

ORIGINAL

Case No. 2009-1070

**In the Supreme Court of Ohio**

*Jack E. Riedel, Danny R. Six, & Josephine Weldy, et al.,*

**Plaintiffs-Appellees,**

v.

*Consolidated Rail Corporation, et al.,*

**Defendants-Appellants.**

ON DISCRETIONARY APPEAL FROM THE  
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO, CASE NOS. 91237, 91238 & 91239

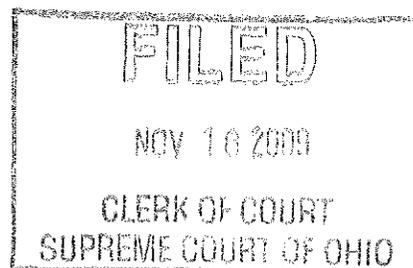
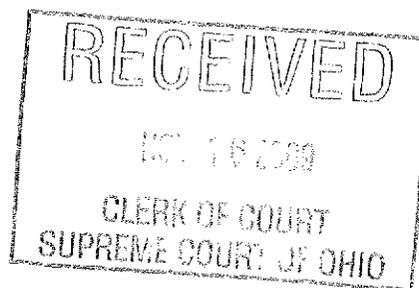
**MERIT BRIEF OF APPELLANTS CONSOLIDATED RAIL  
CORPORATION, AMERICAN PREMIER UNDERWRITERS, INC., AND  
NORFOLK SOUTHERN RAILWAY COMPANY**

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## INTRODUCTION

These consolidated cases present a crucial question that has not been previously addressed by this Court, namely whether an asbestos claim subject to Am. Sub. H.B. No. 292 (referenced as “H.B. 292”) can be severed from a non-asbestos/”mixed” exposure claim when the claimant is alleging that both the asbestos and non-asbestos/”mixed” exposure caused the same pulmonary injury.<sup>1</sup> 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 coverage of H.B. 292 (covering asbestos claimants who bring a claim for non-malignant condition, wrongful-death action, and for claimants who are smokers suffering from lung cancer). See R.C. 2307.92(B), (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 Southern Railway 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 1118 (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 where an asbestos plaintiff, who has suffered one distinct injury (*i.e.*

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<sup>1</sup> For purposes of this Brief, 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.

pulmonary injury) can avoid having to go through the prima facie requirements by tacking on vague and unsubstantiated allegations of non-asbestos exposures.

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 satisfies 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 to be one that streamlines the asbestos litigation process by reducing the number of cases that move forward, would now in fact double the amount of cases that would require adjudication in the courts.

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 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. (*Weldy, Riedel and Six* Complaints; Sup. pp. 1-83) Appellants Defendants Consolidated Rail Corporation, American Premier Underwriters, Inc. and Norfolk Southern Railway Company (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. (Correspondence from Plaintiff's Counsel, December 12, 2007; Sup. pp. 84-85).

On December 6, 2007, the trial court ordered Appellees' counsel to come forward with the names of cases that counsel believed to be exempt from R.C. 2307.92. 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). (Motions to Administratively Dismiss Tort Actions; Sup. pp. 94-101; 108-112.)

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." (Plaintiffs' Letter Briefs, December 12, 2007; Sup. pp. 84-93.) 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 Trial Judge.

On February 7, 2008, 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. (Plaintiff's correspondence, February 7, 2008; Sup. pp. 114-117.) On February 22, 2008, the trial court, in a letter to counsel, ostensibly granted Appellees' request in a vaguely worded order. (1A.) 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. 2307.92. 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). (2A-4A.) The Railroads then timely appealed to the Eighth Appellate District Court of Appeals.<sup>2</sup>

Following briefing and oral argument, on March 19, 2009 the Court of Appeals issued an opinion and order affirming the judgment of the trial court. *Riedel v. Consolidated Rail Corp.*, 2009-Ohio-1242, 2009 WL 712495. (5A-13A.) 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. (14A.)

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). As pointed out by the Railroad, 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 timely sought review of the court of appeals decision pursuant to the Ohio Constitution,

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<sup>2</sup> These cases were consolidated for purposes of appeal.

