

ORIGINAL

No. 13-0761

In the Supreme Court of Ohio

CLEO J. RENFROW

PLAINTIFF-APPELLEE

vs.

NORFOLK SOUTHERN RAILWAY COMPANY

DEFENDANT-APPELLANT

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 98715

**BRIEF OF DEFENDANT-APPELLANT
NORFOLK SOUTHERN RAILWAY COMPANY**

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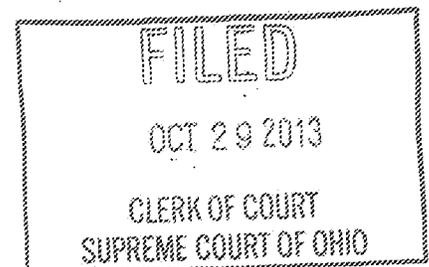
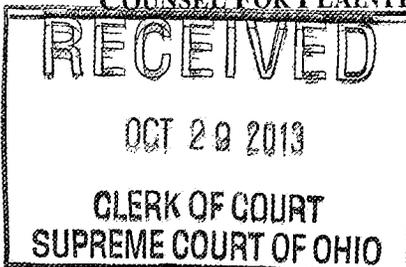


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INTRODUCTION

This case presents crucial questions that have not been previously addressed by this Court, both of which will have an extensive impact on cases subject to the *prima facie* filing requirements contained in Ohio's asbestos legislation, H.B. 292. Both issues will continue to arise in asbestos cases filed in Ohio. The far reaching and careless precedent set by the Eighth Appellate District ignores the statutory requirements contained in H.B. 292, and has undermined the General Assembly's intent in enacting this legislation.

First, the Court will be considering whether the *prima facie* requirements of the Ohio Asbestos Statute (also referred to as "H.B. 292"), requiring the opinion of a "competent medical authority" (*i.e.*, a "treating physician") that the plaintiff's exposure to asbestos substantially contributed to the development of the plaintiff's lung cancer, can be circumvented where the plaintiff, due to the nature of his medical treatment, has not been able to establish a traditional doctor-patient relationship with any particular physician to enable the plaintiff to obtain such an opinion. This exception to the competent medical authority requirement is not contained in the text of H.B. 292, but has been judicially created by the Eighth District Court of Appeals in two cases, *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. No. 88062, 2008-Ohio 3806, and *Whipkey v. Aqua-Chem*, 8th Dist. No. 96672, 2012-Ohio-918.

For purposes of this appeal, this exception is known as the "VA exception" because it first arose in cases involving asbestos plaintiffs who are treated in Veterans Administration facilities. As noted in *Sinnott*, the exception exists because "[H.B. 292] is not in place to penalize veterans or other nontraditional patients who were properly diagnosed by competent medical authority personnel and have the medical records and other evidence to support their claim." *Sinnott*, at ¶22. Applying the *Sinnott* VA exception, the Eighth District found that the

Plaintiff here, Cleo Renfrow, as personal representative of the Decedent, Gerald B. Renfrow, satisfied the *prima facie* requirements even though she admittedly could not obtain the opinion of a treating physician regarding whether asbestos exposure caused Mr. Renfrow's lung cancer. The Court of Appeals therefore applied an "exception" to the Ohio Asbestos Statute's competent medical authority requirement that is not found anywhere in the text of the statute.

More fundamentally, the Eighth District made a policy determination that certain plaintiffs are to be afforded preferential treatment regarding the quality of proof that is required to establish a *prima facie* case. The Ohio Asbestos Statute defines a competent medical authority as a medical doctor who, among other things, "is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person." R.C. §2307.91(Z)(2). The statute does not define what constitutes a "doctor-patient" relationship but certainly does not rule out the possibility that a doctor who actually treated the plaintiff could be a competent medical authority under the statute. The danger here, of course, is that the "competent medical authority" requirement has been judicially eviscerated by permitting a plaintiff to satisfy the *prima facie* requirements even though a doctor who has treated the plaintiff cannot offer an opinion that asbestos was a "substantial contributing factor" to the development of the lung cancer. Relying on this exception, the Eighth District has permitted plaintiffs to obtain and rely on the opinion of a paid expert who had no involvement whatsoever in diagnosing or treating the plaintiff. This is precisely what happened here. Dr. Rao, the expert retained by plaintiff, was not qualified to render an opinion since he neither treated plaintiff nor had a doctor-patient relationship with him and therefore could not meet the definition of "competent medical authority" for purposes of H.B. 292. *See Rossi v. Consolidated Rail Corp.*, 8th Dist. No. 94628, 2010-Ohio-5788, at ¶10 (holding that Dr. Rao, the expert retained by plaintiff, was not qualified to render an opinion

since he neither treated plaintiff nor had a doctor- patient relationship with him and therefore could not meet the definition of “competent medical authority” for purposes of H.B. 292).

The purpose of H.B. 292 is to have the plaintiff demonstrate that he/she has an asbestos related injury which is confirmed by a “competent medical authority,” not an expert hired for litigation. *See* R.C. §2307.91(Z). By relying on an expert witness who cannot meet the definition of “competent medical authority,” the Eighth District has done away with the General Assembly’s intent and removed the statutory requirement of “competent medical authority.” From H.B. 292.

Second, and perhaps of even greater importance, is that in applying this VA exception, the Eighth District significantly watered down the standard established by H.B. 292 and by other cases from the Eighth District with respect to proving a *prima facie* case of asbestos-related medical causation. H.B. 292 requires a showing that asbestos exposure is a “substantial contributing factor” in the development of the plaintiff’s lung cancer, which has been defined as requiring a report from a competent medical authority which states that he or she 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.” R.C. §2307.91(FF)(2). This Court has interpreted this language as, in essence, a “but for” test of causation. *See Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 237, 2008-Ohio-5243, 897 N.E.2d 1118. However, in this case, the court, applying the judicially created VA exception, permitted Mrs. Renfrow to rely on her hired expert even though he could not meet the statutory definition of competent medical authority. To make matters worse, this hired expert did not offer an opinion which satisfied the “but for” standard of causation mandated by H.B. 292 and *Ackison*, but rather stated that “occupational exposure to asbestos dust, diesel fumes and exhaust in part contributed to the

development of [Mr. Renfrow's] lung cancer and eventual death." According to the Eighth District's opinion, "without utilizing magic words, Dr. Rao's opinion supplied the causal link between Mr. Renfrow's occupational exposure to asbestos dust, diesel fumes, and exhaust and him developing lung cancer and eventually dying." *Renfrow v. Norfolk Southern Railway Co.*, 8th Dist. No. 98716, 2013-Ohio-1189, at ¶27.

