No. 2006-1604

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 88062

JAMES SINNOTT, et al.,
Plaintiffs-Appellees,
v.
AMERICAN OPTICAL CORPORATION, PNEUMO ABEX LLC, successor in interest to ABEX CORPORATION, and CBS CORPORATION, a Delaware Corporation, f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION,
Defendants-Appellants,
and
AQUA-CHEM, INC., et al.,
Defendants.

REPLY BRIEF OF APPELLANTS AMERICAN OPTICAL CORPORATION, PNEUMO ABEX LLC, successor in interest to ABEX CORPORATION, and CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION

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I. INTRODUCTION

Despite Appellee Sinnott's transparent attempt to obfuscate the issue on appeal, this Court is asked only to resolve whether a prima-facie-showing order is a final appealable order under recently-amended R.C. 2505.02. The clear and unambiguous language of this statute provides that it is.

Appellee Sinnott, however, attempts to confuse this Court by interjecting arguments and issues that are *not* part of this appeal. *Not* at issue in this appeal is the constitutionality of H.B. 292. Although Sinnott concedes as much (Opp. Br. at 5), Sinnott nonetheless argues that H.B. 292 denies asbestos plaintiffs "valuable due process rights" and "equal protection of the law" by requiring that these plaintiffs satisfy minimum medical criteria. Id. at 7-8. Sinnott then "warns" the Court not to "embark on a public policy frolic" merely to support the "supposed will" of the legislature. Id. at 8. This argument is immaterial to the issue before this Court.

Nor have Appellants AO, Abex, and Westinghouse asked this Court "resolve the crisis in asbestos litigation." Id. at 2. That function is the responsibility of the General Assembly. And the General Assembly responded to the "elephant mass" of asbestos cases by enacting H.B. 292, which amended R.C. 2505.02 – the final-order statute – to provide a statutory mechanism for the immediate review of prima-facie-showing orders.

The *only* issue before this Court is whether the final-order statute provides immediate review of a prima-facie-showing order. It does. In enacting H.B. 292, the General Assembly amended R.C. 2505.02 to expressly include a prima-facie-showing order as a provisional remedy – thereby subjecting the order to immediate review when both R.C. 2505.02(B)(4)(a) and (b) are satisfied.

Both subdivisions are satisfied in this case. First, under well settled Ohio Supreme Court case law, an order affecting a provisional remedy *determines* the action as to the provisional remedy and *prevents* a judgment as to that remedy. Second, AO, Abex, and Westinghouse – and the hundreds of asbestos defendants that are within the jurisdiction of the Eighth Appellate District – would not only be foreclosed from pursuing any meaningful appeal following judgment on the merits, but would be denied the very remedy the General Assembly intended under H.B. 292: that is, the preservation of funds for deserving asbestos plaintiffs.

Sinnott's calculated attempt at interposing an improper constitutional argument is nothing more than a purposeful and surreptitious maneuver meant to detract the Court from the real issue in this case. And that issue is simple and straightforward: is a prima-facie-showing order a final appealable order under R.C. 2505.02? The clear and unambiguous language of this statute provides that it is.

II. LAW AND ARGUMENT

Sinnott mistakenly argues that "there is no statutory mechanism that establishes immediate appellate review, absent a determination of the merits of an individual case." Opp. Br. at 4. This is an incorrect statement of the law. Amendments to the final-order statute over the years have authorized the review of orders that may have been otherwise considered interlocutory if the order under appeal satisfies R.C. 2505.02. Once satisfied, the order is capable of immediate review because it is not only considered "final," but "appealable." See, generally, R.C. 2505.02, Apx. at 22-23. Indeed, Sinnott acknowledges as much by referencing, among others, this Court's decision in *State v. Muncie* (2001), 91 Ohio St.3d 440 (forced-medication order was a final appealable order), and the Ninth Appellate District's decision in *Gibson-Myers & Assoc., Inc. v. Pearce* (Oct. 27, 1999), 9th Dist. No. 19358, 1999 WL 980562

(order compelling the production of documents containing trade secrets was a final appealable order) – neither of which involved the review of orders rendered on the merits following final judgment.

Notwithstanding Sinnott's bald assertion to the contrary, Ohio appellate law recognizes that some otherwise interlocutory orders are capable of immediate review under R.C. 2505.02. A prima-facie-showing order became one such immediately appealable order when the General Assembly enacted H.B. 292 and amended R.C. 2505.02 to specifically include a prima-facie-showing order as a provisional remedy.