Section 4.02(B)(2)(d) (cases of public or great general interest) on June 12, 2009. (15A-19A.)

This Court accepted jurisdiction in this case on September 16, 2009. (20A.)

## ARGUMENT

**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.**

### **I. Introduction – The asbestos litigation crisis and the enactment of H.B. 292.**

These consolidated appeals challenge the trial court’s ruling that asbestos-related claims subject to the prima facie reporting requirements of 2004 Am. Sub. H.B. No. 292, R.C. 2307.91 through 2307.98. (collectively referenced as “H.B. 292”) may be severed from non-asbestos based claims arising in the same lawsuit. This statute, which was signed into law on June 3, 2004, with an effective date of September 2, 2004, was designed to resolve Ohio’s asbestos litigation crisis. There is certainly no disagreement regarding the conclusion that Ohio’s asbestos litigation system is truly in a state of crisis. As this Court observed:

Based on its belief that “[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike,” the General Assembly enacted H.B. 292. H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3970, 3988. By the end of 2000, “over six hundred thousand people [had] filed asbestos claims” nationwide, and Ohio had “become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.” *Id.* at Section 3(A)(3)(a) and (b), 150 Ohio Laws, Part III, 3989. The General Assembly further noted that in Cuyahoga County alone, the asbestos docket increased from approximately 12,800 cases in 1999 to over 39,000 cases by October 2003. *Id.* at Section 3(A)(3)(e), 150 Ohio Laws, Part III, 3989. Eighty-nine percent of claimants do not allege that they suffer from cancer, and “[s]ixty-six to ninety per cent of these non-cancer claimants are not sick.” *Id.* at Section 3(A)(5), 150 Ohio Laws, Part III, 3990.

*Norfolk Southern Railway Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919,

¶ 2; see also *In re Special Docket*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596, ¶ 3

(summarizing General Assembly’s legislative findings regarding the burgeoning asbestos docket). In addition, as one court has observed:

Tragically, plaintiffs with asbestos claims are receiving less than 43 cents on every dollar awarded, and 65 per cent of the compensation paid, thus far, has gone to claimants who are not sick.

*Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, at ¶¶ 22-27

(internal citations omitted).

The General Assembly’s response to this crisis, H.B. 292, draws on the courts’ inherent authority to control their own dockets. The statute directs courts to focus judicial attention on the most serious injuries and where the plaintiff has made a prima facie showing that his injury is related to asbestos. H.B. 292 instructs courts to administratively dismiss cases where there is no present injury or no present evidence that the injury is linked to asbestos. This administrative dismissal does not constitute a final dismissal on the merits of the claim; it merely sets the case aside – tolling the statute of limitations and preserving the court’s jurisdiction over the matter – until the plaintiff demonstrates that his injury is manifest and offers evidence showing that the injury was caused by asbestos.

Recognizing that H.B. 292 is a careful and measured response to the asbestos litigation crisis, this Court has upheld the statute against constitutional challenges based on the Supremacy Clause of the United States Constitution, in the context of an action brought under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.* *Norfolk Southern Railway Co. v. Bogle*, 115 Ohio St. 3d 455, 2007-Ohio-5248, 875 N.E.2d 919. In *Bogle*, this Court held that since no new substantive burdens are placed on FELA asbestos claimants, the prima facie

requirements contained in R.C. 2307.92 and the administrative dismissal mechanism contained in R.C. 2307.93 are procedural and thus, not preempted by federal law. *Bogle* at ¶16-29.

