

ORIGINAL

# In the Supreme Court of Ohio

CLEO J. RENFROW, as personal  
representative of the ESTATE OF  
GERALD B. RENFROW,

*Plaintiff-Appellee,*

v.

NORFOLK SOUTHERN RAILWAY  
COMPANY,

*Defendant-Appellant.*

Case No. 2013-0761

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

Court of Appeals  
Case No. 98715

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**REPLY BRIEF OF *AMICI CURIAE* THE OHIO CHAMBER OF COMMERCE, THE  
OHIO COUNCIL OF RETAIL MERCHANTS, AND THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-  
APPELLANT NORFOLK SOUTHERN RAILWAY COMPANY**

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## INTRODUCTION

The issue before this Court is the evisceration of Ohio's groundbreaking asbestos reform legislation. The Eighth District, in this case and others, has created multiple exceptions to the "competent medical authority" requirement under R.C. 2307.92(C). Those exceptions represent unwarranted deviations from the plain language of the statute. Consequently, Ohio's asbestos litigation is reverting to the pre-reform scenario where an asbestos claim can be sustained based on the opinion of a "hired-gun" expert. These changes will re-open the floodgates of asbestos litigation in Ohio and re-establish Ohio as the go-to forum for asbestos litigation amongst plaintiffs' attorneys nationwide.

Appellee and her out-of-state attorneys claim that the Eighth District's "VA exception" should apply because Decedent was a "non-traditional" patient. The plain language of the statute does not sanction such an exception and, therefore, Appellee is wrong as a matter of law. Moreover, Appellee's policy arguments should be addressed by the General Assembly, not through legislation from the bench.

The holding also undermines the asbestos reform legislation because it relaxed the substantial contributing factor test as clarified by this Court in *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, ¶ 49. The substantial contributing factor test requires a showing that, without the exposure to asbestos, the injury would not have occurred. *Id.* The Eighth District now allows a hired-gun expert to satisfy the substantial contributing factor test merely by stating that asbestos exposure "in part contributed" to the development of lung cancer. *Renfrow v. Norfolk S. Railway Co.*, 8th Dist. 98715, 2013-Ohio-1189, ¶ 26.

These two major changes have rendered the careful balance crafted by the General Assembly through the asbestos reform legislation meaningless. This Court has the opportunity to restore the balance envisioned by the General Assembly.

Finally, Appellee's assertion that the prima facie requirements do not apply to FELA claims contradicts this Court's precedent. *See Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St. 3d 455, 2007-Ohio-5248, 875 N.E.2d 919, syllabus. In *Bogle*, this Court reviewed Ohio's asbestos reform legislation and determined that the prima facie requirements were valid, regardless of whether the underlying claim is a FELA claim. *Id.* Moreover, Appellee's FELA arguments were not raised in the Propositions of Law for which this Court granted jurisdiction.

Thus, *Amici*, the Ohio Chamber of Commerce, the Ohio Council of Retail Merchants, and the Chamber of Commerce of the United States of America respectfully request that this Court hold (1) that the plain language of R.C. 2307.91(Z) controls whether a party has satisfied the "competent medical authority" requirement and (2) that the substantial contributing factor test requires a showing that, without the exposure to asbestos, the injury would not have occurred.

## ARGUMENT

### **I. The Eighth District's Exceptions to the "Competent Medical Authority Requirement" are Eviscerating the Asbestos Reform Statutes Enacted by the General Assembly.**

The prima facie requirements for an asbestos claim brought by a smoker who has lung cancer are set forth in R.C. 2307.92(C). Those requirements govern Appellee's claim, and they include "[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." R.C. 2307.92(C)(1)(a). A "[c]ompetent medical authority" is defined as a medical doctor "who is providing a diagnosis for purposes of constituting prima-facie evidence" and 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).

Had the Eighth District applied the plain language of the statute, it could have come to only one conclusion: Appellee failed to provide a diagnosis from a competent medical authority.

**A. The Decisions of the Eighth District are Eviscerating the “Competent Medical Authority” Requirement.**

Despite the fact that Appellee’s hired-gun expert, Dr. Rao, does not qualify as a competent medical authority, the Eighth District applied the so-called “VA exception” and held that his opinion satisfied the prima facie requirements of R.C. 2307.92. *Renfrow*, 2013-Ohio-1189, at ¶ 23. The “VA exception” is a judicially created exception originating in the Eighth District’s decision in *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. No. 88062, 2008-Ohio-3806. *Amici* believe that *Sinnott* was incorrectly decided, and the problem created by the Eighth District extends to cases beyond *Sinnott*. In addition to *Sinnott* and the present case, the Eighth District has demonstrated a pattern of disregarding the plain language of the “competent medical authority” requirement of the statute. The Eighth District now allows a hired-gun expert, who has not treated a claimant, to qualify as competent medical authority for a broad group of claimants in direct contradiction of the plain language of the statute. *Amici* respectfully ask this Court to halt the evisceration of Ohio’s asbestos reform legislation.