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 dismissing without prejudice those claims where a plaintiff cannot satisfy the *prima facie* elements.¹ Quite simply, the opinion offered by Dr. Rao, even if he was considered to be a "competent medical authority," does not meet the required "but for" causation standard. Thus, the Eighth District's opinion will have a substantial impact in every H.B. 292 case, regardless of whether the VA exception applies, where a plaintiff can produce the report of a competent medical authority but which, nevertheless, fails to meet the requisite causation standards. The Eighth District's opinion essentially eviscerates the entire causation standard. Unless overturned by this Court, the Eighth District's opinion will be used by asbestos litigants to override the requirements of H.B. 292. If permitted to stand, the ruling made by the Eighth District will give other courts blanket authority to judicially ignore the clear and plain language of H.B. 292, thereby becoming a dangerous precedent in Ohio. For these reasons, this Court should reverse the Eighth District's ruling, and remand the matter with instructions that Plaintiff's asbestos claims be administratively dismissed.

¹ Under the administrative dismissal process, the trial court maintains its jurisdiction over the case. Further, the case can be reinstated on the trial court's docket when the plaintiff meets the necessary *prima facie* requirements. See R.C. §2307.93(C).

STATEMENT OF FACTS

I. Procedural History

Plaintiff-Appellee, Cleo J. Renfrow, as representative of the Estate of Gerald B. Renfrow, (“Mrs. Renfrow”), filed this action against Appellant, Norfolk Southern Railway Company (“Norfolk Southern”), on September 21, 2011. (A. 0001). The Complaint alleges that the decedent, Gerald Renfrow (“Mr. Renfrow”), worked for the railroad as a trainman from 1968 until 1992, and that Norfolk Southern violated the Federal Employers’ Liability Act, (hereinafter referred to as “FELA”), 45 U.S.C. §51, *et seq.*, by negligently allowing him to be exposed to asbestos during the course of his employment. She further alleges that these exposures caused him to develop an occupational disease, specifically lung cancer.

Norfolk Southern filed a Motion to Administratively Dismiss the suit due to Mrs. Renfrow’s failure to meet the criteria set forth in R.C. §2307.92(C)(1) because Mrs. Renfrow failed to demonstrate that: (1) a diagnosis has been made by a competent medical authority indicating that exposure to asbestos was a substantial contributing factor in the development of Mr. Renfrow’s lung cancer and subsequent death; and that (2) Mr. Renfrow had substantial occupational exposure to asbestos at the railroad. (A. 0023).² Following hearings, discovery and briefing, the trial court issued an Opinion and Order denying the Motion to Administratively Dismiss on June 1, 2012. (A. 183-188). The order was formally journalized on July 2, 2012. A timely appeal to the Eighth District was filed on July 26, 2012.

II. Pertinent Facts

In order to bring an asbestos claim in Ohio, a plaintiff must adequately proffer the *prima facie* evidence of physical impairment and comply with the minimum requirements specified in

² The record cites referenced with the prefix “A...” are contained in the accompanying Supplemental Appendix which is being filed with the Brief.

the Ohio Asbestos Statute. Here, there was never any dispute that, due to Mr. Renfrow's long history of cigarette smoking and subsequent lung cancer diagnosis, this case is controlled by R.C. §2307.92(C)(1), which provides as follows:

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 a 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 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.

R.C. §2307.92(C)(1)(emphasis added).

In the instant action, Mr. Renfrow's medical history clearly establishes an extensive smoking history. His medical records further indicate that he was a smoker under the statute. The first relevant record of Mr. Renfrow's medical history dated December 3, 1999 indicates that he was smoking 3 packs of cigarettes a day at that time. (A. 0036). A second record dated February 13, 2001 indicates that Decedent was currently smoking 1-1.5 packs per day. (A.

0037). A third record dated August 22, 2001 confirms that he was still smoking 1.5 packs per day at that time. (A. 0038). A November 13, 2003 record indicates that Decedent smoked for “41 Y[ears] 1.5P/DAY” (A. 0039). In 2004, a Patient Questionnaire states the he currently uses cigarettes at a rate of 1.5 packs per day and has no interest in quitting. (A. 0040). Another September 21, 2006 record states “better than 60-pack-year cigarette history...He continues to smoke.” (A. 0041). A September 16, 2007 record indicates that he smoked for fifty years at 1.5 packs per day. (A. 0044).

As recently as 2010, shortly before his death, medical records further detail his lengthy and continued smoking history. On March 14, 2010, a Progress Note indicates that he is smoking 1.5 packs per day, had done so for 50 years, and had a 75 pack year history. (A. 0048). A March 25, 2010 Progress Note provided an identical history of continued smoking. (A. 0053). Finally, an April 9, 2010 record, taken only eleven months prior to his death, states “Smoking history: 83 Pack Years. **Still Smoking.**” (A. 54)(emphasis added).

As such, this would indicate that if Mr. Renfrow ever quit smoking, he did so less than a year before he passed away on January 22, 2011. These records also confirm he smoked for at least 50 years at 1.5 packs per day and continued on that rate of use after he was diagnosed with lung cancer. Therefore, he had at least a 75 year pack history and never quit prior to his diagnosis.

Because there was no dispute as to whether Mr. Renfrow was a “smoker,” Mrs. Renfrow was required to satisfy the *prima facie* requirements of R.C. §2307.92(C)(1). Pursuant to the Act, asbestos is a “substantial contributing factor” to lung cancer if two things are shown: “(1) [e]xposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim [and] (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.” R.C. §2307.91(FF).

Because the instant lawsuit was filed in 2011, Mrs. Renfrow was required to file a written report constituting a *prima facie* showing pursuant to R.C. §2307.92(C)(1) within thirty (30) days of the filing of the Complaint. This report was to be submitted by a competent medical authority, namely a treating physician, establishing that asbestos was a “substantial contributing factor” in the development of Mr. Renfrow’s lung cancer. Because Mrs. Renfrow did not file the *prima facie* evidence as required, Norfolk Southern moved for the case to be administratively dismissed. In response, Mrs. Renfrow argued that Mr. Renfrow was a “non-traditional plaintiff” in that he was a veteran and was treated for his cancer through the Veteran’s Administration (“VA”) health care system. As a result, she argued that such a specific report by a “treating physician” was not required, pursuant to the Eighth District’s opinion in *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. No. 88062, 2008 Ohio 3806. In response, Norfolk Southern argued that *Sinnott* was easily distinguished and not controlling. *See Sinnott* (competent medical authority not needed when a plaintiff could not obtain one because treatment was at a VA facility and treatment records demonstrated a causal link between asbestos and the injury); *Whipkey v. Aqua-Chem, Inc.*, 8th Dist. No. 96672, 2012 Ohio 918(expanding *Sinnott* to cases where the suit was brought before the effective date of the statute and the plaintiff was deceased).

