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NEW OHIO SUPREME COURT RULINGS IMPACT OHIO ASBESTOS LITIGATION AND PERHAPS ALL OHIO PRODUCTS LIABILITY MATTERS

In the last ten days, the Ohio Supreme Court decided two important cases affecting asbestos litigation in Ohio. The second of these cases, *DiCenzo v. Anchor Packing Company*, has broader significance because it impacts Ohio products liability law in general.

The first decision—*Ackison v. Anchor Packing Co*.—was issued on October 15, 2008 and held that the Ohio statutes governing the prima-facie showing could be retroactively applied to cases pending before the September 2, 2004 effective date of H.B. 292. The Court, in part, relied on its earlier decision in *Norfolk S. Ry. Co. v. Bogle*, which determined that the prima-facie-showing statutes merely establish a "procedural prioritization" of asbestos-related cases and, as such, do not affect any substantive rights.

The Court also found the statutes do not impair any vested rights *as to the plaintiff* in particular. Under this part of the Court's analysis, the court made four important conclusions:

- **Asymptomatic pleural thickening was never part of Ohio common law**. The Court expressly rejected the reasoning of the Sixth District in *Verbryke v. Owens-Corning Fiberglas Corp.* and the Eighth District in *In re Cuyahoga Cty. Asbestos Cases*, which both held that pleural thickening alone was a compensable injury. The Court stated that it has never held that asymptomatic pleural thickening, by itself, was a compensable injury and the two appellate courts that did based their decisions on a "faulty interpretation of the Restatement." It concluded that asymptomatic pleural thickening alone as a compensable injury was not part of the common law of Ohio so that it would be a "vested" right.

- **There is no vested right to have the previously-undefined "competent medical authority" term remain undefined**. The Court found the definition of "competent medical authority" enacted by H.B. 292 was "more akin to a rule of evidence" and therefore procedural in nature, not substantive. Defining the term then did not take away the plaintiff's right to pursue her claim.

- **The definition of "substantial contributing factor" does not alter common-law causation**. Although the Court found an ambiguity in part of the definition of "substantial contributing factor," it upheld the statutory definition when read as a whole because the definition merely reflects "the common-law requirement that asbestos exposure be both a cause in fact and the direct cause of the plaintiff's illness."

- **The definition of "substantial occupational exposure" does not adopt the *Lohrmann* frequency-proximity test**. The Court noted that the *Lohrmann* test goes to the merits of a claim—not its prima-facie showing—and that the legislature's simultaneous adoption of the statute implementing that test could only, by its express terms, be applied prospectively.

Ackison has had an immediate impact on cases pending here in Cuyahoga County. Earlier this week, the trial court administratively dismissed 30,000 cases as a result of *Ackison*—making clear that plaintiffs with pending asbestos claims covered by the statute will now have to comply with the prima-facie showing or have their cases administratively dismissed.

One week after the Supreme Court decided *Ackison*, it decided *DiCenzo v. Anchor Packing Co*.

In that case, Defendant George V. Hamilton Inc.—a nonmanufacturing supplier of insulation products containing asbestos—challenged the retroactive application of the Supreme Court's 1977 decision in *Temple v. Wean*, which had found that nonmanufacturing sellers could be held strictly liable for defective products they supplied. Hamilton argued that *Temple* should be applied prospectively only and that it should not be held strictly liable for supplying asbestos products before 1977.

In a 5-2 decision, the Supreme Court agreed. The Court applied the three-part prospective-application test announced by the United States Supreme Court in *Chevron Oil v. Huson*. This test considers: (1) whether the decision establishes a new principle of law that was not clearly foreshadowed; (2) whether retroactive application of the decision promotes or hinders the purpose behind the decision; and (3) whether retroactive application of the decision causes an inequitable result.

Following other states, the Court concluded that *Chevron Oil* had only been overruled as applied to federal, not state, law. The Court then analyzed *Temple* under the three-part test and found that supplier liability established a new principle of law "that had not been foreshadowed in prior cases."

The Court discussed the "slow, orderly and evolutionary development" of Ohio products liability law against *manufacturers* starting first with *Rogers v. Toni Home Permanent* (1958), 167 Ohio St. 244 (lack of privity did not preclude breach of express warranty claim) to *Inglis v. Am. Motors Corp.* (1965), 3 Ohio St.2d 132 (permitting express warranty claim in a defective-manufacture case), and then finally *Lonzrick v. Republic Steel Corp*. (1966), 6 Ohio St.2d 227 (holding a manufacturer liable for a defective product even absent privity). It then said that *Temple*—issued in 1977—"marked a relatively large step in the further development" of products liability law by holding a *supplier* liable for defective products. This "large step" conclusion allowed the court to find the new-principle-of-law prong of the *Chevron Oil* test satisfied. The second "promote or hinder" factor was found to be neutral, while the third "equity" factor played off the new-principle-of-law conclusion to find inequity. In the end, the Court relied heavily on its first-impression/new-principle-of-law conclusion to find that *Temple* should be applied prospectively only, effectively limiting supplier strict liability to those products supplied from 1977 onward.

Justice Pfeifer wrote a spirited dissent. He argued that *Chevron Oil* was overruled, but even if it was not, the three-part test was not satisfied. In criticizing the majority's conclusion that the new-principle-of-law prong was satisfied, he described *Temple* as "a culmination of long-developing Ohio law" and noted that "[a]ny responsible defense attorney would now seek the prospective-only application of *Lonzrick*, which established strict liability for manufacturers. An audacious attorney and a willing court could accomplish a lot."

Whether manufacturers can successfully argue for a prospective-only application of *Lonzrick* remains uncertain, given the majority's historical analysis of *Rogers*, *Inglis*, and *Lonzrick*. But it is something to consider.

These are interesting times for products liability law in Ohio and Tucker Ellis & West LLP is at the forefront of these issues. Stay tuned.

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