



## Tort Reform Law Alert

A Litigation Department Publication

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### A Year of Tort Reform Review

In the past year, the Supreme Court of Ohio has reviewed several important tort reform measures enacted by the state legislature. This Law Alert explores *Arbino v. Johnson & Johnson*, upholding Ohio Revised Code Sections 2315.18 and 3215.21, which provide limits on non-economic and punitive damages, and *Groch v. Gen. Motors Corp.*, upholding Ohio Revised Code Section 2305.10(C)'s ten-year statute of repose for product liability cases.

In addition to the limits on damages and time-barred product liability claims, the Court recently issued two asbestos-related decisions that will help shield manufacturers and suppliers from frivolous and unforeseeable product liability actions. In *Ackison v. Ackor Packing Co.*, the Court upheld the retroactive application of asbestos-related statutes that impose minimum medical requirements for a plaintiff to bring an asbestos-related claim. In *DiCenzo v. A-Best Prods. Co.*, a case involving multiple defendants that manufactured and sold products containing asbestos, the Court found that its 1977 *Temple v. Wean United, Inc.* decision finding suppliers of defective products strictly liable — applies only prospectively.

These recent decisions demonstrate the Court's intent to promote judicial economy and to defer to the state legislature to create public policy. In 2009, the Court will be poised to review the constitutionality of Ohio's employer intentional tort statute, Revised Code Section 2754.01. Unlike its recent decisions upholding the constitutionality of tort-reform statutes, the Court has previously found that statutes limiting an employee's ability to recover for workplace injuries are unconstitutional.

**1. *Arbino v. Johnson & Johnson*, Case No. 2006-1212, 2007-Ohio-6948**

By upholding the constitutionality of R.C. 2315.18 and 3215.21, the *Arbino* decision recognizes the need for a reasonable and predictable justice system that nonetheless provides fair awards for injured parties.

Plaintiff Melissa Arbino brought a product liability action against Johnson & Johnson claiming that Defendant's Ortho Evra birth control patch caused her to develop blood clots and made her vulnerable to high-risk pregnancies. Arbino moved for partial summary judgment and asked the federal court to declare Ohio's caps on the potential amounts of non-economic and punitive damages unconstitutional. In particular, Arbino claimed that the statutory caps violated her right to a jury, right to a remedy, due process, equal protection, and separation of powers, among other constitutional concerns.

United States District Judge David A. Katz, who was presiding over the *Arbino* matter, asked the Supreme Court of Ohio to consider the constitutionality of these two tort reform provisions:

- R.C. 2315.18, which limits damages for non-economic injuries, such as pain and suffering, loss of consortium, and mental anguish, to the greater of \$250,000 or three times the amount of economic damages awarded to the same plaintiff, up to a maximum of \$350,000; and
- R.C. 2315.21, which prohibits punitive damages awards that exceed two times the amount of the compensatory damages from the same defendant.

In support of the punitive damages cap in R.C. 2315.21, Porter Wright Morris & Arthur filed an amicus — or “friend of the court” — brief on behalf of the International Association of Defense Counsel and argued that punitive damages awards can be erratic, without standards, and often result in awards that bear no relationship to actual damages and amount to nothing more than windfalls for plaintiffs. Porter Wright also pointed out that damages limits are within the province of the state legislature because excessive and unpredictable punitive damage awards can have crippling economic consequences on the state economy.

The Court agreed with these arguments and held that placing reasonable limits on punitive damages makes the civil justice system more predictable. The Court likewise upheld the General Assembly’s caps on non-economic compensatory damages for similar reasons.

## **2. *Groch v. Gen. Motors Corp.*, Case No. 2006-1914, 2008-Ohio-546**

In *Groch*, the Supreme Court of Ohio upheld the constitutionality of another Ohio tort-reform measure, a ten-year statute of repose for product liability actions. Ohio Revised Code Section 2305.10(C) provides, in pertinent part, that “no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser . . . .” In other words, ten years after a product first reaches a consumer, the manufacturer or supplier can no longer be held liable for injuries the product allegedly causes.

The plaintiff in *Groch* was injured by a machine press manufactured in 1977. He argued that the statute of repose violated several provisions of the Ohio Constitution, including the open-courts clause, the takings clause, the due process and remedies clause, the equal protection clause, and the ban on retroactive laws.

The Court upheld the statute of repose against plaintiff’s challenges, with one limited exception. Although the statute is not facially unconstitutional, it was unconstitutionally retroactive as applied to the plaintiff in *Groch* because he was injured and his cause of action accrued before the law took effect on April 7, 2005. Going forward, however, the law *will* apply to the claims of any plaintiff who has been injured after the statute’s effective date.