Further, Norfolk Southern argued that there are no medical records that establish that asbestos was in any way related to Mr. Renfrow’s lung cancer. In the course of Mr. Renfrow’s treatment with physicians at the VA, there is not one single medical record that mentions or makes reference to any alleged asbestos exposure by Mr. Renfrow.. No doctor ever notes that Mr. Renfrow stated that he had worked around asbestos or been exposed to asbestos.

Additionally, no doctor ever reviewed Mr. Renfrow's records or test results and concluded that asbestos exposure had occurred. Further, and most importantly, no physician ever looked at Mr. Renfrow's condition and history and determined that asbestos might have been linked to the development of the lung cancer. Thus, any alleged asbestos exposure and connection between asbestos and lung cancer is absent from Mr. Renfrow's treatment records.

During the administrative dismissal proceedings, Mrs. Renfrow produced as proof of a *prima facie* case: (1) Mr. Renfrow's medical records showing he had lung cancer; (2) the affidavit of a railroad co-worker detailing Mr. Renfrow's exposure to asbestos; and (3) the report from a hired expert, Dr. L. C. Rao, who cannot satisfy the definition of "competent medical authority" since he was not his treating physician. In fact, in prior cases the Eighth District had ruled that Dr. Rao's opinions were not acceptable for this very reason. *See Rossi, supra.*, at ¶ 10 holding that Dr. Rao was not qualified to render an opinion as he did not treat Plaintiff and did not have a doctor/patient relationship with him).

As respects causation, Dr. Rao's report states:

Therefore, it is my opinion within a reasonable degree of medical certainty that occupational exposure to asbestos dust, diesel fumes and exhaust **in part contributed** to the development of his lung cancer and eventual death. Asbestos exposure acted synergistically with the cigarette smoking, diesel fumes and exhaust to greatly increase the risk of lung cancer beyond that expected from either exposure alone. (Emphasis added).

Based on this report, Norfolk Southern argued that Dr. Rao could not satisfy the "but for" test as required under the statute, and that his opinion that asbestos contributed "in part" is legally insufficient to demonstrate that absent exposure to asbestos, the lung cancer would not have occurred. Therefore, even if Dr. Rao was a "competent medical authority" (which Norfolk Southern does not concede), the report still did not save this matter from administrative dismissal.

III. The Trial Court's Opinion

The trial court's opinion, issued on June 1, 2012 (Appendix B), completely adopted Mrs. Renfrow's position with respect to the *Sinnott* exception. Relying on *Sinnott* and the more recent decision in *Whipkey*, the court concluded that "[t]here is no requirement in *Whipkey* or *Sinnott* that the medical records of a non-traditional plaintiff contain an opinion of the treating physician(s) that asbestos was a substantial causative factor in plaintiff's disease process," (*Id.* at 5-6.) despite the fact that there were no medical records whatsoever indicating that Mr. Renfrow had any exposure to asbestos or that such exposures caused his lung cancer. In essence, the trial court expanded the very narrow "VA" exception to the point where it completely swallows the underlying statute.

Finding this result and reasoning completely at odds with the language and purposes of the Ohio Asbestos Statute, Norfolk Southern timely appealed to the Eighth District Court of Appeals. .

IV. The Eighth District's Opinion

Following briefing and argument, on March 28, 2013 the Eighth District affirmed the trial court. (Addendum C). The Court of Appeals ignored the primary argument that Norfolk Southern had made, which was that a plaintiff relying on the *Sinnott* exception had to present "medical record evidence" of asbestos exposure. Instead, the panel approved the use of a co-worker's affidavit as sole proof of Mr. Renfrow's asbestos exposure. Op., at ¶¶35-36. Additionally, the Court accepted Dr. Rao's opinion even though he did not state to a reasonable degree of medical certainty that Mr. Renfrow's lung cancer was caused by exposure to asbestos. The panel said that the Eighth District's previous opinions did not require "magic words" from a

competent medical authority to demonstrate that asbestos exposure was a substantial contributing factor in the development of lung cancer. *Id.* at ¶27.

Believing that this result essentially eviscerates the prima facie requirements of HB 292, Norfolk Southern filed a notice of appeal with this Court, which was granted on September 4, 2013.

ARGUMENT

Proposition of Law No I: The “VA exception” to the “competent medical authority” requirement of H.B. 292 constitutes an impermissible judicial expansion of the statutory language.

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

This appeal challenges the Eighth District’s rulings that there are exceptions not found in the text of HB 292 to the “competent medical authority” requirement, and the resulting watering down of the standards by which such reports are to be weighed and evaluated. 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 state’s 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 situation, 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 back log, 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 process of dealing with the large number of asbestos cases, various methods have been developed to avoid the statutory requirements, many of which have been rejected by this Court 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. The Eighth 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*, 8th Dist. No. 91731, 2009-Ohio 3890. This appeal involves yet another approach designed to avoid the *prima facie* requirements of the statute by claiming that there are asbestos plaintiffs who have not been able to obtain an opinion from a “treating physician” regarding the cause of their lung cancer. Not only does such a scheme violate the letter of the *prima facie* requirements in H.B. 292, but it would lead to absurd and, ultimately, unfair and unworkable results.

II. The Plain Language of H.B. 292 does not contain an exception for plaintiffs treated at VA Facilities.

It is well-settled that “in cases of statutory construction, ‘[the Courts’] paramount concern is the legislative intent in enacting the statute.” *State v. Buehler*, 113 Ohio St.3d 114, 2007–Ohio–1246, 863 N.E.2d 124, ¶29, quoting *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004–Ohio–4960, ¶21. In determining intent, courts look to the plain “language of the statute and the purpose that is to be accomplished by the statute, see *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 1999-Ohio-361 704 N.E.2d 1217, and ‘when its meaning is clear and unambiguous,’

we apply the statute ‘as written.’” *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010–Ohio–2550 , 907 N.E.2d 1193 (quoting *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008–Ohio–6323, 900 N.E.2d 601, ¶9.).

Looking at the plain language Ohio’s asbestos legislation the General Assembly expressly uses the word “shall” in directing how a plaintiff bringing an action alleging an asbestos claim must proceed:

The plaintiff in an 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.

