[Cite as *Darrah v. A-Best Prods. Co.*, 2009-Ohio-3349.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DUANE DARRAH, et al.	)	CASE NO. 06 JE 47
	)	
PLAINTIFFS-APPELLEES	)	
	)	
VS.	)	OPINION
	)	
A-BEST PRODUCTS CO., et al.	)	
	)	
DEFENDANTS-APPELLANTS	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 01 CV 315
JUDGMENT:	Reversed and Remanded.

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: June 30, 2009

[Cite as *Darrah v. A-Best Prods. Co.*, 2009-Ohio-3349.]

APPEARANCES:

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WAITE, J.

{¶1} Appellant A-Best Products, Co., is one of 83 named defendants in a personal injury case involving claims of asbestos-related injury filed in the Jefferson County Court of Common Pleas. The defendants include, inter alia, Westinghouse Electric Corporation, General Electric Company, Uniroyal Rubber Company, Pfizer, Inc., Union Carbide Chemical and Plastics Co., Inc., Mobil Oil Corp., Owens-Illinois Corporation, Inc., CertainTeed Corp., and Amchem Products, Inc. The allegations include negligence, negligent installation, strict liability, breach of warranty, fraudulent concealment, and conspiracy. The particular ruling at issue in this appeal granted a motion filed by the plaintiffs requesting a declaration that changes in R.C. Chapter 2307 that became effective after the filing of this lawsuit should not be applied retroactively. The changes in the law were enacted in Am.Sub.H.B. 292, effective September 2, 2004 (hereinafter "H.B. 292"). H.B. 292 requires a plaintiff who is alleging an asbestos-related injury to make a prima facie showing of injury through evidence prepared by a competent medical authority, as defined in R.C. 2307.91. This new law specifically states that it is to be applied to cases pending on the effective date of the statute. R.C. 2307.92-93. Appellees argued that the retroactive application of H.B. 292 was unconstitutional. The trial court granted Appellees' motion. The court held that H.B. 292 was unconstitutionally retroactive because it denied Appellees a vested right. The court ordered the case to proceed under common law standards rather than the new statutory standards found in R.C. 2307.91 et seq. This appeal followed.

{¶2} During the initial stages of this appeal, the parties filed jurisdictional memoranda as to whether there was a final appealable order in this case, and Appellees filed a motion to dismiss the appeal on jurisdictional grounds. While the appeal remained pending, the Ohio Supreme Court released *In re Special Docket No. 73958,* 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596, which held that a trial court's ruling regarding the constitutionality of retroactively applying R.C. 2307.92 is a provisional remedy and may be a final and appealable order pursuant to R.C. 2505.02(A)(3). Such an order is a final appealable order if it, in effect, determines the action and prevents a judgment in the action in favor of the appealing party. In *In re Special Docket No. 73958*, the trial court ruled that the retroactive application of R.C. 2307.92 was unconstitutional and ordered the case to proceed under the substantive law as it existed prior to the enactment of H.B. 262. The Ohio Supreme Court determined this ruling by the trial court was a final appealable order, and the matter was remanded to the Eighth District Court of Appeals to review the substantive issues in the appeal. The judgment entry under review in the instant appeal is factually and procedurally indistinguishable from the judgment entry in *In re Special Docket No. 73958*. We filed a journal entry on January 19, 2007, finding no jurisdictional error and allowed this appeal to proceed.

{¶3} Appellants argue on appeal that H.B. 292 does not impair vested rights, does not add new obligations or disabilities to past transactions, has a remedial and procedural effect, and therefore, is not unconstitutionally retroactive under Section 28, Article II of the Ohio Constitution. During the pendency of this appeal the Ohio

Supreme Court issued its opinion in *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio- 5243, 897 N.E.2d 1118. In *Ackison*, the Supreme Court held that the prima facie filing requirements of H.B. 292 do not offend the Retroactivity Clause of the Ohio Constitution and should be applied to cases pending on the effective date of the legislation. The trial court in the instant case improperly held that H.B. 292 was unconstitutionally retroactive and incorrectly ordered this case to proceed to trial rather than require Appellees to make a prima facie showing pursuant to R.C. 2307.92-93. The judgment of the trial court is reversed and the case remanded for further proceedings. The trial court is also ordered to administratively dismiss, without prejudice, the claims of those plaintiffs who submitted prima facie medical evidence that failed to meet the requirements of R.C. 2307.91-93.