Although H.B. 292 has been upheld as a constitutionally sound method of dealing with the growing flood of asbestos cases, numerous plaintiffs have contrived various methods to end-run the statute, many of which have been rejected by this and other Ohio courts. For example, this Court has rejected the argument that retroactive application of H.B. 292 violates the Ohio Constitution. *Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228, 2008-Ohio-5243, 897 N.E. 2d 1118. More recently, the Eighth Appellate District rejected an argument that the asbestos claimant does not have the ultimate burden to demonstrate that he or she is not a “smoker” pursuant to R.C. 2307.91(DD). *Farnsworth v. Allied Glove Corporation*, 2009-Ohio 3890, 2007 WL 2400867 (Ohio App. 8 Dist). This appeal involves yet another tactic designed to avoid the prima facie requirements of the statute by claiming that cases involving “mixed” asbestos/non-asbestos based claims are not subject to the administrative dismissal provisions of R.C. 2307.92. By tacking on rote claims of exposures that are not expressly covered by H.B. 292, such as exposures to silica or diesel fumes, Appellees here propose to “park” the asbestos claims (for which they readily concede they cannot establish a prima facie case) but let the non asbestos claims go forward through discovery and, presumably trial and judgment. Not only does such a scheme violate the letter of the prima facie requirements in H.B. 292, but it would to absurd and, ultimately, unfair and unworkable results.

**II. The language of H.B. 292 clearly requires administrative dismissal of an entire action where the action contains an asbestos claim.**

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* (1986), 21 Ohio St. 3d

21, 23. An unambiguous statute is to be applied, not interpreted. *Id.* However, it is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result. *Mishr v. Board of Zoning Appeals of Village of Poland*, 76 Ohio St. 3d 238, 240, 1996-Ohio-400, 667 N.E.2d 365. “[W]here the literal construction of a statute would lead to gross absurdity, or where, out of several acts touching the same subject matter, there arise collaterally any absurd consequences, manifestly contradictory to common reason, \* \* \* provisions leading to collateral consequences of great absurdity or injustice, may be rejected \* \* \*.”) *Id.* (quoting *Slater v. Cave* (1853), 3 Ohio St. 80, 83-84. See also R.C. 1.47(C) (“In enacting a statute, it is presumed that \* \* \* [a] just and reasonable result is intended.”).

The Eighth Appellate District’s holding rested solely on its interpretation of R.C. 2307.93(C), which provides that “[t]he 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.” *Riedel*, ¶ 6 (quoting RC 2307.93(C)). (Emphasis added). However, the Court’s analysis completely ignored other portions of H.B. 292 that give context to how the term “claim” is to be interpreted. The Court of Appeals apparently focused on the fact that the prima facie requirements of H.B. 292 requires a showing that asbestos exposure was a “substantial contributing factor” to the claimant’s medical condition. *Riedel*, ¶ 6. The Court, though, erred by focusing on the plaintiff’s burden of proof rather than focusing on the statutory language discussing what happens when the asbestos claimant fails to establish a prima facie case, narrowly interpreting the word “claim” contained in .R.C. 2307.93(C) as meaning that only the “asbestos claim” may be dismissed.

In fact, the question of how the term “asbestos claim” is to be interpreted when discussing the administrative dismissal remedy is easily resolved by reference to other portions of H.B. 292. Thus, R.C. 2307.92(B), provides 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, 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 Eighth Appellate District’s analysis completely ignores this provision, which clearly views the term “asbestos claim” in the larger context of a “tort action.” It is important to note the key passage here is contained in the very first sentence: “No person shall bring a tort action *alleging* an asbestos claim. . . .” (Emphasis added). The wording of this sentence is revealing, for it contemplates that no “tort action” (meaning the entire lawsuit) “alleging” an asbestos claim may be permitted to move forward without a showing that asbestos exposure was a substantial contributing factor to the claimant’s medical condition. The only reasonable interpretation of the use of the word “alleging” in this context is that no tort action that contains an asbestos claim may go forward without the requisite prima facie showing.

This interpretation is supported by H.B. 292’s definition of the broader terms “tort action” and “civil action.” The term “tort action” contained in R.C. 2307.92(B) is defined 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.

By ignoring other portions of H.B. 292 that provide greater context to terms such as “asbestos claim”, “tort action,” and “civil action,” the Eighth Appellate District’s analysis violates a basic principle of statutory construction requiring the courts to “ascertain and give effect to the legislative intent” of a statute by insuring that “none of the language employed therein should be disregarded, and that all of the terms used should be given their usual and ordinary meaning and signification except where the lawmaking body has indicated that the language shall not so used.” *Sarmiento v. Grange Casualty Co.*, 106 Ohio St. 3d 403, 2005-Ohio-5410, 835 N.E.2d 692, ¶ 25. (Citations omitted). As a result, a statute “may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.” *Id.* (Citations omitted). Applying these principles, the term “asbestos claim” cannot be viewed in a vacuum when discussing how such a claim is to be treated as a component of a “tort action” which alleges a myriad of different exposures.

