No. 09-1774

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 90388

MILTON B. CROSS, et al.,
Plaintiff-Appellee,

v.

A-BEST PRODUCTS CO., et al.,
Defendants,

and

AMERICAN OPTICAL CORP.,
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT AMERICAN OPTICAL CORPORATION

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I. Explanation of why this case is involves a substantial constitutional question and is of public and great general interest

This case raises an issue of constitutional and state-wide importance that threatens not only to undermine constitutional analysis under Section 28, Article II of the Ohio Constitution, but the breadth and scope of this Court's authority to establish precedent when applying that analysis to Ohio's Asbestos Tort Reform Act, Am.Sub.H.B. No. 292. It is well understood that unconstitutionally retroactive laws violate Section 28, Article II of the Ohio Constitution—the Retroactivity Clause—and this Court has, through the years, established a two-part test for determining when a law is unconstitutionally retroactive under this Clause. But the Eighth Appellate District here ignored that precedent—including this Court's recent decision in *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243—based on what it perceived as the Act's "savings clause." The important issue then before this Court is whether this perceived "savings clause" alters the test for retroactivity so that an appellate court can ignore this Court's precedent in *Ackison*.

The Eighth District has said that it does. What the appellate court has construed as the Act's "savings clause" is codified at R.C. 2307.93(A)(3)(a), and provides simply that the Act's prima facie requirements apply to pending cases *unless* the trial court finds that to do so would impair a substantive right that violates the Retroactivity Clause of the Ohio Constitution. The "unless" part of this statutory provision is what the Eighth District has said (in several cases now and in this case here) operates as the Act's "savings clause" and an "exception" to the retroactivity analysis set forth in *Ackison*.

Using this flawed "exception" analysis here, the appellate court found that Plaintiff Milton Cross's pre-H.B. 292 asbestos claims were not subject to the Act's prima facie requirements and *Ackison* did not apply simply because the trial court relied on the "savings clause."

Three reasons support this Court's review of the Eighth District's decision. First, the Eighth District's interpretation of R.C. 2307.93(A)(3)(a) makes an end-run around sound principles of constitutional analysis set forth by this Court in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100; *Bielat v. Bielat* (2000), 87 Ohio St.3d 350; *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546; and, most recently in *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243 (reaffirming the two-part retroactivity analysis and finding that H.B. 292's prima facie requirements do not offend the Ohio Constitution's Retroactivity Clause because they are procedural, not substantive, in effect). R.C. 2307.93(A)(3)(a) does not alter the analysis for retroactivity set forth in these cases. Instead, it merely supports the General Assembly's express intention to make the Act's prima facie requirements applicable to pending cases to the fullest extent permissible under the Ohio Constitution, as it has been interpreted by this Court. It is not a vehicle that permits an appellate court to abandon Supreme Court precedent.

Second, the Eighth District has muddied the retroactivity analysis by creating an artificial and unjustified distinction between trial court judgments that reference the R.C. 2307.93(A)(3)(a) "savings clause" and those that do not. Compare *Cross I*, 2009-Ohio-2079, at ¶21 (the trial court "invoke[ed] the R.C. 2307.93(A)(3) savings clause" when it

denied American Optical's motion to administratively dismiss) with *Whipkey v. Aqua-Chem, Inc.*, 8th Dist. No. 88240, 2009-Ohio-3369, at ¶18-22 (because the trial court's entry did not mention the "savings clause" or its application, *Ackison* applied and the Act's prima facie requirements applied to a case pending before the Act's effective date). But because the R.C. 2307.93(A)(3)(a) "savings clause" is supportive of legislative intent and not exclusionary, the distinction is unjustified. Stated differently, the "savings clause" does not replace the retroactivity analysis honed through the years in *Van Fossen* and the cases that followed, nor can the "savings clause" be analyzed in a vacuum apart from the retroactivity analysis applied by this Court in *Ackison*.

And third, the Eighth District's decision is in conflict with decisions from the Second and Seventh Districts—districts that have not found a "savings clause exception" to the analytical framework announced in *Ackison*. See *Neal v. A-Best Prod. Co.*, 2d Dist. No. 22026, 2008-Ohio-6968 (finding the Act's prima facie requirements applied to asbestos claims that were pending on the Act's effective date); see, also, *Darrah v. A-Best Prod. Co.*, 7th Dist. No. 06 JE 47, 2009-Ohio-3349; *McKee v. A-Best Prod. Co.*, 7th Dist. No. 06 MA 164, 2009-Ohio-3348 (same); *James v. A-Best Prod. Co.*, 7th Dist. Nos. 07-MA-42, 07-MA-43, 07-MA-44, 07-MA-45, 07-MA-46, 07-MA-47, 07-MA-48, 07-MA-49, 07-MA-50, 07-MA-51, 2009-Ohio-3335 (same).

This Court's guidance would not only settle the conflicting decisions among the Eighth, Seventh, and Second Appellate Districts, but would provide uniformity and consistency to the retroactivity analysis under the Ohio Constitution and R.C.