**1. The Eighth District First Deviated from the Plain Language of the Statute in *Sinnott* and Created the “VA Exception” to the “Competent Medical Authority” Requirement for “Non-Traditional” Claimants.**

In *Sinnott*, the plaintiff submitted the claimant’s medical records, which included references by the claimant’s doctors that the claimant had significant asbestos exposure over a three decade career that, along with his smoking history, made him a high risk for lung cancer. *Id.* at ¶ 16. Although the plaintiff’s prima facie showing did not satisfy the plain language of the competent medical authority requirement, the Eighth District justified creation of the VA

exception because the claimant's "treating physicians were employed by the Veterans Administration," which "limited [his] ability to achieve *the typical doctor-patient relationship envisioned by the statute.*" *Id.* at ¶ 22. The Eighth District's justification in *Sinnott* and the present case is flawed because the statute does not require a "typical" doctor-patient relationship. Instead, the statute is broadly worded and simply requires a doctor-patient relationship of some sort.

**2. The Eighth District Further Weakened the "Competent Medical Authority" Requirement in *Hoover*.**

Following *Sinnott*, the Eighth District further weakened the competent medical authority requirement in *Hoover v. Norfolk S. Ry. Co.*, 8th Dist. Nos. 93479 & 93689, 2010-Ohio-2894. The plaintiff in *Hoover* submitted medical records, various reports and an opinion from Dr. Rao (i.e., Appellee's hired-gun expert in this case) in order to satisfy his prima facie burden. *Id.* at ¶ 16. Dr. Rao had never seen or treated the claimant. However, included in the medical records submitted to the court was a reference by the claimant's pulmonologist to the claimant's past asbestos exposure and smoking history and noted a right lower lobe mass. *Id.* at ¶ 19. The Eighth District rejected the defendant's argument that the plaintiff did not satisfy the "competent medical authority" requirement. Rather, the Eighth District held that a court "may look at the evidence in toto to see if [the plaintiff] established his prima facie case" and that "[t]he evidence submitted was sufficient to establish a causal link between Hoover's lung cancer and his asbestos exposure." *Id.* at ¶¶ 17, 22.

Thus, the Eighth District set a precedent that the plain language of the statute need not be followed provided that a hired-gun expert is willing to base an opinion on a collection of records for a patient that the expert has never treated.

**3. The Eighth District Expanded the “Non-Traditional” Claimant Exception to Union Members in *Whipkey*.**

The Eighth District then expanded the “VA exception” beyond VA claimants to include union members in *Whipkey v. Aqua-Chem, Inc.*, 8th Dist. No. 96672, 2012-Ohio-918. The claimant in *Whipkey* did not submit a report that satisfied the statutory requirements of a “competent medical authority.” *Id.* at ¶ 13. Nevertheless, the court noted that that “just as in *Sinnott*, William [Whipkey] had a nontraditional treatment context. As a veteran, James [Sinnott] utilized his veteran benefits. *As a union member, William utilized his union benefits.*” (Emphasis added.) *Id.* at ¶ 23.

The *Whipkey* decision demonstrates that the Eighth District is not limiting expansion of the VA exception to VA patients. Instead, the Eighth District has applied an exception to claimants that it deems are “non-traditional.” Considering that many claimants likely received medical care through union benefits, the Eighth District has opened the floodgates of claims provided a claimant can characterize his or her union-benefit medical care as “non-traditional.”

As stated above, however, the plain language of the statute does not permit an exception for so-called “non-traditional” claimants. Moreover, if an exception were warranted based on Ohio’s experience with the asbestos reform legislation, then the exception must be created by the General Assembly.

**4. The Eighth District’s Construction of the “Competent Medical Authority” Requirement Disregards the Fundamental Principle that Statutory Construction is Not Warranted When a Statute is Plain and Unambiguous.**

The Eighth District has repeatedly applied its own construction of the “competent medical authority” requirement. The statutory language defining that requirement, however, is plain and unambiguous and conveys a clear and definite meaning. As this Court has noted, however, “when the General Assembly has plainly and unambiguously conveyed its legislative

intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.” *Silver Lake v. Metro Reg’l Transit Auth.*, 111 Ohio St. 3d 324, 2006-Ohio-5790, 856 N.E.2d 236, ¶ 17 (quoting *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus). Thus, the Eighth District’s decisions construing “competent medical authority” violate this fundamental principle of law.

