

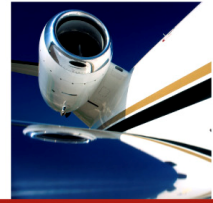
Appeals Court Declines to Apply Stricter Requirements; Competent Medical Authority to be Determined at Time of Filing

On June 25, 2009, the Eighth Appellate District Court of Appeals of Ohio declined to apply the stricter causation requirements set forth in H.B. 292 to a plaintiff who filed his case prior to the enactment of Amended Substitute House Bill 292 (H.B. 292) *Cross v. A-Best Prods. Co.*, 2009-Ohio-3079 (8th Dist.).

In *Cross*, the plaintiff filed a cause of action against American Optical Corporation (AOC), a manufacturer of asbestos-containing protective clothing, alleging that AOC, along with several other defendants, caused him to develop asbestos-related lung injuries (2009-Ohio-3079 at ¶2). AOC filed a motion to dismiss the cause of action, arguing that the plaintiff had not established the statutorily required *prima facie* burden that would show by a qualified medical authority that the plaintiff's exposure to asbestos was a substantial contributing factor to his physical impairment (*Id.* at ¶¶2-6) (citing the codification of H.B. 292 at Ohio Rev. Code §§2307.91 through 2307.98). When a plaintiff fails to meet the *prima facie* showing, the court must administratively dismiss the case pursuant to Ohio Rev. Code §2307.93(C) (*Id.* at ¶7). The Ohio Supreme Court has held that the requirements of H.B. 292 may be applied retroactively to cases pending on September 2, 2004—the date that H.B. 292 was enacted (*Id.* at ¶8) (citing *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228 (2008)).

The trial court applied Ohio Rev. Code §2307.93(A)(3)(a) (the “Savings Clause”), which permits the law prior to the enactment of H.B. 292 to govern an asbestos plaintiff's case if “[a] substantive right of a party to the case has been impaired” and “[t]hat impairment is otherwise in violation of *Section 28 of Article II, Ohio Constitution*” (*Id.* at ¶¶9-14). The trial court noted that the definition of “competent medical authority” should be determined by the rules of evidence at the time *Cross* filed his cause of action, which focused on a witness's competency to testify pursuant to Evid. R. 702 (*Id.* at ¶14). The trial court further stated that the requirements for invoking the Savings Clause in this case had been met, and it would violate *Cross*'s constitutional rights to apply H.B. 292's requirements to his case since the more stringent definition of “competent medical authority” set forth in H.B. 292 and Ohio Rev. Code §§2307.91 through 2307.98 would deprive *Cross* of his ability to maintain his claim (*Id.* at ¶¶14-16). The trial court then denied AOC's motion to dismiss (*Id.* at ¶2).

The Eighth District Court of Appeals affirmed the trial court's decision, noting that when the General Assembly enacted the Savings Clause, it specifically recognized that retroactive application of H.B. 292 will not always be appropriate (*Id.* at ¶¶21-22).



In light of the court's decision in *Cross*, it is apparent that the Eighth District Court of Appeals has begun to test the extent of the Ohio Supreme Court's decision in *Ackison*, applying H.B. 292 retroactively to cases pending on September 2, 2004. As a result, asbestos cases that were pending at the time that H.B. 292 was enacted may survive even though they fail to meet the stricter *prima facie* showing mandated by H.B. 292. With this decision, both H.B. 292 and the Ohio Supreme Court's holding in *Ackison* may be subject to severe erosion as the responsibility of determining what is competent medical authority is now in the hands of the trial courts for asbestos cases that were filed prior to September 2, 2004.

FOR MORE INFORMATION

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