2307.93(A)(3)(a). It will also provide consistency and uniformity to the thousands of pre-H.B. 292 cases that still remain pending on the dedicated asbestos docket in the trial courts within the Eighth District. Without that guidance, the unjustified distinction between constitutional analysis for retroactivity established by this Court and the retroactivity analysis created by the Eighth District will proliferate, and cause unnecessary confusion among the trial and appellate courts of this state.

II. Statement of the case and facts

Plaintiff Milton Cross—a smoker for more than 46 years—was diagnosed with lung cancer in 1999 and underwent successful surgery shortly thereafter. In August 2000, Cross and his wife sued more than 80 defendants, including American Optical. Despite his longstanding smoking history, Cross alleged that his exposure to asbestos during his career as a laborer with Republic/LTV Steel—and later as a jailer with the city of Warren—caused the lung cancer. Yet none of Cross's treating physicians—either at the time of the surgery or since—has ever linked his workplace asbestos exposure to his lung cancer. Indeed, ten years later, Cross continues to see his treating physicians regularly for monitoring purposes, and none have linked his workplace exposure to his lung cancer.

In 2004, while Cross's claims remained pending in the trial court, the General Assembly enacted Am.Sub.H.B. No. 292—Ohio's Asbestos Tort Reform Act. Effective September 2, 2004 and codified at R.C. 2307.91 et seq., the Act requires asbestos plaintiffs to make a prima facie showing of asbestos-related impairment by satisfying

minimum medical criteria for certain types asbestos-related claims. As relevant to Cross's smoking-lung-cancer claim here, Cross was to provide a report from a "competent medical authority" stating that his asbestos exposure was a substantial contributing factor to his lung cancer. See R.C. 2307.92(C)(1). "Competent medical authority" is defined by the statute as, among other things, a treating physician who actually has or had a doctor-patient relationship with the allegedly exposed person. See R.C. 2307.91(Z). Failure to make a prima facie showing as required by the new statute subjects the plaintiff's claims to administrative dismissal until such a time that the requisite showing can be made. R.C. 2307.93(C). The General Assembly expressly made the prima facie showing requirements applicable to claims pending on the Act's effective date. R.C. 2307.93(A)(3)(a).

Instead of submitting a report from any of the treating physicians Cross continued to see, he submitted the reports of three *nontreating* physicians—physicians who did not qualify as competent medical authority under the new statute. These nontreating physicians had either conducted or interpreted breathing and/or radiographic tests administered at a couple of mass screenings that were sponsored by Cross's attorneys and conducted after Cross had already been diagnosed with, and treated for, lung cancer. None of these "reporting" physicians ever treated Cross or otherwise established a doctor-patient relationship with him.

When Cross's evidence of asbestos-related malignancy did not comport with the prima facie requirements of R.C. 2307.92(C)(1), American Optical, in August 2007,

moved to administratively dismiss Cross's claims as authorized under R.C. 2307.93(A)(3)(c). Cross opposed the motion, but did not dispute that he failed to comply with the prima-facie requirements enacted by H.B. 292. Instead, he argued, among other things, that H.B. 292 could not be retroactively applied without violating the Retroactivity Clause of the Ohio Constitution. In reply, American Optical argued that H.B. 292 was remedial legislation, not substantive, and therefore did not offend the Constitution's prohibition against retroactive laws. The trial court, nonetheless found that applying H.B. 292 to Cross's pre-H.B. 292 lawsuit impaired Cross's substantive rights and therefore was unconstitutionally retroactive. The trial court stated:

> Having heard the arguments, the Court finds that the application of R.C. 2307.92 would impair a substantive right of Milton B. Cross, and that the impairment violates Section 28, Article II, of the Ohio Constitution. Under R.C. 2307.93(A)(3), the Court then will not apply R.C. 2307.92(C).

See *Cross v. A-Best Prod. Co.*, 8th Dist. No. 90388, 2009-Ohio-2039, at ¶11 (*Cross I*), Appx. at 16.

American Optical appealed this judgment and Cross moved to dismiss for lack of a final appealable order. Briefing was stayed for a period of time while this Court was reviewing *Ackison* (which the parties acknowledged would be dispositive of the appeal), but the stay was eventually lifted and briefing completed before *Ackison* was released. This Court eventually released *Ackison* in October 2008 and held, in syllabus law, that the prima facie requirements are "remedial and procedural" and may be applied to

pending cases without offending the Retroactivity Clause of the Ohio Constitution. *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, syllabus.

In March 2009, the Eighth Appellate District heard oral argument. In a sua sponte order it released shortly thereafter, the appellate court did two things: (1) it denied Cross's motion to dismiss on the authority of *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268 (*Cross I*, at ¶17, Appx. 18); and (2) it stated that trial court's "conclusory" order did not permit a "meaningful appellate review" and remanded Cross's case to the trial court so that it could issue a clarifying entry "explaining its ruling" and making a determination as to whether Cross's evidence was sufficient under pre-H.B. 292 law (id. at ¶26, Appx. 21-22). It explained that clarification was necessary because the *Ackison* court did not address the impact of the Act's "savings clause," which it construed as an "exception to the retroactive application of H.B. 292" that "has yet to be fully litigated." Id. at ¶9, 20, 24, Appx. 15, 19, 21.