See R.C. §2307.93(A)(1). (Emphasis added.)

It also uses the word “shall” in dictating what the *prima facie* showing must include for smoking lung cancer case:

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 a 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 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.

See R.C. §2307.92(C)(1). (Emphasis added.) Further, if the plaintiff cannot make the *prima facie* showing, then “the court *shall* administratively dismiss 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.” *See* R.C. §2307.93(C). (Emphasis added.) It is axiomatic that the word “shall” denotes mandatory compliance. *Ohio Dept. of Liquor Control v. Sons of Italy Legion*, 65 Ohio St.3d 532, 535, 1992–Ohio–17, 65 N.E.2d 368.

Here, the unambiguous language in the statute does not support the Eighth District’s determination that a “VA exception” was created by the legislature as a way to override the requirement that an opinion be given by a treating physician. The “competent medical authority” requirements are themselves mandatory. The Ohio Asbestos Statute defines a competent medical authority as a medical doctor who, among other things, “is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.” R.C. §2307.91(Z)(2). As the term “doctor-patient relationship” is not itself defined, it is not for the courts to engraft a meaning on the term to expand the statute beyond its recognized limits.

In addition, the Eighth District was too quick to assume that a “doctor-patient” relationship exists only in a highly personalized setting, and, conversely, that such a relationship cannot exist in the “round robin” treatment regime frequently seen in a VA facility. This is simply not true. By way of comparison, in *Lownsbury v. VanBuren*, 94 Ohio St.3d 241, 2002–Ohio–646, 762 N.E.2d 354, this Court held that a physician-patient relationship can be

established between a physician who “contracts, agrees, undertakes, otherwise assumes the obligation to provide resident supervision at a teaching hospital and a hospital patient with whom the physician had no direct or indirect contact.” Surely, the VA physicians who diagnosed and treated Mr. Renfrow had more of a “doctor-patient” relationship than the patient and resident supervisor had in *Lownsbury*. This Court should therefore question whether such an exception has any grounding in the real world practice of medicine.

III. The “VA Exception” permits courts to ignore unbiased medical evidence reflecting the absence of exposure to asbestos.

As noted earlier, the medical evidence in this case did not mention or make reference to any asbestos exposure by Mr. Renfrow. In its opinion, the Eighth District made no mention of this fact. Compare this situation with the medical record evidence in *Sinnott*, where the plaintiff’s medical records from the VA facilities were littered with references to asbestos exposure. As the Eighth District noted “there are comments, such as, ‘patient has significant asbestos exposure in past when works [*sic*] in a factory for 35-36.’ Another report states ‘A: right upper lobe mass with h/o smoking and asbestos exposure make the patient high risk of lung cancer.’” *Sinnott* at ¶16. Additionally, in explaining its reasoning, the Eighth District observed that the plaintiff “provided ample evidence demonstrating that his occupational asbestos exposure was a substantial factor in causing his lung cancer. Appellee submitted hospital records documenting his diagnosis of lung cancer, history of smoking, and asbestos exposure.” *Id.* at ¶18.

In contrast, Mrs. Renfrow produced no records from any of Mr. Renfrow’s treating physicians or treating hospitals that discuss his asbestos exposure or discuss a link between asbestos and his cancer. As a result, this case is nothing like *Sinnott* or *Whipkey* where independent records supported plaintiff’s contention that asbestos was a contributing factor to his

disease.

The Eighth District, inexplicably, has permitted Ohio's trial courts and appellate courts to ignore the medical records themselves. The Court created a new exception wherein the records of treating physicians are given no weight and the paid-for opinion of an expert is dispositive despite the fact that the expert never treated, diagnosed or even met the plaintiff. The purpose of H.B. 292 is to have the plaintiff demonstrate that he/she has an asbestos related injury which is confirmed by a "competent medical authority," not a hired expert. See R.C. §2307.91(Z). The irony of all this is that in *Bland v. Ajax Magnethermic Corp.*, 8th Dist. No. 95249, 2011-Ohio-1247, the Eighth District itself cautioned against creating exceptions to the *prima facie* requirements of H.B. 292. The panel in *Bland* found that the requirements of H.B. 292, and, in particular, R.C. §2307.92(B), cannot be circumvented through "substantial compliance." *Bland*, at ¶26. The *Bland* panel recognized that its earlier decision in *Sinnott* created an exception for non-traditional plaintiffs who, by the unique circumstances of their medical care, would be unable to obtain the opinion of a competent medical authority. *Bland*, at ¶25. That exception was based on the absence of any language in R.C. §2307.92 that defines the doctor-patient relationship. *Id.*

Here, the Court essentially contradicted its earlier decision in *Bland*. The *Renfrow* decision created a "substantial compliance" standard due to the fact that he was treated for his lung cancer at a VA facility and does not have a "competent medical authority" to render an opinion. The court's holding flies in the face of both the medical evidence in this case and the limited nature of *Sinnott*, which was designed to avoid punishing asbestos plaintiffs who, due to the nature of their treatment regimen (*i.e.*, VA Facilities and union-provided care), are unable to identify a competent medical authority.

Proposition of Law No II: Regardless of whether a VA exception applies, the opinion of a competent medical authority must still state that “but for” a plaintiff’s exposure to asbestos, he would not have contracted lung cancer.

As noted earlier, the Eighth District opined that the report of Plaintiff’s hired expert, Dr. Rao, should be deemed an adequate substitute for a competent medical authority report. Going even further, the court, incredibly, said he was a “competent medical authority,” even though he was not a treating physician. *Renfrow*, at ¶ 26. Regardless of whether Dr. Rao was qualified under H.B. 292 to render an opinion, his opinion is fatally flawed, as he only concludes that exposure to asbestos dust (along with other factors) “in part contributed” to Mr. Renfrow’s lung cancer. Even within the Eighth District, this sort of report has been specifically deemed insufficient in numerous decisions. In fact, in *Rossi v. Consol. Rail Corp.*, 8th Dist. No. 92503, 2010-Ohio-5788, the court (relying on this Court’s opinion in *Ackison*), held that a report from a competent medical authority cannot just state that asbestos played a role in the development of the lung cancer, but must opine that without the exposure to asbestos the injury would not have occurred:

A person’s asbestos exposure must be a significant, direct cause of the injury to the degree that without the exposure to asbestos, the injury would not have occurred. *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶48. The doctor’s letter did not state an opinion that Robert’s lung cancer would not have occurred without exposure to asbestos nor did it indicate that asbestos exposure was the substantial contributing factor of Robert’s lung cancer. It offered conjecture that cannot suffice to make a *prima facie* case.

