No. 08-1889

In the Supreme Court of Ohio

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

YVONNE SINNOTT, individually and as the
Successor Administrator of the Estate of James Sinnott,
Plaintiff-Appellee,

v.

AQUA-CHEM, INC., et al.,
Defendants,

and

AMERICAN OPTICAL CORPORATION,

and

PNEUMO ABEX LLC, successor in interest to Abex Corporation,
Defendants-Appellants.

FILED
SEP 24 2008
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS AMERICAN OPTICAL CORPORATION and PNEUMO ABEX LLC, successor in interest to Abex Corporation

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APPENDIX **Appx. Page**

I. Explanation of why this case is a case of public and great general interest

At issue in this appeal is the proof required to make a prima-facie showing under newly-enacted Am.Sub.H.B. No. 292, the Asbestos Litigation Reform Act. The Eighth Appellate District here ignored the clear and unambiguous language of the Act's prima-facie-showing statute, R.C. 2307.92 (and related definitional statutes), and refused to apply the new statute as written. It merely reverted to the pre-H.B. 292 standard to find that the prima-facie showing proof submitted by James Sinnott—hospital medical records and the expert opinions of two non-treating physicians—satisfied the new statute's requirements.

These records and opinions, however, do not satisfy the statute's requirements. In enacting H.B. 292 and codifying the requirement for a prima-facie showing, the General Assembly recognized that "[t]he current asbestos personal injury litigation system is unfair and inefficient" and imposed "a severe burden on litigants and taxpayers alike." *Norfolk S. Ry. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, at ¶2. To lessen that burden, it created an ordered and reasoned prioritization process that includes a requirement to make a prima-facie showing—a necessary "first step toward ensuring that impaired plaintiffs are compensated." Am.Sub.H.B. No. 292, Section 3(A)(5) (R.C. 2307.91, uncodified law).

Under the new statute, Sinnott had to submit a writing from a "competent medical authority"—a treating physician who had developed a doctor-patient relationship with Sinnott—stating that Sinnott's exposure to asbestos was a "substantial contributing

factor" to his diagnosis of lung cancer. To demonstrate "substantial contributing factor," the writing had to state that Sinnott's exposure was the predominant cause of the lung cancer and that the lung cancer would not have occurred but for the asbestos exposure.

The medical records and opinions submitted by Sinnott here do not satisfy the statute's requirements. Although the hospital medical records are compilations of writings by Sinnott's treating physicians and constitute a writing from "competent medical authority," the records do not contain the necessary information sufficient to satisfy the definition of "substantial contributing factor." Recognizing this deficiency, the Eighth District improperly considered and relied upon the opinions of Dr. Robert Altmeyer and Dr. Arthur Frank, both of whom are not competent medical authority as defined by the applicable definitional statute, R.C. 2307.91(Z). The appellate court nonetheless relied on their opinions to "bolster" the medical-record evidence compiled by Sinnott's treating physicians to find that this "combined" evidence was sufficient "to establish a causal link" between Sinnott's lung cancer and his exposure to asbestos. *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. No. 88062, 2008-Ohio-3806, at ¶19, Appx. at 9-10.

But the Act makes no allowance for "combined" evidence when making a prima-facie showing, nor does a showing of a "causal link" satisfy the definition of "substantial contributing factor." Neither the medical records of Sinnott's treating physicians standing alone or as "bolstered" by the opinions of Sinnott's non-treating physicians is sufficient to make a prima-facie showing under the newly-codified statutes. The non-treating-physicians simply are not "competent medical authority" under the statute and

neither the medical-record evidence nor the non-treating-physicians' opinions, even as combined, satisfy the definition of "substantial contributing factor."

The effect of the appellate court's decision is staggering. At the time the General Assembly enacted H.B. 292 in 2004, there were more than 39,000 pending asbestos cases in Cuyahoga County alone, with 200 new asbestos cases being filed every month. Indeed, Ohio had become a "haven for asbestos claims." See Section 3(A)(1), (3)(e), Am.Sub.H.B. No. 292 (R.C. 2307.91, uncodified law). Because the Act provides that the prima-facie-showing requirements can be applied retroactively (and the Eighth District recently confirmed that these pending cases are subject to the requirement to make a prima-facie showing[1]), everyone of the almost 40,000 cases, as well as the thousands that have been filed since 2004, must comply with R.C. 2307.92.

But the Eighth District's decision in this case (allowing a deficient prima-facie showing to be supplemented by the opinions of physicians who are not competent medical authority under the statute) effectively renders the prima-facie-showing statute meaningless and its compliance an unnecessary and useless exercise. Every one of the several thousand asbestos cases pending in Cuyahoga County can merely pay lip service to the requirement for a prima-facie showing by submitting medical records of the exposed person and the expert opinions of the oft-used Drs. Altmeyer and Frank (or some other non-competent medical authority) just as they had before the General Assembly enacted H.B. 292. It would be as if the prima-facie-showing requirement never existed.

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[1] *In re Special Docket No. 73958*, 8th Dist. Nos. 87777 & 87816, 2008-Ohio-4444, at ¶52.

This is not what the General Assembly intended. To the contrary, it was more than explicit in criticizing the manner in which asbestos litigation proceeded before the enactment of H.B. 292 and how the pre-H.B. 292 process contributed to the crisis in asbestos litigation. See, generally, Section 3, Am.Sub.H.B. No. 292 (R.C. 2307.91, uncodified law). The minimum medical criteria address that criticism and are the very foundation of the well-reasoned prioritization process enacted by the legislature. Allowing the Eighth District's decision to stand guts the minimum criteria from the Act by judicial fiat and thwarts the laudatory objectives sought by the General Assembly.

II. Statement of case and facts

A. James Sinnott's smoking and work history

For almost 40 years, James Sinnott smoked one to two packs of cigarettes a day while working as a millwright at Dayton Malleable where he claimed he was exposed to asbestos. In August 2003, Sinnott participated in a union-sponsored mass asbestos screening. Respiratory Testing Services, Inc., an independent testing service, conducted the screening, which included taking chest x-rays and administering pulmonary function tests. The aforementioned Dr. Altmeyer interpreted Sinnott's chest x-ray, suspected an abnormality, and informed Sinnott of the results. In the report that followed, Dr. Altmeyer could not rule out a lower-lung mass and advised Sinnott to see his "personal physician."

Dr. Altmeyer never saw Sinnott again after the screening test. He did not diagnose Sinnott with any malignant disease, nor did he ever treat him for the suspected mass or any other condition. Indeed, Dr. Altmeyer admitted that he does not develop a doctor-

patient relationship with screening participants and, like here, instead refers them to their own family physician for care and treatment.

Sinnott followed Dr. Altmeyer's recommendation. In September 2003, Sinnott's personal physicians—physicians who developed a physician-patient relationship with Sinnott—diagnosed and treated Sinnott at the Huntington, West Virginia Veterans Administration Medical Center. As evidenced by the medical records compiled by the VAMC, it was there, and only there, that Sinnott was diagnosed with and treated for lung cancer. None of these treating physicians, however, provided any report or other writing (either contained in the VAMC records or otherwise) that stated that Sinnott's exposure to asbestos was a predominant cause of his lung cancer or that the lung cancer would not have occurred without the exposure.