Furthermore, there is no clear standard to determine when a claimant qualifies as “non-traditional” such that he or she may invoke an exception that has been created, or will be created, by the Eighth District. The ad hoc decisions of the Eighth District are returning Ohio to the days prior to the General Assembly’s enactment of the groundbreaking asbestos reform legislation where a plaintiff could rely on the opinion of a hired-gun expert to support an asbestos claim. That was the scenario that created Ohio’s asbestos litigation crisis, resulting in clogged dockets and bankruptcies.

*Amici* respectfully ask this Court to prevent the return to the pre-reform days and make clear that courts are not permitted to create exceptions to the plain language of the competent-medical-authority requirement for a prima facie showing under R.C. 2307.92(C).

**B. Appellee Neither Addresses the Plain Language of the Statute Requiring a Diagnosis by a “Competent Medical Authority” Nor Does She Dispute that She Did Not Satisfy the Plain Language of the Statute.**

Appellee does not directly address the plain language of the statute. Instead, she asserts that she need not comply with the plain language of the statute in order to establish her prima facie case because Decedent’s medical care was “non-traditional.” According to Appellee, Decedent’s care was “non-traditional” because he received treatment through the Veterans Administration.

**1. The Plain Language of the Statute Does Not Sanction an Exception for “Non-Traditional” Claimants.**

Nothing in the statute sanctions an exception for a “non-traditional” claimant. Under the plain language of the statute, a medical doctor providing the diagnosis must be treating or must have treated the claimant and must have or have had a doctor-patient relationship with the claimant. Although the statute does not define a “doctor-patient relationship,” this Court has held that such a relationship is “created when the physician performs professional services which another person accepts for the purpose of medical treatment.” *See Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St. 3d 147, 150, 569 N.E.2d 875 (1991); *Lownsbury v. VanBuren*, 94 Ohio St. 3d 231, 235, 762 N.E.2d 354 (2002). When enacting a statute, the General Assembly is presumed to know the common law, and it does not abrogate the common law absent express statutory language. *See State ex rel. Merrill v. Ohio Dep’t of Natural Res.*, 130 Ohio St. 3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 34; *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 91.

Appellee does not dispute that VA doctors provided professional services which the Decedent accepted for the purpose of medical treatment. Under long-settled Ohio law, Decedent had a “doctor-patient relationship” with those doctors. Rather than presenting a diagnosis from a competent medical authority, as defined by the statute, Appellee relied upon the report of Dr. Rao, a paid expert, who had never treated the Decedent. Accordingly, Appellee failed to make a prima facie showing to support her claim and the Eighth District erred by not administratively dismissing Appellee’s case.

**2. The VA’s *Touhy* Regulations Provide a Procedure to Obtain Information from the Agency, and Appellee Appears to Have Not Followed Through with that Procedure.**

Appellee asserts that she cannot obtain a report to comply with R.C. 2307.92 because of

the VA's *Touhy* regulations. A federal agency like the VA may promulgate *Touhy* regulations that govern the dissemination of agency information. See *Rimmer v. Holder*, 700 F.3d 246, 262 (6th Cir. 2012). If an agency refuses to produce requested information pursuant to a *Touhy* regulation, a state-court litigant can challenge that decision by "filing a collateral action in federal court under the [Administrative Procedure Act, 5 U.S.C. § 702]." *Houston Bus. Journal v. Office of the Comptroller of the Currency, U.S. Dep't of Treasury*, 86 F.3d 1208, 1212 (D.C. Cir. 1996). While these regulations make obtaining information from a VA doctor more difficult than would be the case if the doctor was not VA personnel, there is a procedure for a litigant to obtain the desired information.

Appellee notes that the VA denied her request for information regarding Decedent's medical care providers. Implicit in Appellee's argument is that she did not seek review of the agency's decision under the Administrative Procedure Act. Thus, absent a showing that she exhausted her administrative remedies, Appellee's claim that obtaining the desired information is impossible rings hollow.

**3. An Administrative Dismissal is Without Prejudice and Does Not Terminate a Case.**

Appellee's claim that an administrative dismissal would forever bar her claims is specious. "A claimant who fails to comply with [the prima facie] requirements [of R.C. 2307.92] faces administrative dismissal *without prejudice*, and the case effectively becomes 'inactive' for purposes of discovery and trial. . . . Moreover, the statutes toll the limitations period and permit a claimant to reinstate the matter upon a showing of the requisite injury." (Emphasis added.) *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St. 3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶ 28.

Thus, an administrative dismissal of Appellee's claim would not terminate her case.

Moreover, regardless of the difficulty in obtaining information from a government agency, it is not the role of the judiciary to craft exceptions to plain and unambiguous statutes.