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. 2307.93(A)(3)(c) in support of their position administrative dismissal is not proper for the other causes of action asserted in their tort action 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.

However, Appellees' reliance on this section neglected to address the entirety of the provision. The remainder of R.C. 2307.93(A)(3)(c) states "[t]he court shall maintain its jurisdiction over any case that is administratively dismissed under this division." R.C. 2307.93(A)(3)(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.

Rather than directly address these arguments, the Eighth Appellate District 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.*, 4<sup>th</sup> Dist. 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.*, 10<sup>th</sup> Dist. 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 clearly misplaced, and do not at all purport to discuss the scope of the remedy where, as here, there is no dispute that the claimants: (1) are asserting claims that fall within the statute; and (2) cannot meet the prima facie requirements to avoid dismissal of those claims. This is not a case like *Penn*, where the plaintiff was a non-

smoker with lung cancer. Thus, the question here is not whether a claimant has to present a prima facie case in cases that fall outside the statute, but rather the scope of the remedy when a claimant cannot meet the statutory requirements of H.B. 292. Here, there is no doubt that the plaintiffs here 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 burden of proof, that does not mean, however, that a claim of asbestos exposure which clearly falls within the statutory scheme is rendered meaningless by a plaintiff making rote allegations of exposures to additional substances.

The language of H.B. 292, when viewed in its entirety, unmistakably requires that asbestos claimants who fail to make the required prima facie showing must have their entire cause of action administratively dismissed. Accordingly, the Railroads request that the judgment of the Court of Appeals be reversed, and that the matter be remanded to the trial court with instructions to administratively dismiss these lawsuits in their entirety.

**III. Interpreting H.B. 292 to permit severance of claims involving non-asbestos exposures would lead to extra burdens on the courts and asbestos claimants that the statute was designed to remedy.**

As noted earlier, accepted rules of statutory construction require the courts to construe statutes in a manner that would avoid absurd and unfair results. See, e.g., *Mishr v. Board of Zoning Appeals of Village of Poland, supra*. Interpreting H.B. 292 to permit separate trials of asbestos and non-asbestos based exposures would eviscerate the statute and actually double the asbestos workload on Ohio's already overburdened courts. Surprisingly, none of these considerations were given any weight by the Eighth Appellate District.

The most obvious problem created by the Court of Appeals' decision is the very real possibility of multiple trials for the same claimed injury. Permitting severance in these cases

would be completely unworkable and constitute a waste of the courts' limited resources. For example, assuming an asbestos claim were severed from a non-asbestos claim, if the non-asbestos claims were to go to trial first, experts would still have to testify concerning whether asbestos exposure played any factor in the claimed injuries, since a jury would be entitled to know whether other exposures not part of the lawsuit could have caused the injuries. Two separate trials would have to be had involving virtually the exact same evidence. Such a result is not only contrary to the language of H.B. 292, but also to its stated purpose of effectively managing all lawsuits where exposure to asbestos is alleged as a cause of the plaintiff's injuries. It is therefore ironic that counsel for Appellees, in one of the hearings before the trial court, conceded that separate trials on the different causes of action would be a "judicial nightmare:"

I don't think that anybody would want Danny Six to have brought six different actions for these six different causes of action. It would be a judicial nightmare. And that's why this Court has allowed in the past, and lot[s] of Ohio courts have allowed these kinds of cases to be joined under Rule 18. Here, we have one asbestos claim set forth in the first cause of action with multiple other claims.

(Hearing Tr., *Mortiz, et al. v. Norfolk Southern Railway, Co., et al.*, December 19, 2007, at 62; Sup. pp. 102-103.) 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 promoting judicial economy.