Procedural History

{¶4} Appellees filed their complaint on August 17, 2001. The complaint was filed as Case No. 01 CV 315. The complaint named 37 plaintiffs and 80 defendants. A new complaint was filed on March 22, 2002, adding five new defendants. The second case is filed as Case No. 02 CV 121. The two cases are combined on the trial court's docket.

{¶5} The matter remained dormant for five years. Then, on June 15, 2006, Appellees filed a "Motion and Memorandum Regarding the Constitutional Infirmities of Am. Sub. H.B. 292 and Motion to Prove *Prima Facie* Case". The motion challenged the constitutionality of retroactively applying H.B. 292 and requested that the substantive law prior to the enactment of H.B. 292 be applied to the case.

Twenty-three plaintiffs filed medical records to support their prima facie case, although they conceded that the medical documents would not meet the new prima facie requirements of H.B. 292. On July 19, 2006, Appellees filed an additional memorandum in support. The plaintiffs tendered medical documents to establish a prima facie showing of physical impairment resulting from a medical condition, even though they were arguing to the court that they should not be required to make such a showing. Hearings were held on the motions on June 28, 2006, and July 26, 2006.

{¶6} On October 17, 2006, the trial court ruled on the plaintiffs' motion. The court held that, prior to the enactment of H.B. 292, the term "injury" was a legal term of art with an established meaning. The court held that H.B. 292 retroactively changed the meaning of the term "injury," adding elevated burdens and thresholds to the term. The court decided that this was a substantive change in the law, and that retroactive application of the law would impair vested rights. The court held that it would not apply H.B. 292 to active asbestos cases. Instead, it would rely on the standards that existed prior to the enactment of H.B. 292. The court issued a nunc pro tunc judgment entry October 24, 2006, correcting a clerical error. This appeal followed on November 15, 2006.

{¶7} As earlier stated, shortly after the appeal was filed, the parties filed jurisdictional memoranda regarding whether the trial court's order constituted a final appealable order. On January 19, 2007, we determined that there was a final appealable order in the case and allowed the appeal to continue. While this appeal was pending, the Ohio Supreme Court heard the *Ackison* case to determine the

same substantive issue in this appeal. Oral argument was scheduled after the resolution of *Ackison* by the Ohio Supreme Court.

{¶8} Appellants, Bayer Cropscience, Inc. f/k/a Aventis Cropscience USA, Inc., as successor in interest to Amchem Products, Inc., CertainTeed Corporation, Oglebay Norton Engineered Materials, Inc., as successor in interest to Ferro Engineering Division of Oglebay Norton Company, and Union Carbide Corporation filed their merit brief on February 16, 2007. Appellant Owens-Illinois, Inc., filed a separate merit brief on February 21, 2007. Appellees filed their brief on March 8, 2007. Reply briefs were filed on March 19th and 23rd, 2007, respectively.

ASSIGNMENT OF ERROR

{¶9} "The trial court erred by declining to apply portions of H.B. 292 (specifically R.C. 2307.91-2307.93) to Appellee's [sic] case."

{¶10} Appellants are challenging the trial court's interpretation and application of Section 28, Article II of the Ohio Constitution, which states:

{¶11} “The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.”

{¶12} Determination of the constitutionality of a statute presents a question of law which is reviewed de novo on appeal. *Akron v. Callaway*, 162 Ohio App.3d 781, 2005-Ohio-4095, 835 N.E.2d 736, ¶23.

{¶13} H.B. 292 clarifies a variety of issues relating to the accrual date and limitations period of a cause of action for bodily injury arising from exposure to asbestos. R.C. 2305.10(B)(5) sets forth the statute of limitations governing these causes of actions. Prior to 1980, a two-year statute of limitations applied to asbestos actions. In 1980, R.C. 2305.10(B) was amended so that a cause of action for bodily injury for exposure to asbestos did not accrue until the date a plaintiff was informed, or should have become aware, by competent medical authority, that he or she had been injured by such exposure.

{¶14} Prior to September 2, 2004, the Ohio General Assembly did not define a number of key terms in R.C. 2305.10(B), such as "competent medical authority," "bodily injury," or "caused by exposure to asbestos."

{¶15} The Ohio State Legislature passed H.B. 292 to deal with a number of severe problems that had arisen in the voluminous asbestos litigation in Ohio. H.B. 292 became effective in September 2004, after Appellees' complaint was filed. It was intended to reform the current system of asbestos personal injury litigation. According to the uncodified law included with H.B. 292, the prior method of dealing with asbestos cases was deemed to be, "* * * unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of $54 billion dollars have already been spent on asbestos litigation and the

costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range from two hundred billion to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick." Uncodified law accompanying H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3988.