On remand, the trial court provided the requested clarification, which the Eighth District excerpted in large part in its judgment affirming the trial court. The trial court stated that the new definition of "competent medical authority" impaired a substantive right because it deprived Cross of the ability to maintain a previously viable claim. *Cross v. A-Best Prod. Co.*, 8th Dist. No. 90388, 2009-Ohio-3079, at ¶14, 16 (*Cross II*), Appx. 6. The Eighth District agreed and affirmed. Id. at ¶21, Appx. 8. Relying on its earlier decision in *Olson v. Consol. Rail Corp.*, 8th Dist. No. 90790, 2008-Ohio-6641, as well as *Cross I*, the appellate court stated again that the General Assembly "carved out an

exception" to the retroactive application of H.B. 292 when it enacted the R.C. 2307.93(A)(3)(a) "savings clause." *Cross II*, at ¶21, citing *Olson*, 2008-Ohio-6641, at ¶14, Appx. 8. And this "exception" granted it authority to engage in its own retroactivity analysis apart from that promulgated by the Supreme Court in *Ackison*. Id.

Because the appellate court's decision is contrary to this Court's decision in *Ackison*, American Optical applied for reconsideration under App.R. 26(B). It argued that the appellate court did not fully consider this Court's decision in *Ackison*, which held that the Act's definition of "competent medical authority" did not "alter a vested substantive right." See *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, at ¶29. American Optical emphasized that this Court found that the new definition "merely defined the procedural framework" for courts to adjudicate asbestos-related claims and, thus, was "procedural in nature"—not substantive. Indeed, this Court stated that an asbestos plaintiff "did not have a vested right to have the undefined term remain undefined." Id.

American Optical also moved to certify the Eighth District's decision as being in conflict with the Second Appellate District's decision in *Neal v. A-Best Prod. Co.*, 2d Dist. No. 22026, 2008-Ohio-6968, which, under like facts, found that the Act's prima facie requirements applied to asbestos claims that had been pending on the Act's effective date even though the Act contained a "savings clause." Id. at ¶11, 61, 124, 127 (prima facie requirements, including the definition of "competent medical authority," do not impair substantive rights and therefore can be applied retroactively without offending the Retroactivity Clause). American Optical also provided two additional conflicting

decisions that were contemporaneously issued by the Seventh Appellate District—*Darrah v. A-Best Prod. Co.*, 7th Dist. No. 06 JE 47, 2009-Ohio-3349, and *McKee v. A-Best Prod. Co.*, 7th Dist. No. 06 MA 164, 2009-Ohio-3348.

The Eighth District denied both motions on August 18, 2009 (see Appx. 10, 11) and contemporaneously journalized its judgment affirming the trial court's decision on this same date (see Appx. 1).

III. Argument in support of proposition of law

Proposition of Law:

> **R.C. 2307.93(A)(3)(a) does not alter, nor is it an exception to, the constitutional analysis required when determining whether R.C. 2307.92 can be retroactively applied and, therefore, a court must apply controlling Ohio Supreme Court precedent when making a retroactivity determination.**

The Eighth District misinterpreted the purpose, effect, and import of R.C. 2307.93(A)(3)(a), which provides:

> For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:
>
> (i) A substantive right of a party to the case has been impaired.
>
> (ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

This statute, on one hand, satisfies the threshold requirement for retroactivity because it provides "clear indication" that the prima facie requirements are to be applied

to cases pending on the Act's effective date. See *Van Fossen*, 36 Ohio St.3d 100, at paragraph one of the syllabus (a newly enacted statute can be applied prospectively only if there is no "clear indication of retroactive application" because "R.C. 1.48 establishes an analytical threshold [that] must be crossed prior to inquiry under Section 28, Article II."); see, also, *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, at ¶15 (inquiry ends with R.C. 1.48 when the statute at issue did not contain any express language of retroactivity). R.C. 2307.93(A)(3)(a)'s "clear indication" to apply to pending cases is a necessary "first step" in determining whether R.C. 2307.92's prima facie requirements can be retroactively applied without offending the Retroactivity Clause.

The "unless" provisions that follow—subsections (A)(3)(a)(i) and (ii)—support, but do not change, the test for retroactivity announced by this Court in *Van Fossen*, *Bielat*, *Groch*, and *Ackison*. Subsection (i)—determining whether the new statute impairs a substantive right of a party—and subsection (ii)—determining whether the impairment violates Section 28, Article II of the Ohio Constitution—comprise the "second step" referenced in these and other cases employing the test for retroactivity. See *Van Fossen*, 36 Ohio St.3d 100, at paragraph three of the syllabus (second step of constitutional inquiry is whether statute unconstitutionally impairs substantive rights "in violation of Section 28, Article II of the Ohio Constitution"); *Bielat*, 87 Ohio St.3d at 353 ("The second critical inquiry of the constitutional analysis is to determine whether the retroactive statute is remedial or substantive."); *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶186 (court proceeded to "second question, which is whether the statute violates

Section 28, Article II as applied to petitioners," which involves "determin[ing] whether [the statute] is substantive or merely remedial."); *Bielat*, 87 Ohio St.3d at 352 (same).