Permitting severance of non-asbestos claims also serves to undercut another express goal of H.B. 292, which is to "give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos." Am. Sub. H.B. 292, Section 3(B). Rather than giving priority to the most seriously injured asbestos claimants as directed by the

statute, the Court of Appeals has in effect rewritten the statute to give priority to non-asbestos based claims by allowing them to be tried first. This absurd and unfair result violates the express purposes of the statute and allows “creative pleading” to trump the needs of injured plaintiffs and the courts.

Another problem raised by the Court of Appeals decision concerns the question of Appellees’ 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 clear contravention of the clear language of H.B. 292, would create a very real possibility of a double recovery by plaintiffs.

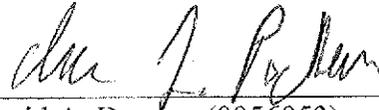
The Eighth Appellate District’s decision, unfortunately, is both bad policy and bad law. If allowed to stand, it will destroy the prioritization scheme of H.B. 292, and be severely detrimental to the concept of judicial economy the statute was designed to promote.

### **CONCLUSION**

Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company respectfully request the Court to reverse the decision of the Court of Appeal with directions that the three lawsuits be administratively dismissed in their entirety. In prior cases interpreting H.B. 292, this Court has not hesitated to uphold the letter and intent of the statute, rejecting arguments that would allow claimants to end run its prima facie requirements, as well as the administrative dismissal procedures. This case presents a unique opportunity to send a message that such manipulations are contrary to the

purposes of H.B. 292, and will also provide much-needed guidance to the Ohio Courts.

Respectfully submitted,



---

David A. Damico (0056053)

Ira L. Podheiser (admitted pro hac vice)

Megan L. Zerega (admitted pro hac vice)

Burns, White & Hickton, LLC

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***Counsel for Defendants-Appellants,***

***Consolidated Rail Corporation,***

***American Premier Underwriters, Inc.,***

***and Norfolk Southern Railway Company***

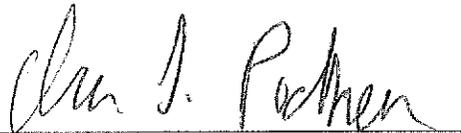
**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent via regular U.S. mail this 13<sup>th</sup> day of November, 2009

to:

Michael Torcello  
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Buffalo, New York 14209  
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Josephine Weldy, as Representative  
of the Estate of Jack Weldy***

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**Colleen A. Mountcastle** (0069588)  
**Holly M. Olarczuk-Smith** (0073257)  
GALLAGHER SHARP  
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Grand Trunk Western Railroad Incorporated***



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***Counsel for Defendants-Appellants,  
Consolidated Rail Corporation,  
American Premier Underwriters, Inc.,  
and Norfolk Southern Railway Company***

# APPENDIX

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
ASBESTOS DOCKET

JACK RIEDEL v. CONSOLIDATED RAIL CORP., et al., Case No: 539576  
JACK WELDY (Estate) v. CONSOLIDATED RAIL CORP., et al., Case No: 457067  
DANNY SIX v. CONSOLIDATED RAIL CORP., et al., Case No: 545282

In a letter dated February 7, 2008, Plaintiff's counsel provided three orders regarding the three cases listed above (F&S 18493683). The three Orders Scheduling Trial are Granted and will proceed as stated in the Orders. The pretrial and trial dates have been set as previously ordered for each case.

So Ordered,

Judge Harry A. Hanna  
February 22, 2008

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
(ASBESTOS DOCKET)

JACK RIEDEL

Case No. 539576

Plaintiffs

vs.

CONSOLIDATED RAIL CORPORATION,  
and  
AMERICAN FINANCIAL GROUP, INC.,  
vs. AMERICAN PREMIER UNDERWRITERS, INC.,

Defendants.