{¶16} The General Assembly noted that, "Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings." (Emphasis omitted.) Id. at Section 3(A)(3)(b). The General Assembly also pointed out that, at the time H.B. 292 was being considered, Ohio had 35,000 pending asbestos cases and dockets were rapidly increasing. Between 1999 and 2003, the number of pending asbestos cases increased from 12,800 to 39,000. Id. at Section (3)(A)(3)(b)-(e). The General Assembly was aware that the entire nation was affected by these asbestos cases. Litigation had contributed to the bankruptcy of more than 70 companies, including nearly all manufacturers of asbestos textile and insulation products, and at least five Ohio-based companies were forced into bankruptcy because of asbestos cases brought by claimants who were not sick at the time they filed their complaints. Id. at Section (4) and (4)(c).

{¶17} The General Assembly concluded that the vast majority of claims are filed by individuals who allege exposure to asbestos and may have some physical signs of exposure, but do not have an asbestos-related impairment. Id. at Section 5. In response to its findings, the General Assembly devised a new statutory system that would force claimants to meet certain prima facie requirements in order to maintain tort actions that involve asbestos claims. Under the new rules established by H.B. 292, if the trial court finds that a claimant cannot meet this prima facie burden, the court must administratively dismiss the claim without prejudice. R.C. 2307.93(A)(3)(c).

{¶18} The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. R.C. 2307.92(A) defines "bodily injury caused by exposure to asbestos" as, "physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor." R.C. 2307.92(B)-(D) sets forth the prima facie requirements that a plaintiff must meet before he or she may bring or maintain a tort action in an asbestos claim. Plaintiffs must make a prima facie showing that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. The evidence must be provided by "competent medical authority," and that term is defined in great detail in R.C. 2703.91(Z). This section requires, among other things, that the medical authority be a board-certified medical doctor, that the doctor has actually treated the patient, and that the doctor not spend more than 25% of his time in consulting or expert services

in tort cases. The new law establishes a detailed set of evidentiary requirements for three distinct types of asbestos claims: those who allege a nonmalignant condition; those who are smokers and have lung cancer; and wrongful death claimants. R.C. 2307.92(B)-(D). Under each subcategory are a series of further evidentiary requirements that the plaintiff must meet before the claim will be permitted to go forward.

{¶19} R.C. 2307.93 also contains a requirement that the new law be applied retroactively to asbestos injury cases already pending in the court system:

{¶20} "(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.

{¶21} "(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.

{¶22} "(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:*

{¶23} "*(i) A substantive right of a party to the case has been impaired.*

{¶24} "*(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.*

{¶25} "(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.

{¶26} "(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.

{¶27} "(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.

{¶28} "(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." (Emphasis added.)

{¶29} According to Appellants, the trial court should have applied R.C. 2307.91 et seq. to Appellees' claims, including the new prima facie evidence

requirements, and that by ruling that the new law was unconstitutional, the new prima facie test could not be applied. Under the new law, if the plaintiff does not meet the prima facie evidentiary test, the case is administratively dismissed without prejudice, but the trial court retains jurisdiction over the case. R.C. 2307.93(C). The case may be reinstated at a later date if a prima facie showing is made. Appellants contend that once the new law is properly applied, the 23 plaintiffs who submitted medical records should have their cases administratively dismissed because they have already admitted that the medical records do not meet the new prima facie standards.

{¶30} All legislation begins with a presumption of constitutionality, and it is not the court's duty to assess the wisdom of a particular statute when considering its constitutionality. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 217, 2008-Ohio-546, 883 N.E.2d 377, at ¶141. The fact that a statute contains a directive that it be applied retroactively does not mean it automatically offends the Ohio Constitution. A retroactive statute is unconstitutional, "if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 354, 721 N.E.2d 28. To decide if legislation is unconstitutionally retroactive, the court must first determine whether the General Assembly expressly intended the statute to apply retroactively. Then the court addresses the question as to whether the statute is substantive, rendering it unconstitutional. Merely remedial statutes do not offend Section 28, Article II of the Ohio Constitution.

