

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

CASE NO. 09-0542

Appellant,)

v.)

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

THE GOODYEAR TIRE & RUBBER)
COMPANY,)

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

Appellee.)

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INTRODUCTION

Revised Code 2307.941 answers the very question Appellant thinks it avoids—whether a premises owner has a tort duty to a plaintiff who was not on the premises, but who was injured from exposures to asbestos carried offsite. The General Assembly had one thing in mind when it enacted what is now R.C. 2307.941(A)(1)—eliminating the asbestos personal-injury liability of premises owners to persons never exposed to asbestos while on the premises. The statute cannot reasonably be read to do anything else. Appellant has raised no other issue beyond the question of what R.C. 2307.941(A)(1) means. Although Appellant makes passing references to a constitutional challenge, she has waived that argument in this Court both by not raising it in the courts below and by not appealing the issue to this Court. Because R.C. 2307.941(A)(1) is subject to only one plausible interpretation, the judgment of the Eighth District Court of Appeals should be affirmed.

Second-hand exposure cases against premises holders are “the latest frontier in 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 was made aware in 2003 and 2004 of this new trend and addressed it with specific legislation. The issue decided by the General Assembly is now sweeping through the appellate courts of the various states. Indeed, since R.C. 2307.941 became law in Ohio, the high courts of Delaware, Michigan, New York, and Georgia have 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.

Revised Code 2307.941 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). Revised Code 2307.941 reforms a small, but growing, part of asbestos litigation by declaring that premises owners owe no duty to those injured by asbestos carried offsite and by setting standards for the liability of premises owners for those injured by asbestos onsite.

The General Assembly decided that take-home exposure liability for premises owners should not be recognized in Ohio. In light of the fact that any property owner who has owned a building that contains asbestos was potentially liable, the General Assembly limited liability for premises owners, but not manufacturers or suppliers of asbestos and asbestos products. The General Assembly decided to eliminate take-home exposure liability for premises owners as part of the comprehensive asbestos reforms in H.B. 292.

¹ See *Riedel v. ICI Americas Inc.* (Del.2009), 968 A.2d 17; *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; *CSX Transp., Inc. v. Williams* (Ga.2005), 608 S.E.2d 208.

STATEMENT OF THE CASE AND FACTS

Appellee agrees with the statement of case and facts, and notes that the underlying complaint in this case asserted claims against “numerous defendants,” including claims for products liability that could not be asserted against a premises owner. [App’t Br. at 2] Consistent with this allegation, deposition testimony established that Ms. Adams’s husband worked around asbestos-containing insulation, pipe covering, and block insulation. [Id. at 3] This appeal raises only the issue of the premises owner’s liability, not the potential liability of the manufacturers and suppliers of these asbestos-containing products.

ARGUMENT

Appellant has asked that this Court answer a refreshingly straightforward question: does R.C. 2307.941(A) apply to asbestos exposures where the premises owner “exposed the employee to asbestos and that family member brought asbestos home * * * causing other family members to become exposed * * * ?” [App’t Br. at 5]

An answer of “yes” is apparent from the statutory language that a “premises owner is not liable for any injury * * * resulting from asbestos exposure unless [an] individual’s alleged exposure occurred while the individual was at the premises owner’s property.” R.C. 2307.941(A)(1) (emphasis added). The General Assembly—anticipating and siding with the majority of state supreme courts that would later consider the question—has declared the public policy of Ohio in unmistakable language. The trial court applied the statute as written when it granted summary judgment to Goodyear as the premises owner. The Eighth District, equally guided by the statute’s language, affirmed. This Court should do the same.

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

The statute leaves no room for debate. It eliminates the liability of premises owners for asbestos personal-injury damages arising from offsite asbestos exposure. The statute is comprehensive. Despite Appellant's suggestions, it is not limited to exposures that occur on the premises; nor is it limited to claims designated "premises" claims. The statute therefore covers—and bars—the claims by Appellant against Goodyear as a premises owner.

A. Revised Code 2307.941 cannot plausibly be interpreted as permitting claims against premises owners for off-site exposure because that interpretation would make section (A)(1) meaningless

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 "was never exposed to asbestos on Appellee's * * * property." [App't Br. at 8] 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 not mounted a proper 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.

Contrary to these authorities, and 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.

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 misapplies the modifying phrase. This Court adheres to the rule that modifying language refers only to the most proximate noun. “The rules of grammar are clear that [r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent * * *.” *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926, 846 N.E.2d 16, at ¶24 (collecting authority) (citation and internal punctuation omitted). Thus, “on the premises owner’s property” modifies “asbestos,” not “exposure.”

But the Court need not resort to a grammatical rule about modifiers to interpret the statute. Appellant’s reading of section (A) is implausible because it would remove any meaning from subsection (A)(1). 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 (internal quotation and 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 Servs.* (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 pension fund argued that a statute prohibited it from making a payment because the statute did not specifically allow payment to a spouse. The Court rejected this argument because another section of the statute prohibited direct payments to certain creditors. The Court reasoned that if the pension fund could make payments only as affirmatively directed by the statute, the section prohibiting payments to certain creditors would be 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 of this Court. 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.*, 59 Ohio St.3d 188, 190 (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. Revised Code 2307.941 does not exempt negligence claims, it covers all potential theories raised against a premises owner

Revised Code 2307.941 is comprehensive as to premises-owner liability. If the alleged injury arose from offsite exposure, there is no liability. The rule applies regardless of whether the injured person labels the claim negligence, premises liability, or “Mary Jane.”² Appellant seeks an exception unsupported by the statute’s text—arguing that R.C. 2307.941(A)(1) applies only to premises-liability claims, not negligence claims brought against premises owners. Contrary to her own authority, Appellant asks this Court to add words to the statute and excuse her from the reach of R.C. 2307.941. [App’t Br. at 7, citing *Burrows* for the proposition that the Court may not insert words into a statute] In addition, Appellant’s argument fails for three reasons.