ORDER SCHEDULING TRIAL

THIS COURT, having been presented with and having duly considered Defendants' Request for an Order Regarding ORC 2307.01 et seq. as well as Defendants' Brief in Support of its request and having considered Plaintiffs' Brief in Opposition as well as Plaintiff's Letter Brief along with supporting evidence filed in response and after conducting extensive hearings on these matters, hereby

ORDERS, that the asbestosis claim of the Plaintiff contained within his first cause of action should be severed from his remaining claims and

ORDERS, that said asbestosis claim should be administratively dismissed and

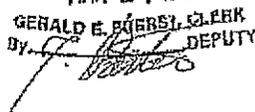
ORDERS, that the remaining claims, contained within the remaining causes of action and pertaining to substances other than asbestos, should be scheduled for trial at the earliest convenience of the Court and of the parties.

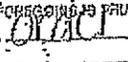
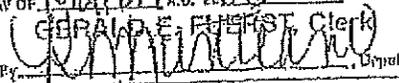
  
HON. HARRY A. HANNA

ENTERED:

RECEIVED FOR FILING

MAR 21 2008

GERALD E. FUERST, CLERK  
BY  DEPUTY

THE STATE OF OHIO Cuyahoga County	1, GERALD E. FUERST, CLERK OF SS. THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND SIGNED BY THE ORIGINAL 	
NOW DO I FILE IN MY OFFICE	
WITH THE SAID COURT AND SEAL OF SAID COURT THIS 31	
DAY OF <u>MAR</u> A.D. 20 <u>08</u>	
GERALD E. FUERST, Clerk	
By  Deputy	

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
(ASBESTOS DOCKET)

JACK WELDY, ESTATE

Case No. 457067

Plaintiffs

vs.

CONSOLIDATED RAIL CORPORATION,  
and  
AMERICAN FINANCIAL GROUP, INC.,  
d/b/a AMERICAN PREMIER UNDERWRITERS, INC.,

Defendants.

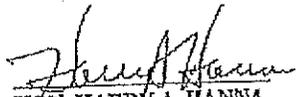
ORDER SCHEDULING TRIAL

THIS COURT, having been presented with and having duly considered Defendants' Request for an Order Regarding ORC 2307.91 et seq. as well as Defendants' Brief in Support of its request and having considered Plaintiffs' Brief in Opposition as well as Plaintiff's Letter Brief along with supporting evidence filed in response and after conducting extensive hearings on these matters, hereby

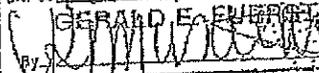
ORDERS, that the asbestosis claim of the Plaintiff contained within his first cause of action should be severed from his remaining claims and

ORDERS, that said asbestosis claim should be administratively dismissed and

ORDERS, that the remaining claims, contained within the remaining causes of action and pertaining to substances other than asbestos, should be scheduled for trial at the earliest convenience of the Court and of the parties.

  
HON. HARRY A. HANNA

ENTERED:

THE STATE OF OHIO Cuyahoga County	I, GERALD E. FUERST, CLERK OF SS. THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING TRULY MADE AND COPIED FROM THE ORIGINAL.	
NOW ON FILE IN MY OFFICE WITNESS MY HAND AND SEAL OF SAID COURT THIS 21 DAY OF March, A.D. 2008.	
GERALD E. FUERST, Clerk	
By:  Deputy	

RECEIVED FOR FILING

MAR 21 2008  
GERALD E. FUERST, CLERK  
By:  DEPUTY

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
(ASBESTOS DOCKET)

DANNY SIX

Case No. 545262

Plaintiff

vs.

NORFOLK SOUTHERN RAILWAY COMPANY, et. al.  
Defendants.

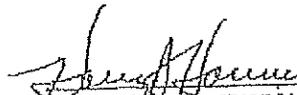
ORDER SCHEDULING TRIAL

THIS COURT, having been presented with and having duly considered Defendants' Request for an Order Regarding ORC 2307.91 et seq. as well as Defendants' Brief in Support of its request and having considered Plaintiffs' Brief in Opposition as well as Plaintiff's Letter Brief along with supporting evidence filed in response and after conducting extensive hearings on these matters, hereby

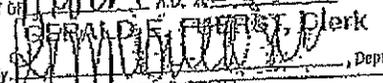
ORDERS, that the asbestosis claim of the Plaintiff contained within his first cause of action should be severed from his remaining claims and

ORDERS, that said asbestosis claim should be administratively dismissed and

ORDERS, that the remaining claims, contained within the remaining causes of action and pertaining to substances other than asbestos, should be scheduled for trial at the earliest convenience of the Court and of the parties.