B. Sinnott sues American Optical and Abex.

In February 2004, before the effective date of H.B. 292, Sinnott and his wife Freda filed their initial complaint naming several defendants, including Appellants American Optical Corporation and Pneumo-Abex LLC, as successor in interest to Abex Corporation. Sinnott voluntarily dismissed American Optical and Abex from this lawsuit in April 2004. After this date, only claims against defendants not parties to this appeal remained pending. In January 2005, after the effective date of H.B. 292, Sinnott amended his complaint to add approximately 30 additional defendants, including American Optical and Abex among the newly-named defendants. Sinnott amended his complaint four more times after that. Relevant to this appeal are the Third and Fifth

Amended Complaints. The Third Amended Complaint, filed in January 2006, averred the death of Sinnott in August 2005, substituted Freda Sinnott as plaintiff, and added claims for wrongful death against all defendants. The most recent amended complaint, the Fifth, was filed in April 2008 and averred the death of Freda Sinnott and substituted Yvonne Sinnott as successor administrator.

C. American Optical and Abex move to administratively dismiss; the trial court denies the motion and finds Sinnott made a prima-facie showing.

In the interval between the filing of the Second and Third Amended Complaints, American Optical filed a Motion to Administratively Dismiss, which was premised on Sinnott's failure to make a prima-facie showing under newly-enacted H.B. 292. Abex filed a separate motion joining American Optical's motion.

Sinnott opposed the Motion. Although he argued that H.B. 292 could not be retroactively applied to his claim (which he claimed was pending on the effective date of the Act), he nonetheless submitted the medical records of his treatment at the West Virginia VAMC as his prima-facie-showing evidence, as well as the screening test report authored by Dr. Altmeyer. Sinnott thereafter supplemented these writings with an expert report authored by Dr. Altmeyer and affidavit and expert report authored by another non-treating physician, the aforementioned Dr. Frank. In reply, American Optical argued (as relevant here) that neither the VAMC medical records nor the reports authored by non-treating physicians satisfied the Act's prima-facie requirements. After first determining that the Act applied to the claims asserted against American Optical and Abex, the trial

court found that the VAMC medical records satisfied "the intent of the new statute" and thus a prima-facie showing had been made. See 3/21/06 J. Entry, Appx. at 33.

American Optical and Abex appealed this order to the Eighth District as authorized under R.C. 2505.02(A)(3) and (B)(4). The Eighth District sua sponte dismissed the appeal as "premature." See 7/12/06 J. Entry, Appx. at 30. This Court accepted discretionary review and reversed and remanded to the Eighth District for determination of the appeal on its merits. See 10/25/07 J. Entry, Appx. at 15; see, also, *Sinnott v. Aqua Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, at ¶31, Appx. at 25.

D. The Eighth District—ignoring the plain language of the prima-facie-showing statute—affirms.

Applying well-established principles of statutory construction, American Optical and Abex argued that the language of the prima-facie-showing statute was clear and unambiguous and therefore had to be applied as written. As written and applied to a smoking, lung cancer case, the statute requires a writing from a competent medical authority who not only diagnoses the lung cancer, but who states that the exposed person's exposure to asbestos was a substantial contributing factor to the development of that cancer.

Appellants did not dispute that Sinnott's VAMC physicians were competent medical authority under the terms of the defining statute, R.C. 2307.91(Z), or that the VAMC medical records constitute a writing for the written-report requirement of R.C. 2307.93(A). Instead, these appellants argued that the medical records, even if they satisfied the written-report requirement and were authored by competent medical

authority, did not contain the information required by statute to constitute a prima-facie showing; i.e., that the exposure was a "substantial contributing factor" to Sinnott's development of lung cancer. Stated differently, the medical records contained no information that stated that Sinnott's exposure to asbestos was a predominant cause of his lung cancer, nor did they state that the cancer would not have occurred without that exposure.

American Optical and Abex also argued the reports authored by Dr. Altmeyer and Dr. Frank could not satisfy the written-report requirement because neither physician was a "competent medical authority" as defined by R.C. 2307.91(Z) because neither physician diagnosed and treated Sinnott for his lung cancer and neither developed a doctor-patient relationship with Sinnott. And even if they did, neither report satisfied the definition of "substantial contributing factor" as defined by R.C. 2307.91(FF).

The appellate court nonetheless affirmed. Ignoring the plain language of the prima-facie-showing statute, the appellate court found that the VAMC medical records when combined with the opinions of non-competent medical authorities Drs. Altmeyer and Frank constituted "ample evidence" that Sinnott's exposure was a substantial contributing factor to Sinnott's development of lung cancer. *Sinnott*, 2008-Ohio-3806, at ¶19, Appx. at 10. Unjustifiably assuming that American Optical and Abex challenged the status of Sinnott's VAMC physicians as "competent medical authority" (they did not), the appellate court found that the "medical records and other evidence" supported Sinnott's claim and the trial court's ruling. Id. at ¶22-24, Appx. 12-13.

III. Argument in support of propositions of law

Proposition of Law I

> When relying on medical records to support the writing requirement for a prima-facie showing under R.C. 2307.92(C), the medical records must demonstrate that the exposure to asbestos was a "substantial contributing factor" in the development of lung cancer [R.C. 2307.92(C)(1)(a) applied].

A. A clear and unambiguous statute must be applied as written.

Well-established principles of statutory construction mandate that a clear and unambiguous statute be applied as written. *Barth v. Barth*, 113 Ohio St.3d 27, 2007-Ohio-973, at ¶10, citing *Wingate v. Hordge* (1979), 60 Ohio St.2d 55, 58. When a statute's terms are capable of only one meaning, the statute is not ambiguous. *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513. A court can neither interpret nor construe a statute without a threshold finding of ambiguity. R.C. 1.49; see, also, *Fairborn v. DeDomenico* (1996), 114 Ohio App.3d 590, 593 ("R.C. 1.49 does not, however, authorize a judicial inquiry into legislative intent where the statute is unambiguous."); accord *In re Adoption of Baby Boy Brooks* (2000), 136 Ohio App.3d 824, 829 ("[I]nquiry into the legislative intent, legislative history, public policy, the consequences of an interpretation, or any of the other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of more than one meaning."). In other words, a court may not construe what needs no construction, nor interpret what needs no interpretation. *Fairborn*, 114 Ohio App.3d at

593, citing *State v. Rose* (1914), 89 Ohio St. 383, 389. An unambiguous statute simply "means what it says." *Hakim v. Kosydar* (1977), 49 Ohio St.2d 161, 164.

B. R.C. 2307.92 is clear and unambiguous and must be applied as written.

As a smoker diagnosed with lung cancer, Sinnott had to comply with Section (C) of R.C. 2307.92, which required Sinnott to make a prima-facie showing by submitting a "written report and supporting test results" from a competent medical authority stating that Sinnott's exposure to asbestos was a "substantial contributing factor" to Sinnott's development of lung cancer. R.C. 2307.92(C); see, also, R.C. 2307.93(A).