Rossi at ¶6.

Similarly, in *Link v. Consol. Rail Corp.*, 8th Dist. No. 98715, 2009-Ohio-6216, the Eighth District, in reaffirming the validity of the statutory language, stated that a competent medical authority must have “determined with a reasonable degree of medical certainty that without the asbestos exposure the physical impairment of the exposed person would not have occurred.” *Link* at ¶8. Again, in *Holston v. Adience*, 8th Dist. No. 93616, 2010-Ohio-2482, the Court held

reiterated that for a competent medical authority report to suffice, it must state that:

‘But for’ Holston’s workplace exposure to asbestos, he would not have developed lung cancer. The record indicates that Dr. Sanchez stated that Holston’s work history and his history of tobacco use directly contributed to his diagnosis of lung cancer. As such, *Holston* fails to establish a *prima facie* case demonstrating that his alleged exposure to asbestos was a substantial contributing factor in causing his lung cancer.

Holston at ¶19.

But now the Eighth District has judicially removed this statutory requirement. Here, the report of Dr. Rao cannot satisfy the “but for” test for establishing medical causation as required by R.C. §2307.91(FF)(2). Dr. Rao’s opinion that asbestos contributed “in part” is legally insufficient to demonstrate that absent exposure to asbestos, the lung cancer would not have occurred. This is not a semantic argument based solely on whether Dr. Rao used the appropriate “magic words.” The “but for” standard is simply not the same as saying that asbestos exposure “in part contributed” to his lung cancer. Rather, to be a substantial contributing factor, it must be shown that “[e]xposure to asbestos [that] is the predominate cause of the physical impairment alleged in the asbestos claim” and that “[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.” R.C. §2307.91(FF)(1) and (2).

This Court’s determination with respect to the adequacy of Dr. Rao’s report will have profound implications concerning the operation of H.B. 292 and its intended purpose. So long as a report contains language that asbestos exposure “contributed” to lung cancer, Ohio courts will be permitted to determine that the “but-for” causation standard has been met. This should not be the law. The statute will become illusory if its requirements are ignored and judicially rewritten. Therefore, this Court needs to ensure that Ohio courts are adhering to and enforcing the “substantial contributing factor” requirement for establishing a *prima facie* case under H.B. 292.

CONCLUSION

Defendant-Appellant Norfolk Southern Railway Company respectfully requests that the Court reverse the decision of the Court of Appeal with directions that the lawsuit be administratively dismissed.

Respectfully submitted,

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APPENDIX A

No. _____

13-0761

In the Supreme Court of Ohio

CLEO J. RENFROW

PLAINTIFF-APPELLEE

vs.

NORFOLK SOUTHERN RAILWAY COMPANY

DEFENDANT-APPELLANT

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE No. 98715

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
NORFOLK SOUTHERN RAILWAY COMPANY**

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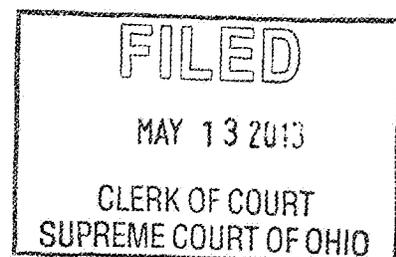
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**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
NORFOLK SOUTHERN RAILWAY COMPANY**

Appellant, Norfolk Southern Railway Company, hereby gives notice of its 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 No. 98715, released and journalized March 28, 2013.

This case is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that Appellants have served an accurate copy of Appellant's Notice of Appeal upon the following individual via U.S. Mail, postage pre-paid, on May 10, 2013:

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APPENDIX B

R.C. 2307.92(C)(1) requires a plaintiff who is classified as a smoker and bringing a claim for lung cancer due to asbestos exposure to show 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.” Further, the statute requires 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.” *Id.*

Defendant alleges that Plaintiff has failed to demonstrate that a competent medical authority has diagnosed Decedent as having a primary lung cancer to which asbestos was a substantial contributing factor. Pursuant to R.C. 2307.91(FF), in order to establish that the exposure to asbestos was a substantial contributing factor to the lung cancer, Plaintiff must show that the “(1) [e]xposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim [and] (2) [that 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.”

Mr. Renfrow is a non-traditional plaintiff in that he was a veteran and was treated for his cancer through the Veterans Administration (“VA”) health care system. He did not have a regular, treating doctor at the VA; he was seen by a variety of doctors and nurse practitioners. Plaintiff provided Defense counsel with Mr. Renfrow’s VA hospital records.

In *Sinnott v. Aqua-Chem, Inc.*, 2008-Ohio-3806, the Eighth District Court of Appeals addressed the issue of whether a veteran utilizing his veterans’ benefits for the

treatment of his lung cancer, without a traditional treating doctor, is bound by the prima facie filing requirements of R.C. 2307.92(C). In that case, the plaintiff's treating physicians were employed by the Veterans Administration which the court found to have limited his ability to achieve the typical doctor-patient relationship envisioned by the statute. The court further recognized that "achieving the typical doctor-patient relationship in the statute is not a bright line test. Nor is it the sole factor in the statute." *Sinnott* at 4.

R.C. 2307.91(Z) defines the term "competent medical authority" as meaning a "medical doctor who (1) is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that 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 percent of its revenues from providing those services."

The evidence submitted by plaintiff in *Sinnott* consisted of VA "hospital records documenting his diagnosis of lung cancer, history of smoking and asbestos exposure."

Id. at 3. In addition, *Sinnott* submitted reports of two experts establishing that asbestos was a contributing cause of his lung cancer. No treating physician authored any expert reports, nor opined that asbestos was a substantial contributing factor to the cancer.