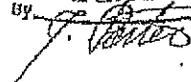
  
HON. HARRY A. HANNA

ENTERED:

THE STATE OF OHIO Cuyahoga County	I, GERALD E. FUERST, CLERK OF SE. THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL	
NOW ON FILE IN MY OFFICE	
WITNESS MY HAND AND SEAL OF SAID COURT THIS	
DAY OF	
A.D. 2000	
By:  Gerald E. Fuerst, Clerk Deputy	

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MAR 21 2000

GERALD E. FUERST, CLERK  
BY  DEPUTY

APR 28 2009

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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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0680 00572

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FILED AND JOURNALIZED  
PER APP. R. 22(B)

APR 28 2009

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY G.E.F. DEP.

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 23(D) AND 26(A)  
RECEIVED

MAR 19 2009

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY G.E.F. DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

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,

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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.*

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*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

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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.

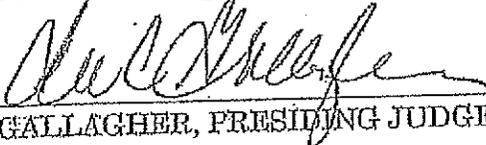
It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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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

0680 00500

**Case No: 91237**

JACK E. RIEDEL VS.  
CONSOLIDATED RAIL  
CORPORATION, ET AL

MOTION BY APPELLANT FOR  
RECONSIDERATION IS  
DENIED.

KILBANE, M., J., CONCUR  
DYKE, A., J., CONCUR  
GALLAGHER, S., P.J.



**TO:**

IRA L. PODHEISER  
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106 ISABELLA STREET  
PITTSBURGH, PA 15212



IN THE SUPREME COURT OF OHIO

09-1070

JACK E. REIDEL,

Plaintiff-Appellee,

v.

CONSOLIDATED RAIL CORPORATION, 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.

**FILED**

JUN 12 2009

CLERK OF COURT  
SUPREME COURT OF OHIO

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

Court of Appeals  
Case No. 91239

NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS  
CONSOLIDATED RAIL CORPORATION, AMERICAN PREMIER  
UNDERWRITERS, INC., AND NORFOLK SOUTHERN RAILWAY COMPANY

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(Counsel of Record)  
Ira L. Podheiser, Esquire  
(Admitted pro hac vice)  
Megan L. Zeroga, Esquire  
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(716) 884-2146 (Fax)

COUNSEL FOR APPELLEES

**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS  
CONSOLIDATED RAIL CORPORATION,  
AMERICAN PREMIER UNDERWRITERS, INC., AND  
NORFOLK SOUTHERN RAILWAY COMPANY**

Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District entered in the Court of Appeals Case Nos. 91237, 91238 and 91239, dated March 19, 2009 and journalized April 28, 2009.

These cases are of public or great general interest.

Respectfully submitted,

BURNS, WHITE & HICKTON, LLC

By:

  
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CERTIFICATE OF SERVICE

It is hereby certified that Appellants have served an accurate copy of Appellants' Notice of Appeal upon the following individual via U.S. Mail, postage pre-paid, on June 12, 2009:

Michael L. Torcello, Esquire  
Doran & Murphy, LLP  
1234 Delaware Avenue  
Buffalo, New York 14209

*D. A. Damico*

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David A. Damico, Esquire  
Counsel for Defendants-Appellants



The Supreme Court of Ohio  
Office of the Clerk

29996

Receipt

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Case:	Case No. GEN-2009-1070 Filed: 06/12/2009 Jack E. Riedel, Danny R. Six, Josephine Weldy v. Consolidated Rail Corporation et al.
Received By:	JoElla - Deputy Clerk General Pay-Ins

Printed: 6/12/2009

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# The Supreme Court of Ohio

FILED

SEP 16 2009

CLERK OF COURT  
SUPREME COURT OF OHIO

~~Jack E. Riedel~~, Danny R. Six, Josephine  
Weldy

Case No. 2009-1070

ENTRY

v.