1. The VAMC medical records can be a "written report."

Although "written report" is undefined by the statute, both R.C. 1.59(J) and the "ordinary and common understanding" of "written" and "report" would encompass a compilation of writings documenting medical care and treatment that are generally known as "medical records." See *Pruszynski v. Reeves*, 117 Ohio St.3d 92, 2008-Ohio-510, at ¶8, quoting *Culbreath v. Golding Ents., L.L.C.*, 114 Ohio St.3d 357, 2007-Ohio-4278 (applying ordinary meaning in absence of statutory definition); R.C. 1.59(J) (*written* means "any representation of words, letters, symbols, or figures *** "); Black's Law Dictionary (7 Ed.Rev. 1999) 1303 (defining *report* as "a formal oral or written presentation of facts"). Because Sinnott's medical records are written and report the care and treatment he received while a patient at the Huntington VAMC, the written-report requirement is satisfied.

But merely submitting a written report or other writing is insufficient under the statute. The writing must be prepared by a statutorily-defined competent medical authority and contain information sufficient to constitute a prima-facie showing, which includes, among other things, "[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).[2]

2. Sinnott's VAMC physicians are "competent medical authority."

"Competent medical authority" is a defined term under the statute. For prima-facie-showing purposes, a "competent medical authority" is, among other things, a "board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist" who "is actually treating or has treated the exposed persons *and* has or had a doctor-patient relationship with the person." R.C. 2307.91(Z)(1) and (2) (emphasis added.). Contrary to the Eighth District's decision, American Optical and Abex did not challenge the qualifications of Sinnott's VAMC physicians as competent medical authority. The VAMC physicians were from the identified practice areas and, unlike Dr. Altmeyer and Dr. Frank, the VAMC physicians actually treated Sinnott for his lung cancer and had developed a doctor-patient relationship with Sinnott.

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[2] The prima-face showing also requires demonstrating that more than ten years have elapsed from the first exposure until the time of diagnosis (R.C. 2307.92(C)(1)(b)) and either evidence of "substantial occupational exposure to asbestos" or quantitative retrospective exposure reconstruction evidence (R.C. 2307.92(C)(1)(c). Neither of these two requirements is at issue here.

3. Sinnott's medical records do not satisfy the "substantial-contributing-factor" requirement.

"Substantial contributing factor" is also a defined term. To satisfy this requirement, Sinnott's competent medical authority had to state that the exposure to asbestos is the predominant cause of, in this case, the lung cancer *and* that the lung cancer would not have occurred without the asbestos exposure. R.C. 2307.91(FF). The medical records compiled by Sinnott's competent medical authority simply do not contain this information. No VAMC physician stated that Sinnott's exposure to asbestos was the predominant cause of his lung cancer and that Sinnott would not have developed the cancer if he had not been exposed.

By ignoring the statutory definition of "substantial contributing factor," the appellate court effectively deleted these words from the new statute. A court, however, cannot delete words that are part of a statute. It must give effect to the words used by the General Assembly, including words used in definitional sections. *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, paragraph three of the syllabus; see, also, R.C. 1.42; *State v. S.R.* (1992), 63 Ohio St.3d 590, 595, citing *Montgomery Cty. Bd. of Commrs. v. Pub. Util. Commrs.* (1986), 28 Ohio St.3d 171, 175 (when the legislature supplies a definition to a word or phrase, the word or phrase acquires that particular meaning and the definition controls the application of the statute). And R.C. 2307.92, as well as the definitional section defining "substantial contributing factor," requires that the writing submitted by the competent medical authority state that the exposed person's

exposure to asbestos was a predominant cause of the lung cancer that would not have occurred without the exposure. The medical records submitted in this case do not.[3]

In plain and unequivocal terms the General Assembly stated the proof required to make a prima-facie showing. The appellate court found no ambiguity and merely had to apply those terms as written. Instead, it ignored the statute's clear language and, in doing so, judicially deleted language that the General Assembly intended to be there.

Proposition of Law II

> The prima-facie showing required under R.C. 2307.92 cannot be supplemented with opinions expressed by physicians who are not competent medical authority under R.C. 2307.91(Z).

Just as a court cannot delete words of a statute, neither can it insert words. *Cleveland Elec. Illum.*, 37 Ohio St.3d 50, paragraph three of the syllabus. But by relying on the "expert" reports of Dr. Altmeyer and Dr. Frank—neither of whom are competent medical authority under R.C. 2307.91(Z)—to establish a "causal link," the Eighth District effectively inserted language into the statute that is not there and was never intended by the General Assembly to be there. Neither Dr. Altmeyer nor Dr. Frank is competent medical authority. Neither diagnosed and treated Sinnott's lung cancer nor did either

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[3] As noted by the appellate court (and Appellants), the medical records contain references to Sinnott's occupational history of exposure to asbestos. *Sinnott*, 2008-Ohio-3806, at ¶16. Appx. at 8-9 (noting that Sinnott "has significant asbestos exposure in past" and a history of "smoking and asbestos exposure" that make him a "high risk of lung cancer.") But those references merely describe Sinnott's past occupational exposure and smoking history. Although these past-exposure references may satisfy the substantial-occupational-exposure requirement under R.C. 2307.92(C)(1)(c), a requirement not at issue here, they do not satisfy the requirement that Sinnott's exposure to asbestos be a substantial contributing factor to his development of lung cancer under R.C. 2307.92(C)(1)(a).

develop a doctor-patient relationship with Sinnott. There is nothing in the prima-facie-showing statute that permits non-competent medical authority to provide a report stating that there is a "causal link" between the asbestos exposure and the exposed person's lung cancer. Although this evidence may have been sufficient under pre-H.B. 292 practice, it simply is not part of the prima-facie showing that is required by statute after H.B. 292.

Nor is there anything in the new statute that allows this pre-H.B. 292 evidence to supplement a deficient prima-facie showing. The statute permits only statutorily-defined competent medical authority to render the prima-facie-showing report. Supplementing a deficient report from competent medical authority with an expert report from non-competent medical authority is not an action authorized by the new statute.[4]

IV. Conclusion

The medical records compiled by Sinnott's competent medical authority and expert reports from non-competent medical authorities are nothing more than the standard used before the General Assembly enacted H.B. 292. By effectively reverting to a pre-H.B. 292 standard, R.C. 2307.92's competent-medical-authority and substantial-contributing-factor requirements become superfluous and unnecessary. If left unaddressed by this Court, the Eighth District will have, by judicial fiat, rewritten the clear and unambiguous terms of the new statute and make it compliance entirely

[4] Even if Dr. Altmeyer or Dr. Frank could be considered competent medical authority (and they are not), neither report satisfies the definition of "substantial contributing factor" because neither report includes the predominant-cause/would-not-have-occurred requirements. Their reports merely state that Sinnott's exposure and his smoking history "both" contributed to the cancer. *Sinnott*, 2008-Ohio-3806, at ¶17, 18, Appx. at 9-10.

unnecessary in the thousands of cases presently pending on asbestos dockets throughout Ohio. Discretionary review is warranted in this case.

