidence again regarding asbestos. This would mean that H.B. 292, a statute acknowledged by all involved to be one that streamlines the asbestos litigation process by reducing the number

cases that move forward, would now in fact double the amount of cases that would require adjudication in the courts. If efficient adjudication is the goal of both parties and obviously the goal of the court system, then redundant and duplicative litigation cannot be permissible in light of a statute aimed at efficiency.

Unfortunately, the trial court and the court of appeals, probably unwittingly, sent a message to plaintiff's lawyers that they will be allowed to employ gimmicks such as "severance" to manipulate the system to avoid the prima facie requirements of H.B. 292. In this appeal, the Court should send an equally strong message that such manipulations violate both the letter and spirit of H.B. 292 and will not be permitted.

STATEMENT OF THE CASE AND FACTS

These three lawsuits were filed on the Cuyahoga County Asbestos Docket pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.* Appellees' tort actions allege various indivisible pulmonary injuries allegedly caused by exposures to asbestos and other toxic substances, including diesel locomotive exhaust, sand and silica, as well as solvents. Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc. and Norfolk Southern Railway Corporation (collectively, "the Railroads"), took the position that Appellees were required to comply with the reporting requirements for asbestos-related claims pursuant to H.B. 292 (later codified as R.C. 2307. 91-2307.97), specifically, R.C. 2307.91 and R.C. 2307.92.

On December 6, 2007, the trial court ordered the Appellees' counsel to come forward with the names of cases that counsel believed to be exempt from R.C. 2307. The above captioned cases were listed by counsel as possibly being exempt. On December 14, 2007, each Appellee was required to file a written report and supporting test results which Appellees alleged fulfilled

the prima facie evidence of their physical impairments and further alleged that Appellees met the minimum requirements specified R.C. § 2307.92. The Railroads moved to dismiss Appellees' written reports and supporting test results pursuant to R.C. § 2307.93(A)(1) because they did not satisfy the necessary criteria set forth in R.C. § 2307.92(B).

In their Responses to the Railroads' motions to administratively dismiss the Complaints, Appellees argued that the administrative dismissal provisions of R.C. 2307 did not apply to "mixed" asbestos/non-asbestos based claims, arguing that the statute "cannot be extended to affect a plaintiff's non-asbestos claim, simply because such claims have been properly pleaded with a plaintiff's asbestos claims in one tort action." Appellees, in effect, requested that the trial court sever the asbestos claims from the non-asbestos claims, and that the non-asbestos claims proceed to trial before the asbestos judge.

On February 8, 2009, Appellees formally requested that the trial court enter an order severing the asbestos claims from the non-asbestos claims, and that the non-asbestos claims be scheduled for trial. On February 22, 2008, the trial court, in a letter to counsel, ostensibly granted Appellees' request in a vaguely worded order. In doing so, it effectively ruled that mixed claims involving allegations of asbestos and non-asbestos exposures were not subject to the administrative dismissal requirements of R.C. 2307.91-2307.97. Pursuant to the Railroads' request, the trial court subsequently clarified this order to include the specific "severance" language originally requested by Appellees, and on March 21, the February 22 Order was journalized pursuant to Civ. R. 58(A). The Railroads then timely appealed to the Eighth District Court of Appeals.²

Following briefing and oral argument, on March 19, 2009, the Court of Appeals issued an

² These cases were consolidated for purposes of appeal.

opinion and order affirming the judgment of the trial court. In its opinion, the Court took the position that “the administrative dismissal provision is limited to the asbestos-related claims that are specified in R.C. 2307.92.” The Court added that “[t]he legislature could have allowed the court to administratively dismiss the entire tort action, but chose to limit R.C. 2307.93(C) to asbestos-related non-malignancy claims, lung cancer claims in a smoker, and wrongful death claims.” The Railroads then filed a Motion for Reconsideration, which the court of appeals denied without comment on April 28, 2009.

In reaching its decision, the court of appeals did not address or discuss the Railroads’ main argument, namely, that R.C. § 2307.92(C) provides that “[t]he court shall maintain its jurisdiction **over any case** that is administratively dismissed under this division.” R.C. § 2307.92(C). (emphasis added). As pointed out by the Railroads, this language contemplates the entire tort action being administratively dismissed, including any non-asbestos related claims, with the entire action remaining on the administrative dismissal docket. Only upon satisfaction of the prima facie requirements by Appellees can the cases be reinstated on the active docket.