² See *Ring v. Arizona* (2002), 536 U.S. 584, 610, 122 S.Ct. 2428 (jury trial guarantee of Sixth Amendment does not depend on label affixed to sentencing factor; even fanciful label attached to factor cannot void the guarantee) (Scalia, J., concurring).

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. According to R.C. 2307.91(II), a tort action is “a civil action for damages for injury, death, or loss to person.” And R.C. 2307.91(C) defines asbestos claim as “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 is irrelevant 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 offsite. 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.³

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 Authority* describes a

³ The breadth of R.C. 2307.941 applies equally to its title—“asbestos claim against premises owner.” Like the statute’s body, the title refers to “asbestos claims,” not “premises claims.” Moreover, “Title, Chapter, and section headings * * * do not constitute any part of the law as contained in the ‘Revised Code.’” R.C. 1.01.

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).⁴ 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.

1. Revised Code 2307.941(A) represents the General Assembly’s policy choice for certain asbestos cases, and this Court should not disregard that choice

Appellant’s argument draws a non-existent line between premises liability and negligence and solicits the Court to disregard the General Assembly’s policy decision declaring that property owners owe no duty to personal injury plaintiffs exposed offsite 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.

This Court recognizes that the judiciary defers to the General Assembly on matters of policy. “[I]t is the role of the General Assembly, rather than the attorney general or this court, to declare the policy of the state of Ohio.” *William v. Spitzer*

⁴ 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).

Autoworld Canton, L.L.C., ___ Ohio St.3d ___, 2009-Ohio-3554, ___ N.E.2d ___, at ¶21 (Slip Op. July 28, 2009); see also *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, at ¶19 (“Public-policy arguments . . . are better directed to the General Assembly.”). *Johnson v. Microsoft Corp.* 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, at ¶14 *“(The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.”).

Appellant argues that the common law somehow 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 her remaining arguments, this contention is plainly wrong.

Appellant places curious importance on the common law distinctions between trespassers, licensees, and invitees in premises cases. [App’t Br. at 5-6] 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).

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.

II. Appellant waived any argument that R.C. 2307.941 deprives her of a remedy and the argument fails nonetheless

Appellant argues that R.C. 2307.941 leaves her with no remedy against Goodyear for the take-home asbestos exposure. [App't Br. at 9] Although that contention sounds like 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's proposition of law in this Court does not challenge R.C. 2307.941 on constitutional grounds; nor did she raise a constitutional challenge in the Eighth District. Each of these failures waives the constitutional argument in this Court. See, e.g., *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, at ¶5 n.1 (“[Appellant], however, failed to raise that issue in its jurisdictional memorandum. As we did not accept jurisdiction based upon that issue, we refrain from addressing it.”); *Niskanen v. Giant Eagle, Inc.*, ___ Ohio St.3d ___, 2009-Ohio-3626, ___ N.E.2d ___, at ¶34 (Slip Op. July 30, 2009) (“[Appellant] has raised this argument for the first time in this court, and it is well settled that [a] party who fails to raise an argument in the court below waives his or her right to raise it here. * * * We therefore decline to consider this issue.”) (internal citation and punctuation omitted; second alteration in original).

Even if Appellant had not waived her constitutional argument, it would not justify reversing the Eighth District's decision. After the trial court awarded summary judgment to Goodyear, Appellant proceeded to trial against other defendants—those who manufactured or supplied the products that contained the asbestos to which Ms. Adams was allegedly exposed. Appellant's brief to this Court acknowledges that she sued “numerous [other] defendants.” [App't Br. at 2] Thus, R.C. 2307.941(A)(1) does not

deprive Appellant of a remedy, it merely eliminates one (of many) possible avenues of recovery. R.C. 2307.941(A)(1) restricts the liability of Goodyear, but leaves untouched potential claims against manufacturers and suppliers of asbestos and asbestos products that may have contributed to Ms. Adams's illness. See, e.g., *Martin v. Cincinnati Gas & Elec. Co.* (C.A.6, 2009), 561 F.3d 439 (considering, but rejecting on the facts, liability of manufacturer for take-home exposure); *Lundsford v. Saberhagen Holdings, Inc.* (Wash.App.2005), 106 P.3d 808 (manufacturer of asbestos-containing products may be liable to take-home exposure plaintiff); *Stegemoller v. ACandS, Inc.* (Ind.2002), 767 N.E.2d 974 (take-home plaintiff had standing under Indiana statute to sue manufacturer of asbestos-containing product). Because it restricts Appellant's remedy against only one of possibly dozens of defendants, R.C. 2307.941(A)(1) does not transgress the limits of the Open Courts Clause. See *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-0546, 883 N.E.2d 377, at ¶151. ("A plaintiff's right to a remedy is not necessarily extinguished when a particular statute * * * might apply to foreclose suits by that plaintiff against certain defendants."). Moreover, because it is "state law which determines what injuries are recognized and what remedies are available," R.C. 2307.941 permissibly defines the available remedy under Ohio law without violating the Open Courts Clause. *Id.* at ¶150 (internal punctuation and citation omitted).⁵

Appellant waived any constitutional argument regarding R.C. 2307.941(A)(1). But even if she had properly raised a constitutional challenge in the lower courts and before this Court, that challenge would fail.

⁵ The remainder of R.C. 2307.941, although not involved in this appeal, actually imposes liability on premises owners for onsite asbestos exposure.

CONCLUSION

Appellant's appeal seeks only an interpretation of R.C. 2307.941(A)(1). Because that interpretation is self-evident—"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"—the Court should affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,



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