Appellants American Optical Corporation and Pneumo-Abex LLC, as successor in interest to Abex Corporation, therefore respectfully request that this Court accept review of this case and reverse the judgment of the Eighth Appellate District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 23rd day of September, 2008, by U.S. Mail, postage prepaid, upon the following:

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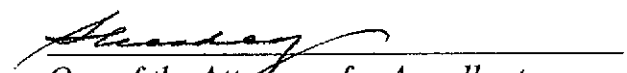

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APPENDIX

AUG 11 2008

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88062

JAMES SINNOTT, ET AL.

PLAINTIFFS-APPELLEES

vs.

AQUA-CHEM, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-521874

BEFORE: Calabrese, P.J., Rocco, J., and Blackmon, J.

RELEASED: July 31, 2008

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

AUG 11 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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

JUL 31 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

VOL 663 PG 619

ANTHONY O. CALABRESE, JR., P.J.:

Defendants-appellants appeal the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

I.

According to the facts and the case, appellees James ("James") and Freda Sinnott (collectively "appellees") filed their initial complaint on February 10, 2004. The complaint was filed before the enactment of Am.Sub.H.B. No. 292, 150 Ohio Laws, Part III, 3970 ("H.B. No. 292"),[1] which included new requirements for the filing of asbestos complaints pursuant to R.C. 2307.92. Appellees[2] filed their complaint against several companies, including the following: American Optical Corporation, Abex Corporation, now known as Pneumo Abex LLC, and Viacom, Inc., Aqua-Chem Inc., and others, alleging injury to James Sinnott from workplace exposure to products containing asbestos.

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[1]The General Assembly enacted H.B. No. 292 in 2004. The bill was a comprehensive new approach to asbestos litigation, and the changes were codified in amendments to R.C. 2505.02 and the creation of R.C. 2307.91 through 2307.96 and R.C. 2307.98.

[2]James Sinnott died on August 25, 2005, and this action was maintained by his surviving spouse. While this appeal was pending, his spouse also died.

In April 2004, appellees dismissed without prejudice American Optical Corporation and Pneumo Abex. After the effective date of H.B. No. 292, in January 2005, appellees filed an amended complaint, again naming appellants American Optical Corporation and Pneumo Abex as defendants.

Because the amended complaint was filed after the effective date of H.B. No. 292, American Optical Corporation filed a motion to administratively dismiss appellees' claim for failure to comply with R.C. 2307.92. Pneumo Abex later joined that motion. Although appellees opposed the motion to dismiss, they also provided supplemental medical evidence and records regarding James' illness. American Optical Corporation continued to argue for administrative dismissal, claiming that the supplemental evidence did not satisfy the requirements of R.C. 2307.91, et seq. The trial court held that while the requirements of H.B. No. 292 applied to the amended complaint, appellees had fulfilled those requirements, and the case could proceed to trial.

Appellants filed an appeal with this court that was dismissed as premature pursuant to R.C. 2505.02.[3] Appellants then filed an appeal with the Ohio Supreme Court, who reversed and remanded the case on October 25, 2007. The Ohio Supreme Court determined that orders finding that plaintiffs have

[3]*Sinnott v. Aqua-Chem, Inc.* (July 12, 2006), Cuyahoga App. No. 88062.

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made the prima facie showings required by R.C. 2307.92 are final and appealable. This case is now again before this court of appeals.

II.

Appellants' assignment of error provides the following: "The trial court erred in finding that Plaintiff made a prima-facie showing under R.C. 2307.92."

III.

Appellants argue in their sole assignment of error that the lower court erred in finding that plaintiff made a prima-facie showing under R.C. 2307.92.

An order finding that a plaintiff in an asbestos action has made the prima facie showing required by R.C. 2307.92 is a final, appealable order under R.C. 2505.02(B)(4). *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217.

Prior to the enactment of H.B. No. 292, the prior statute, R.C. 2305.10, set forth the prevailing requirements placed upon an asbestos litigant:

> **"a cause of action for bodily injury caused by exposure to asbestos *** arises upon the date on which the Plaintiff-Appellee is informed by competent medical authority that the Plaintiff-Appellee has been injured by such exposure, or upon the date on which, by exercise of reasonable diligence, the Plaintiff-Appellee should have become aware that he had been injured by the exposure, whichever date occurs first."**[4]

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[4]R.C. 2305.10.

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H.B. No. 292, the asbestos litigation bill, became effective on September 2, 2004. The General Assembly found it crucial to codify these criteria because the "vast majority" of asbestos claims "are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment."[5]

The statutory mandate to satisfy certain minimum "prima-facie" criteria is set forth at R.C. 2307.93(A). This statute provides:

> **"The plaintiff in any tort action who alleges an asbestos claim shall file *** 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."**[6]

Divisions (B), (C), and (D) of R.C. 2307.92 describe the minimum requirements for three different classes of asbestos claims: a claim based on a nonmalignant condition (Division B); a claim based upon lung cancer of an exposed person who is a smoker (Division C); and a claim based upon a wrongful death (Division D).[7]

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[5]Section 3(A)(5), H.B. No. 292 (R.C. 2307.91, uncodified law), Apx. at 9.

[6]R.C. 2307.93(A), Apx. at 15.

[7]R.C. 2307.92, Apx. at 11-13.

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The requirements for all three divisions involve a "competent medical authority" who indicates to the court that the plaintiff has satisfied a minimum medical threshold sufficient to support that the "person's exposure to asbestos is a substantial contributing factor to the medical condition."[8] "Competent medical authority," for purposes of the prima-facie showing is, among other things, a treating physician who actually has or had a doctor-patient relationship with the exposed person. See R.C. 2307.91(Z).

In the case at bar, James was diagnosed with a lung mass that was observed on an x-ray in August 2003 after completing a series of tests. The tests included pulmonary function tests and x-rays by certified pulmonologist and B-Reader, Robert Altmeyer, M.D. Dr. Altmeyer discussed the matter with James and recommended further testing. Subsequent tests and a lung biopsy at the Veterans Administration Hospital in Huntington, West Virginia confirmed the malignancy.

Later, a Dr. Ross referred James to a pulmonary specialist, Dr. Ammar Ghanem; also signing was Dr. Nancy Munn. Throughout the records are notations documenting James' history. There are comments, such as, "patient has significant asbestos exposure in past when works in a factory for 35-36

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[8]R.C. 2307.92(B), (C)(1), and (D)(1), Apx. at 11-13.

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years."[9] Another report states, "A: Right upper lobe mass with h/o smoking and asbestos exposure make the patient high risk of lung cancer."[10]

Once these medical tests were complete, Dr. Altmeyer reviewed his records and the new medical records confirming his original suspicions. He stated the following on July 5, 2005:

> **"Based upon my review of the above records, it is my opinion that this man's tobacco smoking and asbestos exposure were major contribution causes for the development of his lung cancer, which is documented in these records. *** Unfortunately, individuals who have had a significant exposure to asbestos, with an appropriate latency period and have had a significant smoking history, have approximately 80-100 times the risk of developing lung cancer compared to the population of individuals who have never smoked tobacco and who have never been exposed to asbestos. This is the well known and universally accepted synergistic or multiplier effect that exists between asbestos exposure and tobacco smoking. Therefore, it is my opinion that both the man's tobacco smoking history and his asbestos exposure/asbestos were both significant contributing causes for the development of his lung cancer."**[11]

In addition to the above, board certified pulmonologist Arthur Frank, M.D., also reviewed James' records and stated the following:

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[9]Ex. B, appellees' brief, pp. 43, 44, and 47.