Believing that the court of appeals erred in ruling that the provisions of H.B. 292 permit the severance of claims allegedly resulting from non-asbestos exposures, the Railroads now seek review with this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law. An asbestos claim subject to H.B. 292 may not be severed from non-asbestos claims arising from the same lawsuit and involving the same indivisible injury.

The statutory language of H.B. 292 is clear on its face and requires that Appellees demonstrate that the asbestos claims asserted in their tort action satisfy the criteria set forth therein. Specifically, R.C. 2307.92(B) provides:

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 . . . 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.

R.C. 2307.92(B)

The term “tort action” is clearly defined in the Ohio Revised Code as “a civil action for damages for injury, death, or loss to person.” R.C. 2307.91(II). Furthermore, the statute expressly defines the meaning of “a civil action,” as used in the definition of a tort action, as “all suits or claims of a civil nature in a state or federal court.” R.C. 2307.91(M) (emphasis added). Clearly, the statutory language applies to any and all claims of a civil nature that make up Appellees’ tort action.

Here, counsel for Appellees’ conceded to the trial court and the court of appeals that they do not meet the H.B. 292 criteria for asbestos exposure. Based on the plain meaning of the statute, because Appellees’ have wholly failed to satisfy any of the necessary criteria set forth in R.C. 2307.93(A)(1), their entire tort action including the asbestos claim and the other claims that make up the “alleged various pulmonary injuries occurring as a result of their occupational exposures to various substances” should have been administratively dismissed by the trial court.

In arguing before the trial court and the court of appeals, Appellees erroneously relied on R.C. 2307.92(C) in support of their position that administrative dismissal is not proper for the other causes of action asserted in their tort action. R.C. 2307.92(C) states:

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.

R.C. 2307.92(C).

However, Appellees' reliance on this section neglected to address the entirety of the provision. The remainder of R.C. 2307.92(C) states "[t]he court shall maintain its jurisdiction over any case that is administratively dismissed under this division." R.C. 2307.92(C). Clearly such language contemplates the entire tort action being administratively dismissed, including any non-asbestos related claims, with the entire action remaining on the administrative dismissal docket. Only upon satisfaction of the prima facie requirements by Appellees can the cases be reinstated on the active docket.

It is well-settled that where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory construction. *Ohio Dental Hygienists Assn. v. Ohio State Dental Board*, 21 Ohio. St. 3d 21, 23 (1986). An unambiguous statute is to be applied, not interpreted. *Id.* The unambiguous language in the statute does not support Appellees' position. As previously noted, the statute clearly states that "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 . . . that the exposed person has a physical impairment." R.C. 2307.92(B).

Rather than directly address these arguments, the court of appeals relied on other intermediate appellate court decisions in support of its holding that the statute's language does not require the showing of a prima facie case in mixed exposure cases. *See, e.g., Wagner v. Anchor Packing Co.*, Lawrence App. No. 05CA47, 2006 Ohio-7097 (prima facie requirements of

R.C. 2307.92 do not apply to colon cancer claimants); *Nichols v. A.W. Chesterson Co.*, 172 Ohio App.3d 735, 2007-Ohio-3828 (holding that prima facie requirements apply to only types of asbestos exposures enumerated in the statute, not to all asbestos exposures); *Penn v. A-Best Products Co.*, Franklin App. Nos. -07AP-404, 07AP-405, 07AP-406, 07AP-408, 2007-Ohio-7145 (non-smoker with lung cancer not subject to prima facie requirements).

The Court of Appeals reliance on these decisions, as they clearly involved claims of exposures that did not fall within the statute, is undeniably misplaced. This is not a case like *Penn*, where the plaintiff was a non-smoker with lung cancer. Here, there is no doubt that the plaintiffs have alleged injuries and exposures that fall within the statute. Although the statute is silent with respect to the impact that a claim of mixed exposures can have on the claimant's obligation to make a prima facie showing, that does not mean that an exposure which clearly falls within the statutory scheme is rendered moot by a plaintiff making rote allegations of exposures to additional substances.