A. H.B. 292 amended R.C. 2505.02 to provide a statutory mechanism for the immediate review of a prima-facie-showing order.

Sinnott argues that AO, Abex, and Westinghouse are trying "to create special treatment for themselves" by asking an appellate court to review a prima-facie-showing order. Opp. Br. at 2. These appellants are not asking the Court for any special treatment. To the contrary, they are only asking that this Court enforce the clear and unambiguous language of R.C. 2505.02.

And R.C. 2505.02's clear and unambiguous language indicates that a prima-facie-showing order is a final appealable order. When a statute's language is clear and unambiguous, there is no need for a court to resort to statutory interpretation. Instead, the court must merely apply the statute. *Tomasik v. Tomasik*, 111 Ohio St.3d 481, 2006-Ohio-6109, at ¶14-15, quoting *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, at ¶11-12; see, also, *Fazio v. Hamilton Mut. Ins. Co.*, 106 Ohio St.3d 327, 2005-Ohio-5126, at ¶40 (court has duty to enforce statute as written); *Skilton v. Perry Loc. Sch. Dist. Bd. of Edn.*, 102 Ohio St.3d 173, 2004-Ohio-2239, at ¶11, 17 (a court cannot ignore clear statutory language, but must instead apply statute as written). It is only when the words of the statute are in doubt that a court can resort to "other means of

interpretation." *Hairston*, 2004-Ohio-969, at ¶12. "The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact." Id.

Sinnott does not dispute – and in fact concedes – that the prima-facie showing order at issue here satisfies the definition of provisional remedy set forth at R.C. 2505.02(A)(3). Opp. Br. at 9. Although Sinnott disputes that the order is capable of immediate review under R.C. 2505.02(B)(4) despite this concession, the clear and unambiguous language of subdivision (B)(4) compels a different conclusion. To be immediately appealable under R.C. 2505.02(B)(4), a prima-facie showing order must not only determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, but it must also foreclose an adequate remedy following final judgment. See R.C. 2505.02(B)(4)(a) and (b), Apx. at 22-23. Both provisions are satisfied in this case.

1. An order affecting a provisional remedy satisfies R.C. 2505.02(B)(4)(a) when that order determines the action *with respect to the provisional remedy* and prevents a judgment *with respect to the provisional remedy.*

Sinnott argues that the prima-facie showing order does not prevent a judgment because AO, Abex, and Westinghouse are not prevented from "successfully defending against the claims at trial *** ." Opp. Br. at 10. Sinnott misunderstands the with-respect-to-the-provisional-remedy parts of R.C. 2505.02(B)(4)(a).

Satisfying R.C. 2505.02(B)(4)(a) requires showing that the prima-facie showing order under appeal "determines the action with respect to the provisional remedy and prevents a judgment *** in favor of the appealing party with respect to the provisional remedy." R.C. 2505.02(B)(4)(a), Apx. at 22. This language is clear and unambiguous and requires that the order determine the action *as to the provisional remedy* and prevent a judgment in favor of the

appealing party *as to that remedy*. In *State v. Muncie*, for example, this Court determined that whether the forced-medication order satisfied R.C. 2505.02(B)(4)(a) "is easily answered" because the order "determined the action against Muncie" and prevented a judgment in favor of Muncie "*with respect to the proceeding for forced medication.*" 91 Ohio St.3d at 450-451. The same was true in *State v. Upshaw*, where this Court concluded that a finding of incompetency "determined the competency proceeding" and that finding was a determination adverse to Upshaw. 110 Ohio St.3d 189, 2006-Ohio-4253, at ¶17.[1]

Like the provisional remedies at issue in *Muncie* and *Upshaw*, the prima-facie showing order at issue here *determined* the prima-facie-showing proceeding when the trial court found that Sinnott "satisfied the minimum medical requirements" necessary to establish a prima-facie showing under R.C. 2307.92. This *determination* precluded a judgment in favor AO, Abex, and Westinghouse to the contrary; i.e, that Sinnott had *not* made a prima-facie showing under the statute. Once the prima-facie showing had been determined in favor of Sinnott, no contrary judgment in favor of AO, Abex, or Westinghouse could be entered.

The language of R.C. 2505.02(B)(4)(a) is clear and unambiguous. This subdivision has been satisfied.