It was this same two-step analysis that the Court applied in *Ackison* when it found that the Act's prima facie requirements were not unconstitutionally retroactive. After first finding the General Assembly "expressly directed" that the prima facie requirements were to apply to pending cases, the Court engaged in the substantive/remedial analysis and concluded that the prima facie requirements "pertain to the machinery for carrying on a suit" and are therefore "remedial and procedural in nature," not substantive. *Ackison*, 2008-Ohio-5243, at ¶13, 16.

The Eighth District, however, takes exception to *Ackison* because it claims that this Court did not address the R.C. 2307.93(A)(3)(a) "savings clause" as part of its retroactivity analysis. *Cross I*, 2009-Ohio-2039, at ¶20, Appx. 19. And because it did not, the appellate court concluded that the "savings clause" creates an "exception" permitting it to ignore this Court's precedent. But R.C. 2307.93(A)(3)(a) creates no such exception. On the contrary, it does no more than support the legislature's intent to have the Act's prima facie requirements apply retroactively. Indeed, the statute is the legislature's recognition that the Retroactivity Clause imposes constitutional limitations that must be analyzed in terms of Ohio Supreme Court precedent interpreting that Clause. It is of no consequence then that the *Ackison* court did not specifically reference either R.C. 2307.93(A)(3)(a)(i) or (ii).

Because R.C. 2307.93(A)(3)(a) is consistent with the constitutional analysis for retroactivity, it does not provide the "exception" that the Eighth District thinks it does. A court must first determine whether the legislature intended the statute to be applied retroactively and second, it must determine if the statute, applied retroactively, would impair a substantive right of the plaintiff that would offend the Retroactivity Clause. The analysis would be—and is—the same.

Despite the supportive effect that R.C. 2307.93(A)(3)(a) provides, the Eighth District has continued to find that this statute takes a pending asbestos case out of Supreme Court retroactivity analysis and instead permits it to find that this Court's precedent in *Ackison* does not apply. The Eighth District first planted the seeds of this flawed "exception" analysis in *In re Special Docket No. 73958*, 8th Dist. Nos. 87777, 87816, 2008-Ohio-4444, a case predating this Court's decision in *Ackison*. In that case, the appellate court stated that the "'savings clause' instructs the trial court to apply the law that existed before the effective date of the legislation." Id. at ¶5. The court went on to state that "[t]he 'savings clause' prevents a ruling that H.B. 292 itself is unconstitutional and directs courts to engage in a constitutional inquiry" before applying the Act to pending cases (id. at ¶33), even though a "constitutional inquiry" would take place regardless of either R.C. 2307.92(A)(3)(a)(i) or (ii).

The Eighth District continued this reasoning in *Olson v. Consol. Rail Corp.*, 8th Dist. No. 90790, 2008-Ohio-6641, where it first held that *Ackison* did not apply because the trial court based its ruling on the savings clause. In furthering its perceived

distinction between cases applying the savings clause and those that did not, the Eighth District reasoned that *Ackison* addressed retroactivity *in general* and therefore does not apply when the trial court applies the savings clause. Id. at ¶9, 11.

This unjustified distinction is highlighted in *Whipkey v. Aqua-Chem, Inc.*, 8th Dist. No. 88240, 2009-Ohio-3369—a case that was released two weeks after *Cross II*. There the Eighth District found that because the trial court did not premise the denial of the defendants' motion to administratively dismiss on the savings clause, the appellate court was free to engage in *Ackison*-based retroactivity analysis and reverse. It reasoned:

> Contrary to the Whipkeys' argument, there is nothing in the record to demonstrate that the trial court relied on the savings clause in its decision. A review of the entry, in its entirety, reveals no specific mention of the savings clause and/or its application to this case.

Id. at ¶21.

The Eighth District has thus furthered its artificial and unjustified distinction between cases that specifically mention and discuss R.C. 2307.93(A)(3)(a) and those that do not—a distinction it started in *In re Special Docket*, cultivated further in *Olson*, *Cross I* and *Cross II*, and continued in *Whipkey*. It is a flaw in analysis that is at odds with the analysis set forth by this Court in *Van Fossen*, *Groch*, and *Ackison*, and applied by other appellate districts since *Ackison*. R.C. 2307.93(A)(3)(a) does not create an "exception" to the test for retroactivity. It is simply the legislature's recognition of the constitutional limitations of retroactive laws *as those limitations are interpreted by this Court.*

IV. Conclusion

The Eighth District's decision in this case represents a fundamental flaw in constitutional analysis. Without direction from this Court, the Eighth District will continue to apply its unjustified distinction between what it perceives as the Act's "savings clause" and principles of constitutional analysis set by this Court—a distinction that usurps this Court's authority to interpret the constitutional limitations of the Retroactivity Clause. But there is no distinction. The perceived "savings clause" does not change the analysis for retroactivity.