Other aspects of these lawsuits also serve to undercut Appellees' arguments in favor of a severance. First, the Court should question why, if these lawsuits contain claims that fall outside the parameters of H.B. 292, did Appellees choose to have these claims litigated on the "Asbestos" docket? (At the very least, if these cases are permitted to go forward, they should not be in the "Asbestos" court.). Another issue concerns the question of their claimed damages. In each of the complaints filed in this case, Appellees' are claiming one set of damages for all of their alleged exposures, whether the exposure is to asbestos or some other substance. To permit severance of these claims, in contravention of the clear language of H.B. 292, would create a very real possibility of a double recovery by plaintiffs. It will also encourage plaintiffs to manipulate the system to avoid the prima facie requirements of H.B. 292. In these appeals, the

Court should send an equally strong message that such manipulations violate both the letter and spirit of H.B. 292 and will not be permitted.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Therefore, Appellants respectfully request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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Dated: June 10, 2009

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2009, a true and correct copy of the foregoing Memorandum in Support of Jurisdiction of Appellants was served upon the following counsel of record via first-class United States Mail, postage prepaid, addressed as follows:

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Respectfully submitted,

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APPENDIX

APR 28 2009

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MAY 11 2009

JOURNAL ENTRY AND OPINION
Nos. 91237, 91238, and 91239

JACK E. RIEDEL
DANNY R. SIX
JOSEPHINE WELDY

PLAINTIFFS-APPELLEES

vs.

CONSOLIDATED RAIL CORPORATION, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-539576, CV-545282, and CV-457067

BEFORE: Gallagher, P.J., Kilbane, J., and Dyke, J.

RELEASED: March 19, 2009

JOURNALIZED: APR 28 2009

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SEAN C. GALLAGHER, P.J.:

Defendants-appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Corporation (collectively, "the Railroads"), have appealed the decision of the Cuyahoga County Court of Common Pleas, which administratively dismissed the asbestosis claims of plaintiffs-appellees, Jack E. Riedel, Danny Six, and Josephine Weldy as representative of the estate of Jack Weldy (collectively "Plaintiffs"), and severed the remaining claims. For the reasons that follow, we affirm.

Plaintiffs filed occupational disease claims under the Federal Employers' Liability Act ("FELA") and the Locomotive Inspection Act ("LIA") against the Railroads. Plaintiffs alleged various pulmonary injuries, which occurred as a result of their occupational exposure to various toxic substances. The first cause of action related to exposure to asbestos; the second, exposure to diesel locomotive exhaust; the third, exposure to sand and silica; the fourth, exposure to solvents and other toxic substances; the fifth, aggravation of pre-existing conditions; and the sixth, negligent assignment. In addition, Josephine Weldy made a wrongful death claim for her husband, Jack Weldy, based on his Chronic Obstructive Pulmonary Disease and his occupational exposure to diesel exhaust. Under each cause of action, Plaintiffs alleged injuries that included "pneumonconiosis, asbestosis, pleural disease, restrictive lung disease,

obstructive lung disease, emphysema, asthma, reactive airway disease," fear of cancer, and lost wages.

The trial court required that plaintiffs make a prima facie showing in accordance with R.C. 2307.92(B) as to their asbestos-related claims or stand to have the asbestos claims administratively dismissed. Plaintiffs offered evidence to make their prima facie case, which evidence was challenged by the Railroads. The trial court granted the Railroads' motion for administrative dismissal as to the asbestos-related claims, but severed the remaining claims pertaining to substances other than asbestos.

The Railroads appeal, asserting that the trial court erred in ruling that the administrative dismissal provisions of H.B. 292 (R.C. 2307.93) did not apply to the non-asbestos claims, and in permitting the non-asbestos claims to be severed. The Railroads claim that the court should have administratively dismissed all the claims pursuant to R.C. 2307.93(C).