The Eighth District found that although plaintiff "lacked a traditional doctor, he was examined by a competent medical doctor, as defined in the statute [R.C. 2307.91(Z)]. In addition, the evidence in this case supports [plaintiff's] doctors' diagnosis. That fact that he was examined by a doctor employed by the Veterans Administration does not diminish the value of the evidence contained in the medical records." *Id.* at 5. The court ultimately held that *Sinnott* was examined by a competent medical doctor and that the evidence submitted satisfied the requirements of R.C. 2307.92

The Eighth District recently reaffirmed its decision in *Sinnott* in the case of *Whipkey v. Aqua-Chem, Inc.*, 2012-Ohio-918. The facts in *Whipkey* are similar to the facts in *Sinnott*, and the case at hand. Mr. Whipkey was also a non-traditional patient and utilized his veterans' benefits and his union benefits as a union member. As in *Sinnott*, Mr. Whipkey did not have a regular, treating physician. He submitted two medical expert reports from two doctors who reviewed Mr. Whipkey's medical records, one who opined that Mr. Whipkey's lung cancer was an asbestos related disease and another that stated Mr. Whipkey's asbestos exposure was a substantial factor in causing his lung cancer. The Eighth District found, as in *Sinnott*, that Mr. Whipkey is a nontraditional

patient who was properly diagnosed by competent medical authority personnel and has the medical records and other evidence to support his claim. *Whipkey* at 9, see *Sinnott* at 4. The court further held that “[b]y submitting hospital records documenting [Mr. Whipkey’s] diagnosis of lung cancer, history of smoking, and asbestos exposure, and reports from competent medical authority, [plaintiff] provided ample evidence demonstrating that [Mr. Whipkey’s] occupational asbestos exposure was a substantial factor in causing his lung cancer.” *Whipkey* at 9, see *Sinnott* at 3.

Here, Plaintiff has submitted the records and reports of the VA hospital where Mr. Renfrow was treated. Consistent with these records, the Plaintiff has also submitted the report of Dr. Rao confirming that asbestos was a substantial factor in the development of his cancer. Dr. Rao opined:

I have come to the conclusion within a reasonable degree of medical certainty that Mr. Renfrow had inoperable lung cancer with brain metastasis. Lung cancer with brain metastasis was cited as the immediate cause of death. I have also come to the conclusion, based upon his occupational history of exposure to asbestos dust and diesel fumes and exhaust, that he was occupationally exposed to these carcinogens. Asbestos dust and diesel fumes and exhaust are known carcinogens, and exposure to these increases the risk of lung cancer substantially. In addition he was a smoker. Smoking increases the risk of lung cancer substantially in the presence of occupational exposure to asbestos dust, diesel fumes and exhaust. Therefore it is my opinion within a reasonable degree of medical certainty that occupational exposure to asbestos dust, diesel fumes and exhaust in part contributed to the development of his lung cancer and eventual death. Asbestos exposure acted synergistically with the cigarette smoking, diesel fumes and exhaust to greatly increase the risk of lung cancer beyond that expected from either exposure alone.

Plaintiffs’ Ex. C.

This Court finds that the report of Dr. Rao satisfies the requirement of a competent medical authority set forth in R.C. 2307.91 and *Sinnott*. There is no requirement in *Whipkey* or *Sinnott* that the medical records of a non-traditional plaintiff

contain an opinion of the treating physician(s) that asbestos was a substantial causative factor in plaintiff's disease process. Therefore, the evidence submitted by Plaintiff, consisting of Mr. Renfrow's hospital records, history of smoking, asbestos exposure and a report from a competent medical authority is sufficient to establish a prima facie case as required by R.C. 2307.92 and 2307.93. Defendant's Motion to Administratively Dismiss is Overruled.

IT IS SO ORDERED:


JUDGE HARRY A. HANNA

RECEIVED FOR FILING

JUL 09 2012

GERALD E. FUERST, CLERK
By  Deputy

6

THE STATE OF OHIO Cuyahoga County	} CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRUE AND CORRECTLY FILED IN MY OFFICE ON FILE IN MY OFFICE WITNESS MY HAND AND SEAL OF SAID COURT THIS DAY OF <u>July</u> 20 <u>12</u>	
GERALD E. FUERST, Clerk  Deputy	

APPENDIX C

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98715

CLEO J. RENFROW

PLAINTIFF-APPELLEE

vs.

NORFOLK SOUTHERN RAILWAY COMPANY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-764958

BEFORE: Blackmon, J., S. Gallagher, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: March 28, 2013

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

MAR 28 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By SMW Deputy

PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Norfolk Southern Railway Company (“Norfolk Southern”) appeals the trial court’s denial of its motion to administratively dismiss the complaint of appellee Cleo Renfrow (“Mrs. Renfrow”), as personal representative of the estate of Gerald B. Renfrow (“Mr. Renfrow”). Norfolk Southern assigns the following error for our review:

I. The trial court erred when it found that the decedent, Gerald Renfrow’s treatment at a VA facility meant that he did not have to submit a report from a competent medical authority, when he presented no medical records indicating that he was exposed to asbestos or that asbestos caused his lung cancer.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶3} Mr. Renfrow was a veteran who served in the United States Air Force as an airman from February 15, 1961 to May 7, 1964. Mr. Renfrow later worked for Norfolk Southern as a brakeman beginning in 1968 until 1992 when he retired due to back problems. For more than 50 years, Mr. Renfrow smoked one-and-one-half packs of cigarettes per day.

{¶4} In March 2010, Mr. Renfrow was diagnosed with lung cancer and utilized the Veterans Administration for his healthcare. Mr. Renfrow was treated for lung cancer at Richard L. Roudebush VA Medical Center, the CBOC VA Health Care System and VA Marion, Indiana. During the course of

treatment at the Veterans Administration, Mr. Renfrow did not have a regular treating doctor, but a variety of doctors and nurse practitioners. On January 22, 2011, Mr. Renfrow passed away while receiving palliative care treatment in a hospice care center.

{¶5} On September 22, 2011, Mrs. Renfrow, as representative of the estate of Mr. Renfrow, filed suit against Norfolk Southern alleging asbestos-related injuries under the Locomotive Boilers Inspection Act ("LBIA"), seeking relief pursuant to the Federal Employers' Liability Act ("FELA"). Mrs. Renfrow alleged that during her husband's career with the railroad, he was continuously exposed to various toxic substances, including diesel exhaust and asbestos, in violation of federal law. Mrs. Renfrow further alleged that the exposures to asbestos caused Mr. Renfrow to develop lung cancer.

{¶6} On April 15, 2012, Norfolk Southern moved to administratively dismiss Mrs. Renfrow's claims, alleging she had failed to comply with the prima facie filing requirements of R.C. 2307.92(C). That statute requires a smoker bringing a tort action alleging an asbestos claim to provide certain medical documentation before a prima facie claim may be made.

{¶7} Mrs. Renfrow responded by submitting her husband's Veterans Administration's medical records relating to his treatment for lung cancer. She also offered an affidavit from Darl Rockenbaugh, a railroad coworker, detailing Mr. Renfrow's exposure to asbestos throughout his tenure with Norfolk

Southern. Rockenbaugh, who worked with Mr. Renfrow throughout Indiana, Ohio, Illinois, and Michigan averred that from 1968 when Mr. Renfrow was hired, he was exposed to asbestos on a regular basis.