Appellant American Optical Corporation therefore respectfully requests that the Court accept jurisdiction so that it can provide guidance to the trial and appellate courts of this state as to the constitutional analysis required when determining whether the Asbestos Tort Reform Act's prima facie requirements can be retroactively applied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90388

MILTON B. CROSS, ET AL.

PLAINTIFFS-APPELLEES

vs.

A-BEST PRODUCTS CO., ET AL.

DEFENDANTS

Appeal by:

AMERICAN OPTICAL CORPORATION

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-415636

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

This asbestos-related case is before us on appeal after the trial court issued a supplemental clarifying journal entry on May 18, 2009, based on this Court's limited remand ordered on April 29, 2009. The narrow issue to be decided in this appeal is whether the R.C. 2307.93(A)(3) savings clause applies to plaintiff-appellee, Milton B. Cross's ("Cross") claim, thus allowing him to maintain his asbestos-related action against defendant-appellant, American Optical Corporation ("AOC"). After reviewing the facts of the case and pertinent law, we affirm the court's denial of AOC's motion to dismiss.

The procedural history of this case follows.[1] On August 19, 2000, Cross filed suit against AOC, a manufacturer of asbestos containing protective clothing, alleging asbestos-related lung injuries. On August 10, 2007, AOC filed a motion to dismiss Cross's claim, alleging that he had not established the statutory requirements of Amended Substitute House Bill 292, which was enacted in 2004. Cross counter argued that retroactive application of Am.Sub.H.B. 292 was unconstitutional as applied to him, citing the statute's savings clause, R.C. 2307.93(A)(3)(a). On September 7, 2007, the trial court

[1]The substantive facts of the instant case have been thoroughly discussed in our remand order. See *Cross v. A-Best Products Co.*, Cuyahoga App. No. 90388, 2009-Ohio-2039.

summarily denied AOC's motion to dismiss Cross's claim. AOC appealed and we issued a limited remand with instructions to the trial court to clarify its September 7, 2007 dismissal. On May 18, 2009, the trial court issued a clarifying entry. We now review AOC's appeal on the merits.

AOC's sole assignment of error states:

"The trial court erred when it entered an order making an R.C. 2307.93(A)(3) finding that the prima-facie requirements enacted by Am.Sub.H.B. No. 292 and codified at R.C. 2307.92 cannot be applied retroactively because their application impairs plaintiff-appellee Milton Cross's substantive rights in violation of Section 28, Article II of the Ohio Constitution."

On September 2, 2004, Am.Sub.H.B. 292 became effective, and its key provisions were codified in R.C. 2307.91 through 2307.98. The statutes require plaintiffs who assert asbestos claims to make a prima facie showing by a competent medical authority that exposure to asbestos was a substantial contributing factor to their medical condition resulting in a physical impairment. Stated in other words, the Ohio Legislature found that prioritizing these cases "will expedite the resolution of claims brought by those sick claimants and 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." Am.Sub.H.B. 292, Section 3(A)(5). See, also, *Sinnott v. Aqua-Chem, Inc., et al.*,

116 Ohio St.3d 158, 160, 2007-Ohio-5584, 876 N.E.2d 1217 (stating that requiring prima facie evidence by an asbestos plaintiff "is an attempt to place those already ill at the head of the line for compensation").

If a plaintiff fails to make this prima facie showing, the court must administratively dismiss the claim. "The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements" discussed above. R.C. 2307.93(C).

In *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, the Ohio Supreme Court found these new requirements may be applied retroactively to cases pending on September 2, 2004.

However, the legislature included a savings clause in R.C. 2307.93(A)(3)(a), which allows the law prior to September 2, 2004 to govern an asbestos plaintiff's case under certain circumstances. R.C. 2307.93(A)(3) provides as follows:

"(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the Court that has jurisdiction over the case finds both of the following:

"(i) A substantive right of a party to the case has been impaired.

"(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution."

On remand, the trial court found the following:

"At the time Mr. Cross's asbestos-related lung cancer claim accrued and was filed, the definition of 'competent medical authority' was determined by established rules of evidence regarding a witness's competency to testify. See Evid.R. 702. Requiring Mr. Cross to satisfy the new definition of 'competent medical authority' would deprive him the ability to maintain his claim. ***

"***

"Applying the Act's requirements now would effectively eliminate Mr. Cross's previously viable claim for asbestos-related lung cancer. The Court, therefore, finds that a substantive right of Mr. Cross's would be impaired, and that impairment is otherwise in violation of Section 28, Article II of the Ohio Constitution. See R.C. 2307.93(A)(3)(a).

"Having made a finding under R.C. 2307.93(A)(3)(a), this Court next determines under R.C. 2307.93(A)(3)(b) whether Mr. Cross has provided sufficient evidence to support his cause of action or the right to relief under the law that was in effect prior to the effective date of the Act. The law that was in effect prior to Am.Sub.H.B. 292 was R.C. §2305.10. It states:

'a cause of action for bodily injury caused by exposure to asbestos *** arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, the plaintiff should have become aware that the plaintiff had been injured by the exposure, whichever date occurs first.' R.C. §2305.10.