In briefing before the Supreme Court of Ohio, Porter Wright filed an amicus brief on behalf of the Ohio Association of Civil Trial Attorneys supporting the statute of repose.

The Court agreed that the statute was constitutional and that the legislature properly made a public policy decision balancing the interests of manufacturers, suppliers, and consumers. The statute of repose protects manufacturers and suppliers from costly litigation over very old products, but it does not preclude injured consumers from recovering fair awards within a reasonable amount of time after the product is placed into the stream of commerce.

## **3. *Ackison v. Anchor Packing Co.*, Case Nos. 2007-0219; 2007-0415, 2008-Ohio-5243**

Like the *Arbino* and *Groch* decisions, the *Ackison* decision reflects the Supreme Court of Ohio’s intent to uphold legislative decisions that promote a balanced and efficient judicial system, which provides fair opportunities for injured plaintiffs while helping to avoid costly and unnecessary litigation.

In *Ackison*, the Court found that the application of certain asbestos-related tort reform measures was not unconstitutionally retroactive. In September 2004, the General Assembly approved legislation that would revise state laws concerning asbestos and improve the system for asbestos-related litigation. The *Ackison* plaintiffs challenged the retroactive application of the following statutes:

- R.C. 2307.91, which provides definitions concerning asbestos-related litigation;
- R.C. 2307.92, which requires a plaintiff to present certain minimal medical evidence of the asbestos-related injury in order to proceed with her asbestos claim; and
- R.C. 2307.93, which explains that the plaintiff must file a written report and test results to support the medical evidence required in R.C. 2307.92. This evidence must be submitted to the court regardless of whether the claimant’s cause of action arose before or after the effective date of the statute. If the plaintiff fails to provide sufficient medical evidence, then the Court shall administratively dismiss the case without prejudice.

Before these statutes became effective, Ackison, a widow and the administrator of her deceased husband's estate, filed suit against her husband's former employer seeking redress for her husband's non-malignant asbestosis, among other claims. The trial court dismissed Ackison's asbestos-related claim because she did not file the required documentation. Ackison appealed the trial court's decision and argued that the retroactive application of the asbestos statutes impaired her substantive rights.

The Court determined that the challenged statutes do not affect the claimant's substantive rights, but rather they are procedural statutes that help prioritize the administration of asbestos-related claims. None of the statutes took away Ackison's right to bring an asbestos-related claim on behalf of her husband. None of the statutory requirements or definitions affected substantive legal precedent, such as the standard of causation for tort claims. Indeed, Ackison's asbestos-related claim was dismissed without prejudice, which meant that she could re-file the case, present the requisite minimal medical evidence, and potentially proceed to a trial on the merits.

#### **4. *DiCenzo v. A-Best Prods. Co.*, Case No. 2007-1628, 2008-Ohio-5327**

Unlike the Court's *Ackison* decision finding that certain asbestos-related statutes apply retroactively, in *DiCenzo*, the Court found that its asbestos-related decision, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, applies only prospectively. In *Temple*, the Court found that nonmanufacturing sellers could be held strictly liable for defective products. Because of the Court's holding in *DiCenzo*, nonmanufacturing sellers can be held strictly liable only for defective products that were manufactured after the *Temple* decision was rendered in 1977.

Joseph DiCenzo worked at a steel mill from the 1950's until 1993, and during his employment, he was exposed to a number of products that contained asbestos. Appellant George V. Hamilton sold insulation products that contained asbestos to DiCenzo's employer. Hamilton did not manufacture the insulation containing asbestos, but after DiCenzo died of mesothelioma, DiCenzo's wife filed suit against 90 defendants, including Hamilton, to recover damages for her husband's death, which was allegedly caused by his exposure to defective products.

Under Ohio Supreme Court precedent, "an Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior decision." Although the general rule is that a decision applies retrospectively, the Court adopted the U.S. Supreme Court's three-part test to determine whether the *Temple* decision should be applied only prospectively. In *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296, the Supreme Court found that a state court "has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision; and (3) whether retroactive application of the decision causes an inequitable result."