[10]Ex. B, appellees' brief, p. 46.

[11]Ex. C, appellees' brief.

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"Based upon my review of the materials sent me, it is my opinion, held with a reasonable degree of medical certainty, that Mr. Sinnott developed two asbestos related conditions. First I believe he developed asbestosis as characterized by the radiologic changes, given his past history of exposure to asbestos. Secondly, and more importantly, he developed and ultimately died of, a cancer of the lung due to his exposure to asbestos in combination with his cigarette smoking. It would further be my opinion that the scientific literature clearly documents that both asbestos and cigarettes, independently, can lead to the development of lung cancer, but that it is also well known that the addition of asbestos on top of cigarette smoking greatly increases the risk of developing lung cancer, far beyond that of cigarette smoking alone. In addition it would further be my opinion that each and every exposure, to any and all products containing asbestos, of any and all fiber types, would have contributed to his developing both of these diseases. This would include his work at the foundry, as well as his many exposures to brake and clutch products."[12]

The evidence submitted was sufficient to establish a causal link between James' lung cancer and his asbestos exposure. In addition, James 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. Two pulmonologists, Dr. Altmeyer and Dr. Frank, rendered

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[12]Ex. D, appellees' brief.

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opinions consistent with the hospital pulmonologists as to the causes of James' lung cancer.

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 requirements specified in R.C. 2307.92, and (2) meets the requirements listed in R.C. 2307.91(Z)(1)-(4).

R.C. 2307.91(Z) provides the following:

> **"(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**

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> **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."

James' treating physicians were employed by the Veterans Administration. This limited James' ability to achieve the typical doctor-patient relationship envisioned by the statute. However, achieving the typical doctor-patient relationship in the statute is not a bright line test. Nor is it the sole factor in the statute.

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As the appellants stated in their brief, part of the rationale behind the statute is to preserve scarce resources for individuals who are truly sick as a result of asbestos exposure. The statute 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. The evidence in the case at bar supports the lower court's ruling. Appellees have satisfied the requirements of the statute.

James should not be penalized for utilizing his veteran benefits in order to obtain affordable and necessary health care. Although James may have lacked a traditional doctor, he was examined by a competent medical doctor, as defined in the statute. In addition, the evidence in this case supports James' 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. We find the lower court's decision to be well-founded.

Appellants' assignment of error is overruled.

Judgment affirmed.

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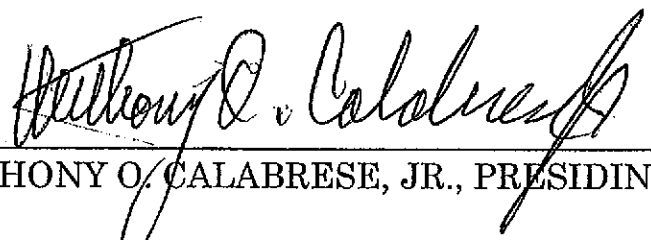
It is ordered that appellees recover from appellants costs herein taxed.

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.



ANTHONY O. CALABRESE, JR., PRESIDING JUDGE

KENNETH A. ROCCO, J., and
PATRICIA ANN BLACKMON, J., CONCUR

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The Supreme Court of Ohio

FILED
OCT 25 2007
CLERK OF COURT
SUPREME COURT OF OHIO

James Sinnott, et al.

v.

Aqua-Chem, Inc., et al.

Case No. 2006-1604

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and this cause is remanded to the court of appeals for a decision on the merits of the appeal, consistent with the opinion rendered herein.

It is further ordered that a mandate be sent to the Court of Appeals for Cuyahoga County by certifying a copy of this judgment entry and filing it with the Clerk of the Court of Appeals for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 88062)

THOMAS J. MOYER
Chief Justice

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2007-OHIO-5584

SINNOTT ET AL., APPELLEES, *v.* AQUA-CHEM, INC., ET AL.; AMERICAN OPTICAL CORPORATION ET AL., APPELLANTS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Sinnott v. Aqua-Chem, Inc.*, Slip Opinion No. 2007-Ohio-5584.]

Final, appealable order — An order finding that a plaintiff in an asbestos action has made the prima facie showing required by R.C. 2307.92 is a final, appealable order under R.C. 2505.02(B)(4).

(No. 2006-1604 – Submitted June 6, 2007 – Decided October 25, 2007.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 88062.

SYLLABUS

An order finding that a plaintiff in an asbestos action has made the prima facie showing required by R.C. 2307.92 is a final, appealable order under R.C. 2505.02(B)(4).

LANZINGER, J.

{¶ 1} We accepted this discretionary appeal to resolve whether a trial court's order finding that a prima facie showing required by R.C. 2307.92 has been made in an asbestos case is a final, appealable order. We hold that it is, because the order prevents a judgment in the action in favor of the appealing party regarding the provisional remedy and leaves the appealing party without a meaningful or effective appellate remedy following final judgment. R.C. 2505.02(B)(4).

Case Background

{¶ 2} In February 2004, before enactment of Am.Sub.H.B. No. 292, 150 Ohio Laws, Part III, 3970 ("H.B. No. 292"), which included new requirements for the filing of asbestos complaints pursuant to R.C. 2307.92, appellees James[1] and Freda Sinnott ("appellees") filed a complaint against several companies, including American Optical Corporation, Abex Corporation, now known as Pneumo Abex L.L.C., and Viacom, Inc. ("appellants"), as well as Aqua-Chem Inc. and many others,[2] alleging injury to James Sinnott from workplace exposure to products containing asbestos. In April 2004, appellees dismissed without prejudice American Optical Corporation and Pneumo Abex. After the effective date of H.B. No. 292, in January 2005, appellees filed an amended complaint, again naming appellants American Optical Corporation and Pneumo Abex as defendants.

{¶ 3} Because the amended complaint was filed after the effective date of H.B. No. 292, American Optical Corporation filed a motion to administratively dismiss appellees' claim for failure to comply with R.C. 2307.92. Pneumo Abex later joined that motion. Although appellees opposed the motion to dismiss, they also provided supplemental medical evidence and records regarding Sinnott's

[1] James Sinnott died on August 25, 2005, and this action was maintained by his surviving spouse. While this appeal was pending, his spouse also died.

[2] Aqua-Chem, Inc., and other defendants are not parties to this appeal.

illness. American Optical Corporation continued to argue for administrative dismissal, claiming that the supplemental evidence did not satisfy the requirements of R.C. 2307.91 et seq. The trial court held that while the requirements of H.B. No. 292 applied to the amended complaint, appellees had fulfilled those requirements and the case could proceed to trial.