"As noted previously, Mr. Cross submitted the medical reports of Dr. Venizelos, Dr. Schonfeld, and Dr. Pohl, all of whom have been qualified as experts to testify before this Court previously. The Court finds that Mr. Cross has presented sufficient evidence under R.C. §2305.10 by proffering medical opinions that his injuries were caused by exposure to asbestos. Discovery is complete, AO's Motion for Summary Judgment has been denied, and all expert reports have been produced. The only remaining issue to be determined at trial is whether he is able to prove the elements of a cause of action under the law prior to September 2, 2004. Plaintiff's case is ready for a trial date.

"Finally, a finding that Mr. Cross's claims are within the Act's Savings Clause conforms with the stated intent of the statute, by compensating 'cancer victims and others who are physically impaired by exposure to asbestos' and giving 'priority to those asbestos claimants who can demonstrate actual physical harm from exposure to asbestos.' See Am.Sub.H.B. 292 §3(B), supra."

We find that the trial court's conclusion that the Am.Sub.H.B. 292 requirements were unconstitutional as applied to Cross because they acted to "eliminate Cross's previously viable claim" is well reasoned. See *Olson v. Consol. Rail Corp.*, Cuyahoga App. No. 90790, 2008-Ohio-6641 (holding that the court did not err in applying the savings clause to a case that had five non-asbestos related claims in addition to the plaintiff's claim of an asbestos-related injury). "Through the savings clause, the General Assembly specifically recognized that the retroactive application of H.B. 292 will not always be appropriate. Indeed, by enacting R.C. 2307.93(A)(3)(a), the General Assembly carved out an exception to the retroactive application of H.B. 292 in all cases." *Olson*, supra at ¶14. See, also, *State ex rel. Internatl. Heat & Frost Insulators & Asbestos Workers Local v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 85116, 2006-Ohio-274 (concluding that R.C. 2307.93(A)(3) "reaffirms the authority of the court of common pleas to make determinations regarding constitutionality").

Accordingly, the court did not err in denying AOC's motion to dismiss and AOC's sole assignment of error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

MILTON B. CROSS, ET AL.

Appellee

COA NO. 90388 | LOWER COURT NO. CP CV-415636

COMMON PLEAS COURT

-vs-

A-BEST PRODUCTS CO., ET AL.

Appellant

MOTION NO. 423806

Date August 18, 2009

Journal Entry

MOTION BY APPELLANT TO CERTIFY CONFLICT IS DENIED.

RECEIVED FOR FILING

AUG 18 2009

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

Presiding Judge MELODY J. STEWART, Concurs

Judge MARY J. BOYLE, Concurs

Judge JAMES J. SWEENEY

NOTICE MAILED TO COUNSEL

CA07090388 59074821

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

MILTON B. CROSS, ET AL.

Appellee

COA NO. 90388 | LOWER COURT NO. CP CV-415636

COMMON PLEAS COURT

-vs-

A-BEST PRODUCTS CO., ET AL.

Appellant

MOTION NO. 423807

Date August 18, 2009

Journal Entry

APPLICATION BY APPELLANT FOR RECONSIDERATION IS DENIED.

RECEIVED FOR FILING

AUG 18 2009

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

NOTICE MAILED TO COUNSEL
FOR PAR
CDS
XED

Presiding Judge MELODY J. STEWART, Concurs

Judge MARY J. BOYLE, Concurs

Judge JAMES J. SWEENEY

CA07090388 59074820

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SUA SPONTE ORDER
Court of Appeals No. 90388
Motion No. 420136

MILTON B. CROSS, ET AL.

PLAINTIFFS-APPELLEES

vs.

A-BEST PRODUCTS CO., ET AL.

DEFENDANTS

Appeal by:

AMERICAN OPTICAL CORPORATION

DEFENDANT-APPELLANT

JUDGMENT:
REMANDED FOR LIMITED
PURPOSE OF CLARIFICATION

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-415636

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

DATE: April 27, 2009

Defendant-appellant, American Optical Corporation ("AOC"), appeals the court's denial of its motion to administratively dismiss plaintiff-appellee, Milton B. Cross's, complaint alleging asbestos-related products liability claims. After reviewing the facts of the case and pertinent law, we deny Cross's motion to dismiss this appeal for lack of a final appealable order, and we remand this cause to the lower court for the limited purpose of clarification.

On August 19, 2000, Cross filed suit against AOC, a manufacturer of asbestos containing protective clothing, alleging asbestos-related lung injuries.[1] Cross, who was exposed to various asbestos containing products during his 30-year career as a laborer, developed lung cancer and other lung related conditions. Cross was also a smoker for 46 years. Medical doctors attributed Cross's lung conditions to occupational asbestos exposure and tobacco use.