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[1] Appellate courts around the state have likewise applied the with-respect-to-the-provisional-remedy part of R.C. 2505.02(B)(4)(a) as did this Court in *Muncie* and *Upshaw*. See, also, *Othman v. Heritage Mut. Ins. Co.*, 158 Ohio App.3d 283, 2004-Ohio-4361, at ¶10 (orders granting a party's motion for a protective order and denying a motion to disqualify counsel "determined the action with respect to the motions"); *Smalley v. Friedman, Domiano & Smith Co., LPA*, 8th Dist. No. 83636, 2004-Ohio-2351, at ¶15 (order requiring plaintiff to produce privileged material in discovery "determined the action" with respect to the discovery motion and "prevented a judgment with respect to that remedy"); *Kinsey v. Erie Ins. Group*, 10th Dist. No. 03AP51, 2004-Ohio-579, at ¶12 (order granting defendant's motion for an independent medical examination of plaintiff "determines the action with respect to the provisional remedy and prevents a judgment in favor of the plaintiff with respect to the provisional remedy.").

2. An appeal of a prima-facie-showing order after final judgment on the merits is an inadequate remedy because it not only thwarts the express purpose of H.B. 292, but may render any such appeal moot.

To satisfy R.C. 2505.02(B)(4)(b), the appealing party must be foreclosed from an adequate remedy following final judgment on the merits. R.C. 2505.02(B)(4)(b), Apx. at 22. Sinnott repeatedly insists that AO, Abex, and Westinghouse would not be foreclosed from challenging the prima-facie-showing order following final judgment on the merits and, therefore, cannot satisfy subdivision (B)(4)(b). Relying on *State ex rel. Lyons v. Zaleski* (1996), 75 Ohio St.3d 623, and *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, Sinnott contends that interlocutory appeals are only authorized when a right is "irretrievably lost" – not when a "disappointed litigant" wishes to avoid the expense and inconvenience of trial. Opp. Br. at 10-11.

This argument fails for three reasons. First, Sinnott's reliance on *Celebrezze* is misplaced. Although the issue in *Celebrezze* was whether a denial of a motion for summary judgment based on absolute immunity was a final appealable order, plaintiff misrepresents – and indeed misquotes – this case. The excerpted material at page 11 of Sinnott's Opposition Brief is quoted material from the United States Supreme Court's decision in *Mitchell v. Forsyth* (1985), 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411, which analyzed whether the order at issue was a final order under the federal collateral order doctrine. *Celebrezze*, 51 Ohio St.3d at 91. Acknowledging that Ohio has no analogous collateral order rule, the *Celebrezze* court nonetheless stated that even if it did, the denial of a summary-judgment motion – even if premised on immunity – would not be immediately appealable under the federal collateral order rule. Id. at 92. Thus, the final-judgment rule referenced in *Mitchell* and ascribed to the *Celebrezze* court actually refers to the final-judgment rule under federal law – not Ohio law.

Second, Sinnott's reliance on *Zaleski* is equally misplaced. In fact, *Zaleski* did not even involve a final-appealable-order issue. Instead, at issue in *Zaleski* was whether a medical malpractice plaintiff was entitled to a writ of mandamus when the trial judge granted a motion for change of venue. Concluding that the plaintiff had an adequate remedy at law by pursuing an appeal after final judgment on the merits, this Court upheld held the denial of the writ. 75 Ohio St.3d at 626. Although Sinnott relies on *Zaleski* for the proposition that potentially unnecessary expenditures of time and money do not render the remedy of an appeal following final judgment inadequate (Opp Br. at 11), the General Assembly intended otherwise.

Indeed, the General Assembly's express purpose in making a prima-facie-showing order immediately appealable was so that unnecessary expenditures associated with trial could be avoided. After noting the expansive increase in asbestos litigation and the unfairness of the process to asbestos litigants, the General Assembly enacted "reasonable medical criteria" for the express purpose of "expedit[ing] the resolution of claims brought by those sick claimants *** [which] will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future." Section 3(A)(5), Am.Sub.H.B. No. 292 (R.C. 2307.91, uncodified law), Apx. at 12-13. If AO, Abex, and Westinghouse are denied the right of immediate review plainly afforded under R.C. 2505.02, the resources that the General Assembly intended to preserve would be spent on preparing for and participating in a potentially unnecessary trial. And these resources – once spent – cannot be unspent or otherwise retrieved.