{¶ 4} Appellants filed an appeal with the Eighth District Court of Appeals that was dismissed as premature pursuant to R.C. 2505.02. *Sinnott v. Aqua-Chem, Inc.* (July 12, 2006), 8th App. No. 088062. We accepted jurisdiction to determine whether orders finding that plaintiffs have made the prima facie showings required by R.C. 2307.92 are final and appealable. We hold that they are.

Background of New Legislation

{¶ 5} Recognizing that asbestos claims have proven to be a challenge to Ohio defendants, plaintiffs, and the court system as a whole, the General Assembly enacted H.B. No. 292 in 2004. The bill was a comprehensive new approach to asbestos litigation, and the changes were codified in amendments to R.C. 2505.02 and the creation of Revised Code 2307.91 through 2307.96 and R.C. 2307.98.

{¶ 6} R.C. 2307.92 now requires that all plaintiffs who file tort actions based on an asbestos claim 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." Plaintiffs unable to make this showing face administrative dismissal of their claims without prejudice. R.C. 2307.93(C). The court retains jurisdiction, and any plaintiff whose case has been administratively dismissed may move to reinstate the claim upon making the prima facie showing. Id.

{¶ 7} The General Assembly cited the steadily increasing litigation cost to all parties as well as the continued solvency of asbestos defendants as its overriding concern in enacting the new legislation. Section 3(A)(2), H.B. No. 292, 150 Ohio Laws at 3988-3989. Asbestos litigation, which includes claims of those who are not yet sick, has contributed to the bankruptcy of over 70 companies nationwide and at least five companies in Ohio. Section 3(A)(4), H.B. No. 292, 150 Ohio Laws at 3989-3990. The General Assembly recognized that "the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment." Section 3(A)(5), H.B. No. 292, 150 Ohio Laws at 3990. In addressing the cost of litigating such claims and the ability to fully compensate those who are already ill, the General Assembly found that "[t]he public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries." Section 3(A)(7), H.B. No. 292, 150 Ohio Laws at 3991.

{¶ 8} As noted by Section 3(A)(5), H.B. No. 292, the General Assembly found that "reasonable medical criteria" are necessary to "expedite the resolution of claims brought by those sick claimants * * * [to] 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." That there must now be prima facie evidence of exposure to asbestos as a substantial contributing factor to a plaintiff's medical condition is an attempt to place those already ill at the head of the line for compensation. In this discretionary appeal, we examine whether the trial court's order finding that appellees have made a prima facie showing is a final appealable order.

Final Orders

{¶ 9} For Ohio's appellate courts to have jurisdiction over an appeal, Section 3(B)(2), Article IV of the Ohio Constitution requires that the court decision under review be a judgment or final order.

{¶ 10} Six appealable orders are listed in R.C. 2505.02, only one of which, an order granting or denying a provisional remedy, is at issue in this case:

{¶ 11} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶ 12} "* * *

{¶ 13} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶ 14} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶ 15} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶ 16} Thus, R.C. 2505.02(B)(4) establishes a three-part test for determining whether an order is final and appealable. *State v. Muncie* (2001), 91 Ohio St.3d 440, 446, 746 N.E.2d 1092. As an initial matter, the order must grant or deny a provisional remedy; if so, the order must also determine the action and prevent a judgment in favor of the appealing party regarding the provisional remedy, and the appealing party cannot have a meaningful or effective appellate remedy following final judgment. R.C. 2505.02(B)(4)(a) and (b). Not all provisional remedy orders are necessarily appealable; the conditions of R.C. 2505.02(B)(4)(a) and (b) must be satisfied before the order can be considered final and appealable. *Muncie*, 91 Ohio St.3d at 450, 746 N.E.2d 1092.

Definition of "Provisional Remedy" — R.C. 2505.02(A)(3)

{¶ 17} The first question is whether the order is a provisional remedy. The term "provisional remedy" is defined by R.C. 2505.02(A)(3) as "a proceeding ancillary to an action, including, but not limited to, * * * *a prima-facie showing pursuant to section 2307.92 of the Revised Code*, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code." (Emphasis added.)

{¶ 18} Thus, a prima facie showing pursuant to R.C. 2307.92 is an ancillary proceeding by definition. R.C. 2307.92 sets forth the minimum medical criteria that plaintiffs must demonstrate to avoid having their asbestos claims placed on hold through an administrative dismissal pursuant to R.C. 2307.93.

{¶ 19} In this case, the trial court found that appellees had met their burden, "had satisfied the minimum medical requirements for bringing certain asbestos claims contained in H.B. 292," and had presented evidence that satisfied the intent of the new statute. The trial court's determination, therefore, constitutes an order issued pursuant to R.C. 2307.92 and thus meets R.C. 2505.02(A)(3)'s definition of a provisional remedy.

Preventing a Judgment — R.C. 2505.02(B)(4)(a)

{¶ 20} Second, even though the order, which found that appellees had satisfied the minimum medical requirements of R.C. 2307.92, is a provisional remedy, it must also "effectively determine [ ] the action *with respect to the provisional remedy* and prevent [ ] a judgment in the action in favor of the appealing party *with respect to the provisional remedy*." (Emphasis added.) R.C. 2505.02(B)(4)(a). Appellees' argument that the order must determine the entire action is unpersuasive. The statute clarifies that the trial court's order need not determine the action overall but must simply determine the action as it relates to the provisional remedy itself. See, also, *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711, ¶ 17 (order finding defendant incompetent determined action with respect to competency proceeding); *Munci e*, 91 Ohio

St.3d at 450-451, 746 N.E.2d 1092 (order determined action with respect to petition for forced medication).

{¶ 21} As already noted, if plaintiffs do not make the prima facie showing required, their action is subject to administrative dismissal. The trial court here determined that appellees had met the minimum medical requirements under R.C. 2307.92 and therefore denied an administrative dismissal under the provisions of R.C. 2307.93(C).

{¶ 22} The order finding that the requirements were met in this case also prevented a judgment in favor of the appellants regarding appellees' prima facie showing under R.C. 2307.92. Once the trial court ruled in favor of appellees on the minimum medical requirements, a judgment could not be entered in favor of appellants, and an administrative dismissal could not be granted. As a final determination of the provisional remedy, the order finding that a prima facie showing had been made was adverse to appellants and satisfied the requirement of R.C. 2505.02(B)(4)(a).

No "Effective Remedy" — R.C. 2505.02(B)(4)(b)

{¶ 23} The third and final part of the test is whether "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). In considering this requirement, we have noted that there are times when "a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment." *Muncie*, 91 Ohio St.3d at 451, 746 N.E.2d 1065. In so holding, we recognized that "[i]n some instances, '[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage' suffered by the appealing party." Id., quoting *Gibson-Myers & Assoc. v. Pearce* (Oct. 27, 1999), Summit App. No. 19358.

{¶ 24} Appellees argue that appellants have the remedy of final appeal, which is available to any nonprevailing party after final judgment, and that allowing an interlocutory appeal leads to a piecemeal approach. Appellants, on the other hand, argue that the trial court's order allowing the case to proceed to trial requires them to spend funds that cannot be recovered even if they ultimately prevail upon the merits. We are persuaded that appellants have the better argument.