On September 2, 2004, Amended Substitute House Bill 292 became effective, and its key provisions were codified in R.C. 2307.91 through 2307.98. H.B. 292 requires plaintiffs who assert asbestos claims to make a prima facie showing by a competent medical authority that exposure to asbestos was a substantial contributing factor to their medical condition, resulting in a physical

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[1] As is typical in many asbestos related cases, Cross was one of many plaintiffs who brought this claim against various defendants, including AOC. See, *Cross, et al. v. A-Best Products Co., et al.*, Cuyahoga County Common Pleas Case No. CV-415636. As a result of various dismissals, Cross and AOC are the only parties to this appeal.

impairment. Stated in other words, the Ohio Legislature found that prioritizing these cases "will expedite the resolution of claims brought by those sick claimants and 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." Am. Sub. H.B. 292, Section 3(A)(5). See, also, *Sinnott v. Aqua-Chem, Inc., et al.*, 116 Ohio St.3d 158, 160, 2007-Ohio-5584 (stating that requiring prima facie evidence by an asbestos plaintiff "is an attempt to place those already ill at the head of the line for compensation").

If a plaintiff fails to make this prima facie showing, the court must administratively dismiss the claim. "The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements" discussed above. R.C. 2307.93(C).

However, the legislature also included a savings clause in R.C. 2307.93(A)(3)(a), which allows the law prior to September 2, 2004 to govern an asbestos plaintiff's case under certain circumstances. R.C. 2307.93(A)(3) provides as follows:

"(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92

of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution."

See *Olson v. Consolidated Rail Corp.*, Cuyahoga App. No. 90790, 2008-Ohio-6641 (holding that the court did not err in applying the savings clause to a case that had five non-asbestos related claims in addition to the plaintiff's claim of an asbestos-related injury). "Through the savings clause, the General Assembly specifically recognized that the retroactive application of H.B. 292 will not always be appropriate. Indeed, by enacting R.C. 2307.93(A)(3)(a), the General Assembly carved out an exception to the retroactive application of H.B. 292 in all cases." *Olson*, supra at ¶14. See, also, *State ex rel. International Heat & Frost Insulators & Asbestos Workers Local v. Court of Common Pleas of Cuyahoga County*, Cuyahoga App. No. 85116, 2006-Ohio-274 (concluding that R.C. 2307.93(A)(3) "reaffirms the authority of the court of common pleas to make determinations regarding constitutionality").

On August 10, 2007, AOC filed with the trial court a motion to dismiss Cross's claim, alleging that he had not established the prima facie medical requirements. Specifically, AOC argued that no competent medical authority,

as defined by R.C. 2907.91(Z), had opined that Cross's exposure to asbestos substantially contributed to his lung problems. Cross opposed this motion to dismiss, arguing that retroactive application of H.B. 292 is unconstitutional. On September 7, 2007, the trial court denied AOC's motion, ruling as follows:

"Having heard the arguments, the Court finds that the application of R.C. 2307.92 would impair a substantive right of Milton B. Cross, and that the impairment violates Section 28, Article II, of the Ohio Constitution. Under R.C. 2307.93(A)(3), the Court then will not apply R.C. 2307.92(C). Defendant, American Optical Corporation's motion is, therefore, denied." It is from this order that AOC appeals.

Motion to Dismiss

We first address Cross's motion to dismiss this appeal for lack of a final appealable order. Specifically, Cross argues that the denial of the motion to dismiss "does not concern a provisional remedy, nor does it meet the test for finality under R.C. 2505.02(B)(4)."

Cross's motion to dismiss the appeal was filed in this court on September 19, 2007. On October 11, 2007, the Ohio Supreme Court decided *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, which concerned the following issue: "whether the court of appeals correctly dismissed, for lack of a final appealable order, an appeal from a finding by the trial court, rendered

pursuant to R.C. 2307.93(A)(3), on the constitutionality of retroactively applying certain statutory provisions enacted by 2003 Am.Sub.H.B. 292."

In *In re Special Docket No. 73958*, supra, the Ohio Supreme Court held that "a finding on the constitutionality of retroactively applying the prima facie filing requirements of R.C. 2307.92" is a final, and therefore appealable, order. Id. at 432.

"In the case before us, the trial court's order denies the appellants' motion to apply the prima facie filing requirements in R.C. 2307.92, which the General Assembly enacted with the intent to 'give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos' and to enable courts to administratively dismiss the claims of those claimants who cannot present prima facie evidence of an impairment caused by exposure to asbestos. Am.Sub.H.B. No. 292, Section 3(B), 150 Ohio Laws, Part III, 3991. If the appellants in this matter are unable to challenge the trial court's finding in an interlocutory appeal, they will be unable to obtain the remedy set forth in the legislation upon an appeal from a final judgment -- it would be meaningless at that point either to require a claimant to present prima facie evidence, or to administratively dismiss a claimant's case for failure to present prima facie evidence, after the case has proceeded to a final judgment on the merits. As we stated in *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-

4253, 852 N.E.2d 711, at ¶18, 'without immediate judicial review, that mistake is uncorrectable.'"

Id. at 431. See, also, *Sinnott*, supra, 116 Ohio St.3d at 164 (holding that "[a]n 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").