And finally, Sinnott's argument fails because an appeal of a prima-facie-showing order following final judgment on the merits would be at best meaningless, and at worst moot. If an asbestos claim proceeds to trial after a trial court issues an order finding that the plaintiff has

made a prima-facie showing of asbestos-related impairment – and that prima-facie-showing is determined to be not immediately reviewable – any appeal of the prima-facie-showing order following a judgment in favor of an asbestos plaintiff on the merits would be a non-issue and, in fact, may be considered moot. See, e.g., *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 156.

Notwithstanding Sinnott's arguments to the contrary, AO, Abex, and Westinghouse do not have an adequate remedy in an appeal following a judgment on the merits. Not only would they would be foreclosed from any appellate challenge of the prima-facie-showing order following judgment on the merits, but the General Assembly's express purpose of preserving scarce resources would be thwarted and funds expended at trial would be irretrievably lost if they were not otherwise prevented from appealing an adverse prima-facie-showing order.

This result is not what the General Assembly intended when it enacted H.B. 292. To the contrary, the General Assembly envisioned a statutory framework that determined – as a threshold matter – whether an asbestos plaintiff satisfied certain minimum medical criteria for asbestos-related illness and then made any such determination immediately reviewable by an appellate court.

B. Application of H.B. 292 is not dependent upon whether an asbestos plaintiff is ill.

Sinnott argues that she is a "deserving" plaintiff – and therefore within the intent of H.B. 292 – because she is an asbestos plaintiff whose husband was "truly sick." Opp. Br. at 2, 4. Taking this argument to its logical conclusion, Sinnott would have this Court believe that H.B. 292's amendments to R.C. 2505.02 would not apply to her because her husband was sick. This is an absurd and unjustified conclusion.

It is not the health status of any particular asbestos plaintiff that determines whether a prima-facie-showing order is a final appealable order. Instead, it is the *statutory process* itself that promotes the General Assembly's intent of preserving resources for deserving asbestos plaintiffs. Permitting immediate appellate review of a prima-facie-showing order satisfies that intent.

In an attempt to detract this Court from the issue in this case, Sinnott nonetheless argues that AO, Abex, and Westinghouse "glaringly omit" any reference to statistics regarding the incidence of asbestos-related illnesses in the state of Ohio. Sinnott then references and appends to her brief two articles discussing these statistics. Opp. Br. at 8. This is no glaring omission on the part of these appellants. The articles are not only irrelevant to the issue raised in this appeal, but the articles are not referenced, addressed, or discussed in H.B. 292 itself or made part of the record in the courts below. It is well established that a party to an appeal in the Supreme Court cannot add material to its brief that was not part of the record below. *State ex rel. Office of Montgomery Cty. Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, at ¶20, quoting *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730.

The narrow issue before this Court is whether a prima-facie-showing order is a final appealable order. Statistics addressing the incidence of asbestos-related disease are immaterial to the resolution of this issue and they give no insight into the intent of the General Assembly in enacting H.B. 292.

C. Application of a summary-judgment standard in resolving an asbestos plaintiff's prima-facie showing does not preclude appellate review under R.C. 2505.02 when that resolution is adverse to an asbestos defendant.

When determining whether an asbestos plaintiff's medical evidence comports with R.C. 2307.92, a trial court is to review the evidence using the same standard as that employed when resolving a motion for summary judgment. R.C. 2307.93(B), Apx. at 20. Sinnott contends that this evidentiary-review standard is the equivalent of denial of a motion for summary judgment and, as such, is not immediately reviewable.

Sinnott is mistaken. Merely because H.B. 292 directs a court to employ a summary-judgment standard of review does not transform any adverse determination into an order incapable of immediate review. To the contrary, the trial court is directed to review the evidence supporting a prima-facie showing and determine whether "reasonable minds can come to but one conclusion" after construing that evidence "most strongly" in the asbestos plaintiff's favor. See *Wagner v. Anchor Packing Co.*, 4th Dist. No. 05CA47, 2006-Ohio-7097, at ¶39. It is an evidentiary standard and no more.

D. Immediate review of a prima-facie-showing order does not invite piecemeal appellate review.

Sinnott argues that review of prima-facie-showing order essentially involves a review of a record that is factually incomplete. According to Sinnott, a factually incomplete record leaves nothing for an appellate court to review and invites a piecemeal appellate process. Opp. Br. at 12-13.