**II. The Eighth District Weakened the “Substantial Contributing Factor” Requirement by Holding that the Requirement is Satisfied if Asbestos Contributed “In Part” to the Injury.**

Appellee was required to produce, as part of her prima facie case, an opinion “that the exposed person has primary lung cancer and *that exposure to asbestos is a substantial contributing factor* to that cancer . . . .” (Emphasis added.) R.C. 2307.92(C)(1)(a).

A “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.

R.C. 2307.91(FF).

As this Court has held, “[w]hen R.C. 2307.91(FF)(1) and (2) are read in pari materia, it appears that the two subsections were intended to require 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.” *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶ 49.

**A. Dr. Rao’s Opinion Does Not Show that, Without the Exposure to Asbestos, the Injury Would Not Have Occurred.**

Dr. Rao’s opinion does not demonstrate that exposure to asbestos was a substantial contributing factor to Decedent’s cancer. Dr. Rao provided the following opinion regarding Decedent:

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.*

(Alteration sic and emphasis added.) *Renfrow*, 2013-Ohio-1189, at ¶ 26.

Appellee claims that, because Dr. Rao offered an opinion that asbestos exposure *contributed* to the harm, “it cannot be said that the harm would have occurred regardless of the asbestos exposure.” Appellee’s Merit Brief at 32. Thus, Appellee asserts that she has established the requisite “but for” causation to show that exposure to asbestos is a substantial contributing factor to Decedent’s cancer.

Appellee’s argument is not a fair reading of Dr. Rao’s opinion. It is simply not logical to say that, if asbestos exposure “in part contributed” to the development of lung cancer, then without the exposure to asbestos, the injury would not have occurred. This is especially so considering that Dr. Rao grouped asbestos exposure with other carcinogens – diesel fumes and exhaust. More importantly, however, is that Appellee’s flawed logic (and the Eighth District’s decision) ignore the impact of Decedent’s history as a heavy smoker. The record shows that Decedent smoked heavily throughout his life. The link between smoking and lung cancer is well recognized. Considering these facts, one cannot read Dr. Rao’s equivocal opinion and conclude that, absent asbestos exposure, Decedent would not have contracted lung cancer despite his smoking history.

Thus, Appellee has not made a prima facie showing that exposure to asbestos was a substantial contributing factor to Decedent’s lung cancer as required by R.C. 2307.92(C)(1)(a). Accordingly, the Eighth District erred in holding that Appellee made a prima facie showing

under R.C. 2307.92(C).

**B. This Court has Held that the Prima Facie Requirements Under R.C. 2307.92 Apply to FELA Claims and Appellee's Reliance on *CSX Transp., Inc. v. McBride* Does Not Change that Result.**

Appellee argues at length that the Eighth District's Decision should be affirmed because the prima facie requirements under the statute should not apply to a FELA claim. This Court has held 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...does not violate the Supremacy Clause because the provisions do not impose an unnecessary burden on a federally created right." *Bogle*, 115 Ohio St. 3d 455, 2007-Ohio-5248, 875 N.E.2d 919, at the syllabus. The Eighth District below recognized that the prima facie requirements apply to Appellee's claim. *Renfrow*, 2013-Ohio-1189, at ¶ 17 fn.1. Appellee's FELA arguments were not raised as Propositions of Law for which this Court accepted jurisdiction. Thus, Appellee's arguments are not properly before this Court. Nevertheless, Appellee's FELA arguments lack merit.

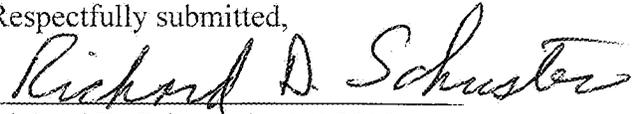
Appellee relies on FELA case law that analyzes a test not relevant to the prima facie requirements under R.C. 2307.92. In *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 180 L.Ed.2d 637 (2011), the court held that the traditional notion of *proximate causation* does not apply to FELA claims. *Id.* at 2642. Proximate causation, however, is not relevant to an analysis of whether exposure to asbestos is a substantial contributing factor to cancer as defined by 2307.91(FF). This Court has held that the substantial contributing factor "requirement is, in essence, a '*but for*' test of causation, which is the standard test for establishing cause in fact. . . . Cause in fact is distinct from proximate, or legal, cause." (Emphasis added.) *Ackison*, 120 Ohio St. 3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶ 48.

### CONCLUSION

Thus, for the reasons stated above and in *Amici's* merit brief, *Amici*, the Ohio Chamber of

Commerce, the Ohio Council of Retail Merchants, and the Chamber of Commerce of the United States of America, respectfully urge this Court to reverse the decision of the Eighth District.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of *Amici Curiae* was served on the following counsel by first-class U.S. mail, postage pre-paid, on this 17<sup>th</sup> day of December, 2013:

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