Since this case requires statutory interpretation, which is a question of law, we review the case de novo. *State ex rel. City of Cleveland v. Cornell*, Cuyahoga App. No. 84679, 2005-Ohio-1977. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, we cannot resort to the rules of statutory interpretation. *Ohio Dental Hygienists Assn. v.*

Ohio State Dental Bd. (1986), 21 Ohio St.3d 21. An unambiguous statute is to be applied, not interpreted. *Id.*

R.C. 2307.93(C) states that "The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code." R.C. 2307.92 sets forth the minimum medical requirements for a tort action alleging asbestos claims. To maintain a tort action for an asbestos-related claim, a claimant must make a prima facie showing 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. R.C. 2307.92 requires a prima facie showing specifically for nonmalignant conditions under subsection (B), lung cancer in a "smoker" under subsection (C), and wrongful death claims under subsection (D), but explicitly exempts claims for mesothelioma under subsection (E) from a prima facie showing.

The Railroads argue that non-asbestos claims, joined in the same action, must comply with R.C. 2307.91, et seq., or be administratively dismissed. We disagree. The statute is clear that R.C. 2307.91, et seq., applies only to asbestos-related claims.

In *Wagner v. Anchor Packing Co.*, Lawrence App. No. 05CA47, 2006-Ohio-7097, the claimant had colon cancer and the court found that the prima facie requirements of R.C. 2307.92 do not apply to "other cancer" claimants. The court reasoned that nothing in the statute explicitly applies to colon cancer, that the statute explicitly requires only three types of plaintiffs to present a prima facie showing, and that colon cancer is not one of them. Further, the court pointed out that the draft of R.C. 2307.92 included a provision for other cancers; however, that provision did not make it into the final draft. The court stated that "while the General Assembly may well have intended all asbestos-related cancer claims to be subject to the new legislation, that intent is not clearly expressed in the statute."

The *Wagner* court also held that the trial court should not have used the "competent medical authority" definition contained in R.C. 2307.91(Z) to determine whether a cause of action accrued under R.C. 2305.10 because, again, the definition is limited to establishing a prima facie case for the specific causes of action delineated in R.C. 2307.92.

Likewise in *Nichols v. A.W. Chesterton Co.*, 172 Ohio App.3d 735, 2007-Ohio-3828, the court concluded that "If the General Assembly had intended for the definition of 'competent medical authority' to apply to R.C. 2305.10(B)(5) in *all* asbestos cases, the legislature could have easily said so. Because the

General Assembly did not, it is apparent that the definition of 'competent medical authority' contained in R.C. 2307.91(Z) applies merely to those medical doctors who provide a diagnosis for purposes of establishing prima facie evidence of an exposed person's physical impairment that meets the requirements of R.C. 2307.92."

Then in *Penn v. A-Best Products Co.*, Franklin App. Nos. 07AP-404, 07AP-405, 07AP-406, 07AP-407, 2007-Ohio-7145, the Tenth District stated that "A plain reading of R.C 2307.92 indicates that only those types of cases explicitly specified must demonstrate a prima facie case." The court found that R.C. 2307.92 imposes no burden to present a prima facie case on a nonsmoker with lung cancer.

As stated previously, R.C. 2307.93(C) states that "The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code." R.C. 2307.92(B), (C), and (D) require a plaintiff to present a prima facie case when alleging an asbestos-related claim for nonmalignancies, lung cancer in a smoker, and wrongful death.

The administrative dismissal provision is limited to the asbestos-related claims that are specified in R.C. 2307.92. The legislature could have allowed the court to administratively dismiss the entire tort action, but chose to limit

R.C. 2307.93(C) to asbestos-related nonmalignancy claims, lung cancer claims in a smoker, and wrongful death claims.

Although plaintiffs allege numerous nonmalignant conditions, which are defined as conditions that are caused or may be caused by asbestos other than a diagnosed cancer, plaintiffs could not set forth a prima facie showing that these conditions were substantially caused by exposure to asbestos. However, these same conditions (except asbestosis) may be caused by other substances. Therefore, those claims remain because "[a] plain reading of R.C. 2307.92 indicates that only those types of cases explicitly specified must demonstrate a prima facie case." *Penn*, supra.

Plaintiffs properly joined their asbestos-related claims with their non-asbestos-related claims pursuant to Civ.R. 18, which states that a party asserting a claim for relief as an original claim may join as many claims, legal or equitable, as he has against an opposing party. Further a trial court may dismiss one, some, or none of a party's claims without dismissing the entire case.

We find that the trial court did not err when it severed the non-asbestos-related claims. Accordingly, the Railroads' sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.



SEAN C. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
ANN DYKE, J., CONCUR