In re Special Docket No. 73958 is controlling, and accordingly, Cross's motion to dismiss this appeal is denied (see motion No. 401174).

Retroactive Application of Am. Sub. H.B. No. 292

AOC's assignment of error states:

"The trial court erred when it entered an order making an R.C. 2307.93(A)(3) finding that the prima-facie requirements enacted by Am. Sub. H.B. No. 292 and codified at R.C. 2307.92 cannot be applied retroactively because their application impairs Plaintiff-Appellee Milton Cross's substantive rights in violation of Section 28, Article II of the Ohio Constitution."

At the time the court denied AOC's motion to dismiss, the Ohio Supreme Court had not yet handed down its decision in *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243. In *Ackison*, the Ohio Supreme Court found that "requirements in R.C. 2307.91, 2307.92, and 2307.93 pertaining to asbestos exposure claims are remedial and procedural and may be applied without offending the Retroactivity Clause of the Ohio Constitution to cases pending on

September 2, 2004." Id. at 229. See, generally, *Ackison, In re Special Docket No. 73958,* and *Sinnot*, supra, for a thorough analysis of the constitutionality of retroactive legislation, and specifically, the constitutionality of R.C. 2307.92 and R.C. 2307.93's retroactive application. The *Ackison* opinion does not address the R.C. 2307.93(A)(3)(a) savings clause. But, see, *Ackinson*, supra (Pfeifer, J., dissenting) (noting that "[t]he General Assembly, at least, offered a lifeline to claimants whose cause of action arose before the date of the passage of H.B. 292. Pursuant to R.C. 2307.93(A)(3), the requirements of H.B. 292 do not apply if they impair the substantive rights of the plaintiff and that impairment 'is otherwise in violation of Section 28 of Article II, Ohio Constitution.' The majority, however, effectively cuts that lifeline today for all plaintiffs").

In the instant case, however, Cross does not dispute that the evidence he put forth does not meet the requirements of R.C. 2307 et seq. Rather, he argues that the R.C. 2307 requirements do not retroactively apply to him specifically. In fact, Cross's brief concedes that "[t]he only question before this Honorable Court is whether H.B. 292 violates Section 28, Article II of the Ohio Constitution as it is applied in this case." The trial court agreed with Cross, invoking the R.C. 2307.93(A)(3) savings clause when it denied AOC's motion to administratively dismiss the action.

Although conclusory findings by a trial court do not necessarily constitute error, for an appellate court to conduct a meaningful review, sufficiently detailed reasoning should be specified in the trial court's order. See *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321-322 (holding that a court's reasoning for granting a new trial "will be deemed insufficient if simply couched in the form of conclusions or statements of ultimate fact"). Compare *State ex rel. Kinnear Div. v. Industrial Commission* (1997), 77 Ohio St.3d 258,262-263 (holding that an administrative agency's "findings become the basis for allegation of error. Without clarity, the parties are afforded little or no insight into the basis for decision, and the reviewing court is severely hampered in its task of discerning whether the record supports the [agency's] decision"); *Kent v. United States* (1966), 383 U.S. 541, 561 (holding that meaningful appellate review is based on the court having "before it a statement of the reasons motivating the [decision] including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons ***").

In *Kent*, supra, the United States Supreme Court held, among other things, that written reasons were required when a juvenile court waived jurisdiction, thus subjecting a juvenile defendant to trial as an adult. Id. The *Kent* Court, however, limited the responsibilities of the trial court: "We do not read the statute as requiring that this statement must be formal or that it

should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review." Id. at 561.

We are aware that the instant case involves the individual applicability of the savings clause section of an otherwise constitutionally retroactive statute, and not a new trial, an administrative hearing, or a juvenile jurisdiction waiver. However, R.C. 2307.93(A)(3)(a)'s utility has yet to be thoroughly litigated. Accordingly, we analogize the issue before us to other instances in Ohio jurisprudence when conclusory orders are insufficient for meaningful appellate review.

Furthermore, R.C. 2307.93(A)(3)(b) states that if the savings clause is invoked, "the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section." The court in the case before us failed to make this determination.

In light of the foregoing, we find merit to AOC's assignment of error, to the extent that the court's September 7, 2007 order is insufficient for meaningful review. Sua sponte, this court remands this cause to the trial court for the

limited purpose of issuing a journal entry explaining its ruling on AOC's motion to administratively dismiss Cross's claim, including a determination under R.C. 2307.93(A)(3)(b).

The parties are granted leave to file with the clerk of the trial court the clarifying entry made upon remand as a supplemental record. The parties shall prepare the supplemental record in compliance with Loc. App. R. 11(B). This case, including the supplemental record and revised pagination of record, is to be returned to the clerk of this court within 21 days of the date of this entry. Upon the transmittal of the requisite clarifying entry in the supplemental record, this court will review the appeal on the merits.

MELODY J. STEWART, P.J., CONCURS
MARY JANE BOYLE, J., CONCURS.

JAMES J. SWEENEY, JUDGE