{¶8} Specifically, Rockenbaugh averred that he had first-hand, personal knowledge of the use of asbestos containing products on the railroad; that he and Mr. Renfrow sometimes worked 8-to-16 hour shifts seven days per week. Rockenbaugh averred that the condition of the asbestos insulation was poor from wear and tear, poorly maintained, and the two men regularly breathed the asbestos dust.

{¶9} Rockenbaugh also averred that the locomotives the two men worked on contained significant amounts of asbestos throughout the units. He stated that the cabins were heated with hot water and the pipes feeding the radiators were wrapped with white asbestos insulation. The pipes were at floor level and Rockenbaugh and Renfrow came in regular contact with the worn, frayed, and dusty asbestos containing insulation throughout their respective tenure with Norfolk Southern.

{¶10} In addition, Mrs. Renfrow submitted an expert report from Dr. Laxminarayana C. Rao. Dr. Rao, is board certified in internal medicine and pulmonary medicine; he is also a NIOSH certified B-reader, specifically trained in the detection of pneumoconiosis on chest x-ray.

{¶11} The case proceeded to a hearing, and the trial court denied the motion to administratively dismiss. The trial court found that Mrs. Renfrow submitted evidence, “consisting of Mr. Renfrow’s hospital records, history of smoking, asbestos exposure, and a report from a competent medical authority is sufficient to establish a prima facie case as required by R.C. 2307.92 and 2307.93.” Norfolk Southern now appeals.

Administrative Dismissal

{¶12} In the sole assigned error, Norfolk Southern argues that the trial court should have administratively dismissed the complaint because Mrs. Renfrow failed to present prima facie evidence from a “competent medical authority” that exposure to asbestos was a “substantial contributing factor” to the development of Mr. Renfrow’s lung cancer.

{¶13} On September 2, 2004, Am.Sub.H.B. 292 became effective, and its key provisions were codified in R.C. 2307.91 through 2307.98. *Farnsworth v. Allied Glove Corp.*, 8th Dist. No. 91731, 2009-Ohio-3890. The statutes require plaintiffs who assert asbestos claims to make a prima facie showing by a competent medical authority that exposure to asbestos was a substantial contributing factor to their medical condition resulting in a physical impairment. *Cross v. A-Best Prods. Co.*, 8th Dist. No. 90388, 2009-Ohio-3079; Am. Sub. H.B. 292, Section 3(A)(5).

{¶14} “Substantial contributing factor” is defined as “[e]xposure to asbestos [that] is the predominate cause of the physical impairment alleged in the asbestos claim” and that “[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.” *Link v. Consol. Rail Corp.*, 8th Dist. No. 92503, 2009-Ohio-6216; R.C. 2307.91(FF)(1) and (2). In *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, the Ohio Supreme Court construed the statute as requiring that asbestos exposure be a significant, direct cause of the injury to the degree that without the exposure to asbestos, the injury would not have occurred. *Id.*

{¶15} Directly relevant to this case, specifically because Mr. Renfrow smoked a pack and a half of cigarettes per day for more than 50 years, R.C. 2307.92(B), (C), and (D), respectively, prohibit plaintiffs from maintaining asbestos actions based upon: (1) nonmalignant conditions; (2) smoker lung-cancer claims; and (3) wrongful death, unless the plaintiff in one of these situations can establish a prima facie showing in the manner described in R.C. 2307.93(A).

{¶16} Any plaintiff who bases his claim on any of the three circumstances listed in R.C. 2307.92(B), (C), or (D), must file “a written report and supporting test results constituting prima facie evidence of the exposed person’s physical

impairment” meeting the requirements specified in those sections. R.C. 2307.93(A)(1).

{¶17} Specifically, R.C. 2307.92(C)(1) sets forth the requirements a smoker with lung cancer must present to establish a prima facie case, including, evidence from a competent medical authority that the exposed person has primary lung cancer, and that the exposure to asbestos is a substantial contributing factor; evidence that there was a latency period of ten or more years since the exposure and the diagnosis of lung cancer; and evidence of either the exposed person’s substantial occupational exposure or evidence that the exposure to asbestos was at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a certified industrial hygienist or safety professional.¹

{¶18} Under R.C. 2307.93(A)(1), defendants may challenge the adequacy of the plaintiff’s prima facie evidence. R.C. 2307.93(B) provides that if the defendant does challenge the adequacy of the plaintiff’s prima facie evidence, the court “shall determine from all of the evidence submitted” whether the proffered prima facie evidence meets the minimum requirements for cases

¹The Ohio Supreme Court has determined that “[t]he prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the FELA and the LBIA does not violate the Supremacy Clause, because the provisions do not impose an unnecessary burden on a federally created right.” *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919. Therefore, the prima facie requirements contained in R.C. 2307.92(C)(1) do apply to this case.

involving smoker lung cancer, as specified in R.C. 2307.92(C). The trial 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. R.C. 2307.93(B).

{¶19} If the court finds, after considering all of the evidence, that the plaintiff failed to make a prima facie showing, then “[t]he court shall administratively dismiss the plaintiff’s claim without prejudice.” *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006 Ohio 6704, 864 N.E.2d 682 (12th Dist.); R.C. 2307.93(C). Summary judgment is reviewed de novo on appeal. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App.3d 826, 586 N.E.2d 1121 (9th Dist. 1990). Summary judgment is proper only when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude that no genuine issue as to any material fact remains to be litigated, and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶20} Furthermore, summary judgment “must be awarded with caution. Doubts must be resolved in favor of the non-moving party.” *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 1992-Ohio-95, 604 N.E.2d 138. Thus, if a defendant challenges the medical evidence presented by a plaintiff, the

evidence must be construed most favorably for the plaintiff and against the defendant. *Id.* at ¶ 29.

{¶21} In the instant case, Norfolk Southern contends the trial court should have administratively dismissed the case because Mrs. Renfrow never produced any records from her husband's treating physician or hospitals that discuss asbestos exposure or discuss a link between asbestos and his lung cancer.

{¶22} However, in denying Norfolk Southern's motion to administratively dismiss the case, the trial court relied on our decision in *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. No. 88062, 2008-Ohio-3806, which addressed the issue of whether a veteran utilizing his veterans' benefits for the treatment of his lung cancer, without a traditional treating doctor, is bound by the prima facie filing requirements of R.C. 2307.92(C).