{¶ 25} By enacting H.B. No. 292, the General Assembly has distinguished asbestos litigation from other types of litigation. As a general rule, "contentions that appeal from any subsequent adverse final judgment would be inadequate due to time and expense are without merit." *State ex rel. Lyons v. Zaleski* (1996), 75 Ohio St.3d 623, 626, 665 N.E.2d 212. Yet the uncodified section of H.B. No. 292 cites to the negative effects that ballooning asbestos litigation expenses have upon plaintiffs and defendants both. Section 3(A)(2), H.B. No. 292, 150 Ohio Laws at 3988. One of the primary reasons for requiring a plaintiff to make a prima facie showing of an asbestos-related impairment is to reduce litigation costs and thereby preserve the resources of asbestos defendants so that more injured plaintiffs can be made whole. Section 3(A)(7), H.B. No. 292, 150 Ohio Laws at 3991. Indeed, the General Assembly's intent to preserve the funds of asbestos defendants for the benefit of those who are ill will be thwarted unless an order pursuant to R.C. 2307.92 is immediately reviewable. Waiting until the end of litigation before allowing appeal of this provisional order does not provide the remedy of restoring funds that might have been used otherwise. Such an appeal would be neither meaningful nor effective, even if the appellant prevails on the merits of the case

{¶ 26} In the limited context of asbestos litigation, where preservation of resources for the benefit of those actually manifesting injury is a stated purpose of the General Assembly, we determine that the incurrence of unnecessary trial

expenses is an injury that cannot be remedied by an appeal from a final judgment; thus, this appeal from a provisional remedy satisfies R.C. 2505.02(B)(4)(b).

{¶ 27} Although we did not accept the stated proposition, we note that appellees interpret R.C. 2307.93(B), which states that "[t]he court shall resolve the issue of whether the plaintiff has made the prima-facie showing * * * by applying the standard for resolving a motion for summary judgment" to mean that the prima facie determination and a summary judgment order should be treated the same. Because denial of a motion for summary judgment is generally not a final appealable order, *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292, appellees maintain that an adverse determination pursuant to R.C. 2307.92 should not be immediately reviewable.

{¶ 28} Appellees' argument, however, reflects a fundamental misunderstanding of R.C. 2307.93(B). Far from equating summary judgment with administrative dismissal for lack of a prima facie showing, the statute simply directs trial courts to apply the evidentiary standard of summary judgment when making a determination whether the minimum medical standard has been met.

{¶ 29} The summary judgment standard requires the trial court to grant judgment for the moving party "when, looking at the evidence as a whole, (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and it appears from the evidence, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party." *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-687, 653 N.E.2d 1196. Furthermore, summary judgment "must be awarded with caution. Doubts must be resolved in favor of the non-moving party." *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 359, 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. The court's use of the summary judgment

standard to determine whether a prima facie showing has been made does not affect the finality or appealability of the order itself.

Conclusion

{¶ 30} An order finding that a plaintiff in an asbestos action has made the prima facie showing required by R.C. 2307.92 is a final appealable order. Such an order is explicitly listed as a provisional remedy in R.C. 2505.02(B)(4) and determines the action with respect to the prima facie showing and the related issue of administrative dismissal. Furthermore, if the order finds that a prima facie showing exists, and the case proceeds to trial, an appeal from a final judgment does not provide appellants with an adequate remedy on the provisional ruling. Even assuming that they have prevailed at trial, appellants will have exhausted significant resources, thereby thwarting H.B. No. 292's goal of preserving the resources of asbestos defendants to ensure that injured parties can be fully compensated.

{¶ 31} For these reasons, we reverse the judgment of the Eighth District Court of Appeals dismissing appellant's appeal for lack of a final appealable order and remand to the court of appeals for a determination on the merits of the appeal.

Judgment reversed
and cause remanded.

LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and CUPP, JJ., concur.

MOYER, C.J., and PFEIFER, J., dissent.

MOYER, C.J., dissenting

{¶ 32} I respectfully dissent. The majority holds that a trial court order finding that a plaintiff in an asbestos action has made the prima facie showing required by R.C. 2307.92 is a final, appealable order. Pursuant to R.C. 2505.02(B)(4), an order that grants or denies a provisional remedy is a final, appealable order only if 1) the order determines the action and prevents a

judgment in favor of the appealing party with respect to the provisional remedy, *and* 2) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment.

{¶ 33} While I agree with the majority that the first requirement of R.C. 2505.02(B)(4) is met, I do not agree that the second requirement is met. Appellants have a meaningful and effective remedy by appeal following the trial court's final judgment. Therefore, I would affirm the court of appeals' decision to dismiss appellants' appeal as premature.

{¶ 34} The majority states that appellants would not be afforded a meaningful or effective appellate remedy following final judgment because "allowing the case to proceed to trial requires [appellants] to spend funds that cannot be recovered." This holding is contrary to this court's established precedent.

{¶ 35} The majority is correct in stating that "[a]s a general rule, 'contentions that appeal from any subsequent adverse final judgment would be inadequate due to time and expense are without merit.' *State ex rel. Lyons v. Zaleski* (1996), 75 Ohio St.3d 623, 626, 665 N.E.2d 212." We have stated this proposition numerous times. See *Lyons*, 75 Ohio St.3d at 626, 665 N.E.2d 212 (denying a writ of mandamus because the remedy of appeal was not inadequate even though a second trial might have been necessary if an order transferring action to another county was erroneous); *State ex rel. Abner v. Elliott* (1999), 85 Ohio St.3d 11, 17, 706 N.E.2d 765 (holding that time, expense, and the large number of asbestos cases involved did not establish inadequacy of an appeal); *Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm.* (1995), 74 Ohio St.3d 120, 124, 656 N.E.2d 684 (holding that petitioner's claims that an appeal from an adverse Ohio Civil Rights Commission decision would be inadequate due to time and expense were without merit); and *State ex rel. Willacy v. Smith* (1997), 78 Ohio St.3d 47, 50, 676 N.E.2d 109 (holding that contentions that appeal from an

adverse final judgment would be inadequate due to time and expense were without merit in a parentage action, even though appellant contended that there was no mechanism to guarantee reimbursement of temporary child support payments).

{¶ 36} The majority's decision to stray from our previous holdings is an error: appellants' argument in this case could be applied to virtually every appellant arguing that a provisional remedy is a final, appealable order. As we stated in *State v. Muncie* (2001), 91 Ohio St.3d 440, 450, 746 N.E.2d 1092, "[A]n appellate court's determination that a particular proceeding constitutes a 'provisional remedy' is only one step of the analysis required under *R.C. 2505.02(B)(4)*. Not every order granting or denying relief sought in an ancillary proceeding will necessarily satisfy the additional requirements imposed by *R.C. 2505.02(B)(4)(a)* and *(b)*." In view of our established precedent, appellants' argument that they will be denied a meaningful or effective remedy because they will be required to expend funds to defend a case at trial is unpersuasive.