To support this argument, Sinnott relies on several irrelevant cases – *State v. Lester* (1975), 41 Ohio St.2d 51, *Salisbury v. Smouse*, 4th Dist. No. 05CA737, 2005-Ohio-5733, and *State v. Greer* (Feb. 20, 1991), 9th Dist. No. 14696, 1991 WL 21548. Each of these cases,

however, involves the review of an order denying a petition for post-conviction relief under R.C. 2953.21 and each concludes that the trial court erred by not preparing findings of fact as required by R.C. 2953.21(C) (if a court dismisses a petition for post-conviction relief, "it shall make and file findings of fact and conclusions of law with respect to the dismissal."). There is no comparable statutory mandate in R.C. 2307.92.

The lack of authoritative value of *Lester, Salisbury,* and *Greer* notwithstanding, Sinnott does not state how the record would be factually incomplete only that it would be so. To be sure, it would be the *plaintiff's* responsibility to demonstrate a prima-facie showing under R.C. 2307.92 – not the court's responsibility to establish a record. AO, Abex, and Westinghouse could only fathom that the record would be incomplete *as to the prima-facie showing* because the plaintiff did not or could not satisfy the minimum medical requirements. This is not an appellate-review issue but a matter of proof necessary to satisfy a statutory requirement. Thus, there is no risk that the review of a prima-facie-showing order would promote a piecemeal appellate process.

E. Whether a prima-facie-showing order is a final appealable order is a question of law that is not dependent on factual distinctions among cases issued by other appellate districts.

Lastly, Sinnott contends that factual distinctions between this case and *Stahlheber v. DuQuebec, LTEE,* 12th Dist. No. CA2006-06-134, 2006-Ohio-7034, and *Wilson v. AC & S, Inc.*, 12th Dist. No. CA2006-03-056, 2006-Ohio-6704, minimize any persuasive impact *Stahlheber* and *Wilson* may have on this Court. This argument is unavailing.

Sinnott confuses a review of whether the prima-facie-showing order satisfies the requirements of R.C. 2307.92 with whether the order satisfies the definition of final order in the first instance. Either the order satisfies the definition of final order or it does not – the inquiry is

not fact dependent. On the contrary, a review of the prima-facie-showing order on the merits – that is, whether a plaintiff's medical evidence is sufficient for a prima-facie showing – is fact dependent. But that issue is not before this Court. Unlike the Eighth Appellate District here, the *Stahlheber* and *Wilson* courts correctly determined that a R.C.2307.92 prima-facie showing order is a final appealable order subject to immediate review. Any factual distinctions in the proof presented to establish a prima-facie showing are immaterial.

III. CONCLUSION

Appellee Sinnott insists that review of a prima-facie-showing order is only reviewable after a decision on the merits. Sinnott is wrong. R.C. 2505.02 clearly and unambiguously provides that a prima-facie-showing order is a final appealable order capable of immediate review under R.C. 2505.02(B)(4). The order is a provisional remedy as expressly defined in R.C. 2505.02(A)(3). It becomes immediately appealable because the order satisfies both provisions of R.C. 2505.02(B)(4). First, the order determines the action as to the provisional remedy and prevents a judgment as to that remedy, thereby satisfying R.C. 2505.02(B)(4)(a). Subdivision (B)(4)(b) is then satisfied because AO, Abex, and Westinghouse would have no adequate remedy following an adverse judgment on merits. Not only would they be foreclosed from pursuing further appeal following an adverse judgment on the merits, but the very purpose for which the General Assembly enacted H.B. 292 would be thwarted.

No "frolic" of any kind – much less a public policy one – is required for this Court to enforce R.C. 2505.02 as written. The statute's language is clear and unambiguous and the intent of the General Assembly is equally clear and unambiguous. The immediate appeal of a trial court's prima-facie-showing order promotes the General Assembly's laudable goal of protecting scarce resources for deserving asbestos claimants.

Appellants AO, Abex, and Westinghouse, therefore, respectfully request this Court that it reverse the judgment of the Eighth Appellate District and reinstate the appeal for resolution on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Reply Brief of Appellants American Optical Corporation, Pneumo-Abex LLC, successor in interest to Abex Corporation, and CBS Corp., f/k/a Viacom, Inc., successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corp.** has been served this 7th day of April, 2007, by U.S. Mail, postage prepaid, upon the following:

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