{¶23} In *Sinnott*, as well as in the present case, the plaintiff's treating physicians were employed by the Veterans Administration, which we have found to limit plaintiff's ability to experience the typical doctor-patient relationship that was envisioned by the statute. There, we recognized that achieving the typical doctor-patient relationship in the statute is not a bright line test, nor is it the sole factor in the statute. *Id.* The fact that plaintiff was examined by a doctor employed by the Veterans Administration does not diminish the value of the evidence contained in the medical records. *Id.*

{¶24} R.C. 2307.91(Z) defines "competent medical authority" as 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 [R.C. 2307.92] 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.

{¶25} Recently, in *Whipkey v. Aqua-Chem, Inc.*, 8th Dist. No. 96672, 2012-Ohio-918, a case also involving a nontraditional patient, utilizing veterans' benefits for treatment of lung cancer, we reaffirmed our decision in *Sinnott*. In *Whipkey* we considered it immaterial that plaintiff's experts were not his treating physicians. *Id.* We concluded that R.C. 2307.92 was not intended to penalize a nontraditional patient like the decedent who was properly diagnosed by competent medical personnel and had medical records and other evidence to support his claim. *Id.*

{¶26} Dr. Rao, is a competent medical authority; he reviewed Mr. Renfrow's medical records, and he opined in pertinent part as follows:

I have come to the conclusion within a reasonable degree of medical certainty that Mr. Renfrow had inoperable lung cancer with brain metastasis. * * * I have also come to the conclusion, based upon his occupational exposure to asbestos dust and diesel fumes and exhaust, that he was occupationally exposed to these carcinogens. Asbestos dust and diesel fumes and exhaust are known carcinogens, and exposure to these increases the risk of lung cancer substantially. In addition he was a smoker. Smoking increases the risk of lung cancer substantially in the presence of occupational exposure to asbestos dust, diesel fumes and exhaust. Therefore it is my opinion within a reasonable degree of medical certainty that occupational exposure to asbestos dust, diesel fumes and exhaust in part

contributed to the development of his lung cancer and eventual death.

{¶27} Here, without utilizing magic words, Dr. Rao's opinion supplied the causal link between Mr. Renfrow's occupational exposure to asbestos dust, diesel fumes, and exhaust and him developing lung cancer and eventually dying. Dr. Rao opined that Mr. Renfrow's exposure to these known carcinogens, acted synergistically with his cigarette smoking to greatly increase the risk of developing lung cancer beyond what would have been expected from only smoking or only being exposed to asbestos dust.

{¶28} Consequently, because Dr. Rao's report provided the crucial causal link between Mr. Renfrow's occupational exposure to asbestos dust, diesel fumes and exhaust and him developing lung cancer, the trial court was on firm ground in concluding that Mrs. Renfrow had established a prima facie case as required by R.C. 2307.92 and 2307.93.

{¶29} Unlike, for example, the situation we faced in *Rossi v. Conrail*, 8th Dist. No. 94628, 2010-Ohio-5788, where decedent's treating physician's belief that asbestos exposure "may have" played a role in the development of his lung cancer, did not state an opinion to a reasonable degree of medical certainty. There, "may have" was purely conjecture and could not suffice to make a prima facie case. *Id.*

{¶30} We also note that the decedent's estate in *Rossi* also offered the opinion of a certified B-reader who conducted a records review of decedent's

medical files. However, the defendant railroad challenged whether the B-reader met the statutory definition of a “competent medical authority” found under R.C. 2307.91(Z). The railroad argued that there was nothing in the record to show that B-reader had treated decedent or had a doctor-patient relationship with decedent. Instead, the record showed that decedent was consistently treated by a single doctor and was never treated by the B-reader.

{¶31} Unlike the instant case, the decedent in *Rossi* was without the benefit of our pronouncement in *Sinnott*, 8th Dist. No. 88062, 2008-Ohio-3806, which allows a plaintiff who is treated by a team of doctors at a Veterans Administration hospital to sufficiently demonstrate a doctor-patient relationship for purposes of R.C. 2307.91(Z). Consequently, we were constrained to conclude that no medical authority had competently testified to a reasonable degree of medical certainty that decedent’s exposure to asbestos was a substantial contributing factor to his lung cancer.

{¶32} The situation in *Holston v. Adience, Inc.*, 8th Dist. No. 93616, 2010-Ohio-2482, provides yet another example of conjecture, which is insufficient to establish a prima facie case. In *Holston*, one of plaintiff’s treating physicians, stated in pertinent part as follows: “In my medical opinion I feel that Mr. Holstons [sic] work history and his history of tobacco use directly contribute to his diagnosis of Lung Cancer.”

{¶33} "I feel" in *Holston*, is just as inadequate as "may have" in *Rossi*, and, thus failed to establish a prima facie case as required by R.C. 2307.92 and 2307.93. Here, Dr. Rao's expert opinion, within a reasonable degree of medical certainty, laid out the causal link between Mr. Renfrow's occupational exposure to asbestos dust, diesel fumes, and exhaust and him developing lung cancer and eventually dying.

{¶34} Pivotaly, R.C. 2307.91(GG) defines "substantial occupational exposure to asbestos" as 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.

{¶35} Here, in addition to Mr. Renfrow's medical records from the Veterans Administration and Dr. Rao's expert report, Mrs. Renfrow submitted the affidavit of Rockenbaugh, her husband's coworker for more than two

decades. As previously stated in the affidavit, Rockenbaugh gave a detailed account of Mr. Renfrow's exposure to asbestos and asbestos products on an ongoing basis throughout his long tenure with Norfolk Southern. We have upheld the use of this selfsame evidence to establish substantial occupational exposure to asbestos. *See Hoover v. Norfolk S. Ry. Co.*, 8th Dist. Nos. 93479 and 93689, 2010-Ohio-2894.

{¶36} Along with Rockenbaugh's affidavit detailing Mr. Renfrow's asbestos exposure, along with the Veterans Administration's hospital records documenting his diagnosis of lung cancer, history of smoking, as well as the report of Dr. Rao, a competent medical authority, Mrs. Renfro provided ample evidence demonstrating that her husband's occupational asbestos exposure was a substantial factor in causing his lung cancer.

{¶37} The above evidence, when viewed collectively, is sufficient to survive an administrative dismissal. As such, the trial court did not err when it denied Norfolk Southern's motion to dismiss. Accordingly, we overrule the sole assigned error.

{¶38} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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



PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

APPENDIX D

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

APPENDIX E

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

APPENDIX F

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

CERTIFICATE OF SERVICE

It is hereby certified that Appellants have served an accurate copy of Appellant's Notice of Appeal upon the following individual via U.S. Mail, postage pre-paid, on this 28th day of October, 2013:

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