{¶ 37} The majority states that in some instances, " 'the proverbial bell cannot be unrung,' " quoting *Gibson-Myers & Assoc. v. Pearce* (Oct. 27, 1999), Summit App. No. 19358. However, in the past, courts have expressed that concern only in situations in which parties who are required to delay appeal until after final judgment on the merits will be harmed beyond the expenditure of funds. In *Gibson-Myers & Assoc.*, the phrase was used with respect to the discovery of trade secrets. The court stated that "[i]n a competitive commercial market where customers are a business' most valuable asset and technology changes daily, disclosure of a trade secret will surely cause irreparable harm." Id. The court then held that an order compelling the production of documents that constituted trade secrets was final and appealable pursuant to R.C. 2505.02(B)(4).

{¶ 38} The phrase, "the proverbial bell cannot be unrung," was cited by this court in *Muncie*, where we held that an order compelling the administration of

psychotropic medication under *R.C. 2945.38* satisfies *R.C. 2505.02(B)(4)(b)*. 91 Ohio St.3d 440, 451, 746 N.E.2d 1092. We noted that " '[t]he availability of appellate review after a sentence is imposed offers no effective remedy for the accused person forced to endure the side effects of those medications during the pendency of the * * * proceedings.'" Id. at 452, 746 N.E.2d 1092, quoting amicus brief of Glenn Weaver Institute of Law and Psychiatry, University of Cincinnati Law School. In *Muncie*, we also noted that a court of appeals opinion cited the phrase, "the proverbial bell cannot be unrung," when a party appealed an order compelling production of certain communications about asset transfers—communications that were allegedly subject to the attorney-client privilege. Id. at 451,746 N.E.2d 1092, citing *Cuervo v. Snell* (Sept. 26, 2000), Franklin App. Nos. 99AP-1442, 99AP-1443 and 99AP-1458, 2000 WL 1376510. The majority opinion has given new meaning to a ringing of the bell.

{¶ 39} In this case, appellants will be afforded a meaningful or effective remedy by an appeal following final judgment. Unlike the cases cited, which held that the appealing parties would not be afforded a meaningful remedy if a trade secret was disclosed, if an order compelling a person to receive psychotropic medication was upheld, or if an attorney-client privilege was breached, appellants here argue that they will not be afforded a meaningful remedy on appeal because they will be forced to spend funds. Quite simply, appellants' rationale does not approach the rule of law developed by this court's earlier cases.

{¶ 40} The majority reasons that the General Assembly's purpose for the prima facie requirement is to "reduce litigation costs and thereby preserve the resources of asbestos defendants so that more injured plaintiffs can be made whole." While I agree with the majority's recognition of the General Assembly's intent, I do not agree that such an intent warrants a retreat from this court's established precedent. The General Assembly's decision to establish a prima facie requirement in an asbestos claim will expedite the resolution of claims

brought by sick claimants and help to preserve resources for those who are currently suffering. These benefits will not be eliminated if the trial court's order is not appealable. Rather, the prima facie requirement will help to limit the number of asbestos cases filed in Ohio.

{¶ 41} Because appellants cannot meet the requirements if R.C. 2505.02(B)(4)(b), I would affirm the court of appeals' decision to dismiss appellants' appeal as premature.

PFEIFER, J., concurs in the foregoing opinion.

Brent Coon & Associates, Christopher J. Hickey, and Mary Brigid Sweeney, for appellees.

Tucker, Ellis & West, L.L.P., Susan M. Audey, Irene C. Keyse-Walker, Christopher J. Caryl, a nd Jeffrey A. Healy, for appellants, American Optical Corporation and Pneumo Abex L.L.C.

Oldham & Dowling, and Reginald S. Kramer, for appellant CBS Corporation.

JUL 12 2006

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CA06088062 39474751

JAMES SINNOTT, ET AL.

Appellee

COA NO. 88062 | LOWER COURT NO. CP CV-521874

COMMON PLEAS COURT

-vs-

AQUA-CHEM, INC., ET AL.

Appellant

MOTION NO. 384177

Date 05/18/06

Journal Entry

SUA SPONTE, UPON RECOMMENDATION OF THE CONFERENCE ATTORNEY, APPEAL IS DISMISSED AS PREMATURE. R.C 2505.02.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED
MAY 18 2006
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

FILED AND JOURNALIZED
PER APP. R. 22(E)
JUL 12 2006
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Judge FRANK D. CELEBREZZE,JR., Concurs

Administrative Judge ANN DYKE

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

CA06088062 40399317

This is an announcement of Court's decision.
Motion for reconsideration must be filed within 10 days from date hereof.

VOL0616 PG0389

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

JAMES SINNOTT, ET AL.

Appellee

COA NO. 88062

LOWER COURT NO. CP CV-521874

COMMON PLEAS COURT

-vs-

AQUA-CHEM, INC., ET AL.

Appellant

MOTION NO. 384728

Date 07/12/2006

Journal Entry

MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED.

RECEIVED FOR FILING

JUL 12 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

Judge FRANK D. CELEBREZZE,JR., Concurs

Administrative Judge ANN DYKE

CA06088062 40399196

WD616 M0365

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

James Sinnott,	)	Case No. CV-04-521874
	)	
Plaintiff,	)	
	)	
v.	)	Judge Leo M. Spellacy
	)	
Aqua-Chem, Inc., et al.	)	
	)	
Defendants	)	ORDER

Plaintiff filed his initial complaint on or about February 10, 2004. On April 8, 2004, plaintiff voluntarily dismissed without prejudice certain defendants from the lawsuit. On January 3, 2005, plaintiff amended his complaint to include certain defendants who had been dismissed on April 8, 2004.

House Bill 292, establishing minimum medical requirements for certain asbestos claims, including lung cancer, became effective on September 2, 2004. Plaintiff contends, however, that the new evidentiary standard contained in H.B. 292 does not apply in this case because the amended complaint "relates back" to the original filing by virtue of Civil Rule 15(C). Defendants argue that the "relation back" provision of Rule 15(C) does not apply because the April 8, 2004 dismissal was voluntary. Moreover, Defendants argue that there is no evidence of a mistake with regard to the identity of the parties involved in this case, and that for Rule 15(C) to apply, such a mistake must have occurred. This Court agrees that Civil Rule 15(C) governs the issue and finds that the amended complaint does not relate back to the original complaint because plaintiff was not mistaken as to the correct parties' identities. Therefore, the parties added in the amended complaint fall under the provisions of H.B. 292.

In determining whether the plaintiff has satisfied the minimum medical requirements contained in H.B. 292, this Court finds that there is sufficient evidence that the treatment received at the Veterans Administration Hospital in Huntington, West Virginia satisfies the intent of the new statute.

At the time of trial for those cases filed after September 2, 2004, the Court will instruct the jury on the law of causation incorporated in H.B. 292.

The wrongful death claim filed after the enactment of H.B. 292 is subject to the provisions of R.C. 2307.91, et seq.

IT IS SO ORDERED.

Judge Leo M. Spellacy

March 2, 2006

Judge Leo M. Spellacy

RECEIVED FOR FILING
MAR 21 2006
GERALD E. FUERST, CLERK
By Deputy

THE STATE OF OHIO } SS. I, GERALD E. FUERST, CLERK OF
Cuyahoga County } THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 21
DAY OF March A.D. 20 06
GERALD E. FUERST, Clerk
By Deputy