{¶31} The Ohio Supreme Court in *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, held that R.C. 2703.91-98 was expressly made retroactive, does not impair substantive rights, and therefore does not run afoul of the prohibition against retroactive laws found in Section 28, Article II of the Ohio Constitution. Id. at ¶62. The Supreme Court held that R.C. 2703.91 et seq. does not relate to the rights and duties that give rise to a cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Id. at ¶16. Rather, R.C. 2703.91 et seq. pertains to the machinery for carrying on a suit, and is thus procedural in nature rather than substantive. Id. R.C. 2703.92-93 in particular establish "a procedural prioritization" of asbestos-related cases. Id. at ¶17. " 'Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. No new substantive burdens are placed on claimants * * *.' " Id. quoting *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶17. Instead, the enactments, "merely substitute a new or more appropriate remedy for the enforcement of an existing right." Id. quoting *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570.

{¶32} It is clear from the *Ackison* case that R.C. Chapter 2703 is constitutional and must be applied to pending asbestos cases. The trial court's judgment entry falls short as to each of the main legal rulings made by the court. The trial court concluded that H.B. 292 has a substantive rather than a remedial effect. *Ackison* held that H.B. 292 is remedial and procedural only, and not substantive. The trial court held that the term "injury" had a fixed and established legal meaning within the

context of asbestos litigation prior to the enactment of H.B. 292. *Ackison*, in contrast, held that, "[b]efore the enactment of H.B. 292, there was no statewide standard for what constituted an 'injury' giving rise to an asbestos claim." *Ackison*, supra, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, ¶20.

{¶33} The trial court cited *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, to establish that the plaintiffs could assert vested rights in this case even though no final order had yet been issued on any substantive matter. *Smith* involved an attempt to eliminate a child support arrearage by retroactively applying a new statute, R.C. 3111.13, to a preexisting child support order. The *Smith* Court held that the mother had a vested interest in an existing and valid court order, and the new law could not be applied retroactively. *Smith* does not tell us whether vested rights may arise before a final judgment has been issued in a case. The *Ackison* Court, on the other hand, does address the specific question as to whether vested rights arise in asbestos injury cases, and whether H.B. 292 may be applied retroactively. In an analysis to determine retroactivity, we must first determine whether a new statute is remedial or substantive. If it is substantive, it cannot be applied retroactively. It is substantive, "if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat*, supra, 87 Ohio St.3d at 354, 721 N.E.2d 28. *Ackison* clearly held that H.B. 292 does not impair vested rights, and is remedial and not substantive.

{¶34} Because the trial court erred as to the constitutional issue, we must sustain Appellants assignment of error and reverse the judgment of the trial court. Upon remand, the court must apply the new requirements of R.C. 2307.91 et seq. to all pending claims in this case. Appellants have further requested that we order the trial court to administratively dismiss the 23 claims that are part of this appeal because the claimants have conceded that their medical evidence does not meet the prima facie requirements.

{¶35} According to R.C. 2307.93(B), the trial court should have ruled on the evidence submitted as if it were presented in summary judgment:

{¶36} "(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."

{¶37} Summary judgment is reviewed de novo on appeal. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. 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* (2001), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243.

{¶38} We are persuaded based on our de novo review of the record, and on counsel's admissions during oral argument, that the medical records as submitted did not and were not intended to meet the new prima facie requirements of R.C. 2307.92-93. Administrative dismissal of the claims is required by R.C. 2307.93(A)(3)(c). The administrative dismissal is without prejudice and may be reinstated upon a proper prima facie showing:

{¶39} "(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."

{¶40} In summary, the trial court erred in failing to retroactively apply the requirements of H.B. 292 and R.C. 2307.91 et seq. to this case. We hereby reverse the judgment of the Jefferson County Court of Common Pleas and remand this case for further proceedings. The trial court is ordered to administratively dismiss the claims of the following plaintiffs according to the requirements of R.C. 2307.93:

Ralph Archer, Thomas Bensie, Grover Brown, Joseph Castner, Duane Darrah, Roger Edgar, James Ferguson, Albert L. Floto, Jr., Charles Greene, Edward Lewis, Forest W. Machak, Samuel Motto, Samuel Nicosia, James O'Connell, John William Pratt, Michael Runkel, Junior R. Skinner, Nicholas G. Tye, Jr., Jerry Valenti, Theodore E. Wallace, John Woods, John Wiley, Jr., and John S. Wood, Sr. The administrative dismissal must be without prejudice, and the trial court is to retain jurisdiction over the claims pursuant to R.C. 2307.93.

Donofrio, J., concurs.

Vukovich, P.J., concurs.