Consolidated Rail Corporation et al.

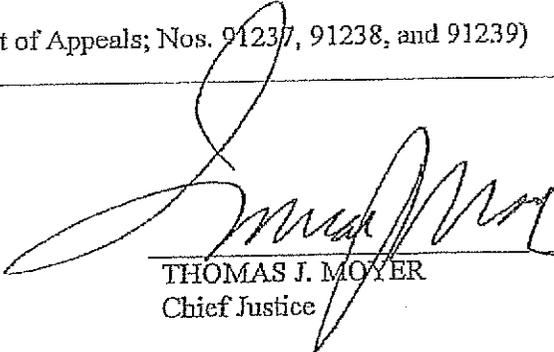
Upon consideration of the motions for admission pro hac vice of Michael L. Torcello by Christopher M. Murphy and Ira L. Podheiser by David A. Damico,

It is ordered by the Court that the motions are granted.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Cuyahoga County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Cuyahoga County Court of Appeals; Nos. 91237, 91238, and 91239)

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THOMAS J. MOYER  
Chief Justice

## **2307.91 Asbestos claims - definitions.**

As used in sections 2307.91 to 2307.96 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(C) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(D) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(E) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(F) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(G) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(H) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(I) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(J) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(K) "Certified industrial hygienist" means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

(L) "Certified safety professional" means a safety professional who has met and continues to meet all requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

(M) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(1) A civil action relating to any workers' compensation law;

(2) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(3) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(N) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under section 2307.92 of the Revised Code.

(O) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(P) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(Q) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (2000), as amended.

(R) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma.

(S) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(T) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(U) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(V) "Physical impairment" means a nonmalignant condition that meets the minimum requirements specified in division (B) of section 2307.92 of the Revised Code, lung cancer of an exposed person who is a smoker that meets the minimum requirements specified in division (C) of section 2307.92 of the Revised Code, or a condition of a deceased exposed person that meets the minimum requirements specified in division (D) of section 2307.92 of the Revised Code.

(W) "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes.

(X) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(Y) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(Z) "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(AA) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(BB) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(CC) "Regular basis" means on a frequent or recurring basis.

(DD) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections 2307.92 and 2307.93 of the Revised Code, during the last fifteen years.

(EE) "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung.

(FF) "Substantial contributing factor" means both of the following:

(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.

(GG) "Substantial occupational exposure to asbestos" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled raw asbestos fibers;

(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers.

(HH) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer.

(II) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(JJ) "Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration.

(KK) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(LL) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code.

Effective Date: 09-02-2004

## **2307.92 Asbestos claim - prima facie showing - evidence of physical impairment - effect of decision.**

(A) For purposes of section 2305.10 and sections 2307.92 to 2307.95 of the Revised Code, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(B) 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, in the manner described in division (A) of section 2307.93 of the Revised Code, 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. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is

equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, 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. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed person's occupational history and history of exposure to asbestos.

(2) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with

another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (C)(1)(c) of this section, and alleges that the plaintiff lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code, the plaintiff is considered as having satisfied the requirements specified in division (C)(1)(c) of this section.

(D)(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in section 2125.01 of the Revised Code of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(2) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section, and alleges that the exposed person lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(3) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under division (D)(1) or (2) of this section regarding a tort action of the type described in that division.

(E) No prima-facie showing is required in a tort action alleging an asbestos claim based upon

mesothelioma.

(F) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decisions are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

Effective Date: 09-02-2004

## **2307.93 Asbestos claim - filing of evidence of physical impairment - challenge - administrative dismissal.**

(A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(c) 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. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division

(B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

(C) 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. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

Effective Date: 09-02-2004

## **2307.96 Asbestos claim - multiple defendants - "substantial factor" test.**

(A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

- (1) The manner in which the plaintiff was exposed to the defendant's asbestos;
- (2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;
- (3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;
- (4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

(C) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of this section.

Effective Date: 09-02-2004