Applying the *Chevron* test, the *DiCenzo* court found that:

1. the liability of a nonmanufacturing supplier was an issue of first impression in *Temple*, so this principle of law had not been foreshadowed by prior decisions;
2. the retroactive application of *Temple* would not promote the purpose of the rule because the primary purpose was to promote the safer design of products, but products containing asbestos are no longer manufactured; and
3. the nonmanufacturing sellers of products containing asbestos would be subject to an inequitable result because they could not have foreseen that they could be held liable in the twenty-first century for products that were manufactured and distributed from the 1950's through the 1970's.

Accordingly, the Court reversed the court of appeals decision and reinstated the trial court decision granting Hamilton's motion for summary judgment.

*DiCenzo* is an important decision because it limits the liability of suppliers for damages they could not have foreseen resulting from an alleged defective product. Like many of the Court's decisions, *DiCenzo* promotes judicial economy by limiting a claimant's ability to pursue stale claims.

#### **5. *Kiminski [sic] v. Metal & Wire Prods. Co.*, Case No. 2008-0857 and *Stetter v. R.J. Corman Derailment Services, LLC*, Case No. 2008-0972**

In August and September 2008, the Court agreed to review two cases challenging the constitutionality of Ohio's employer intentional tort statute, Ohio Revised Code Section 2745.01, which became effective in April 2005. In the past, Ohio's legislature has attempted to limit employers' liability for their employees' workplace injuries, but such statutes were declared

unconstitutional by the Court. R.C. 2745.01 is the legislature's most recent effort at providing a reasonable and predictable standard for actions against employers arising from injuries sustained in the workplace.

In Ohio, an employee who suffers an injury in the workplace can file a lawsuit for damages against the employer, circumventing the workers' compensation system, if the injury was caused by the employer's intentional conduct. Previously, to establish intent on the part of the employer, the employee had to prove that the employer required the employee to undertake a dangerous task knowing that harm to the employee was a substantial certainty.

In April 2005, the Ohio legislature passed the current intentional tort statute, which essentially raised this standard of proof. Under R.C. 2745.01, an employee must still prove that the employer acted with the belief that injury was substantially certain to occur, but, under the statute, "substantially certain means that an employer acts with *deliberate intent to cause an employee to suffer an injury . . .*" Ohio courts have recognized that this standard is significantly more stringent than the previous common law standard.

The two cases that the Court accepted present the question of whether the statute violates the Ohio Constitution. The first case, *Kiminski [sic] v. Metal & Wire Prods. Co.*, arises from a court of appeals decision where the court found R.C. 2745.01 unconstitutional. As explained by the lower court, Rose Kaminski was injured at Metal & Wire Products Co.'s facility when a forklift operator bumped an 800-pound metal coil that Kaminski was balancing, knocking the coil over and causing it to fall on Kaminski's legs and feet. In her action against Metal & Wire Products Co. for an employer intentional tort, the trial court granted summary judgment in favor of the employer.

The court of appeals reversed, agreeing with Kaminski's assertion that R.C. 2745.01 is unconstitutional. Relying on Supreme Court cases interpreting former (now repealed) versions of the employer intentional tort statute, the court of appeals noted that "[t]he Ohio Supreme Court has made it abundantly clear that any statute that codifies the common law employer intentional tort and attempts to limit employers' liability for such intentional torts is unconstitutional under both Section 34 and 35 of Article II of the Ohio Constitution." The court described the action available under R.C. 2745.01 as illusory because of its requirement of proving intent to injure. The court concluded that the "excessive standard of requiring that the employer intended to cause injury" violates Sections 34 and 35 of Article II of the Ohio Constitution, which empowers the legislature to pass laws that provide for the "comfort, health, safety and general welfare" of employees and laws that establish a state workers' compensation fund.

The second case that the Court will hear is *Stetter v. R.J. Corman Derailment Services, LLC*, which comes to the Court on a question from U.S. District Chief Judge, James G. Carr, who is presiding over the case in the federal district court in Toledo. Like Kaminski, the plaintiffs in *Stetter* are challenging R.C. 2745.01's constitutionality.

*Kiminski* and *Stetter* are the Court's first opportunity to decide R.C. 2745.01's constitutionality. Since the *Kiminski* decision in the court of appeals, two other Ohio courts of appeals have followed *Kiminski's* reasoning and declared R.C. 2745.01 unconstitutional. Porter Wright attorney J.H. Huebert will be filing an amicus brief in *Kiminski* on behalf of the Ohio Association of Civil Trial Attorneys, urging the Court to uphold R.C. 2745.01. Decisions from the Court in *Kiminski* and *Stetter*, determining whether employees can prevail on an employer intentional tort claim without demonstrating intent to harm by the employer, should be forthcoming in 2009.