



Sub. S.B. 36

123rd General Assembly
(As Passed by the Senate)

Sens. Latell, Brady, Herington, Mumper, McLin, Latta, Mallory, DiDonato, Espy, Fingerhut, Furney, Hagan, Prentiss, Shoemaker, Blessing, Nein, Armbruster, Schafrath, Watts, Carnes, Gardner, Ray, Cupp, Johnson, Hottinger

BILL SUMMARY

- Subjects wrongful death actions based on an aggravated murder or murder to a discovery rule, under which an action for wrongful death must be commenced within two years after the date on which the plaintiff discovers, or the date on which the plaintiff by the exercise of reasonable diligence should have discovered, the identity of the party whose wrongful act, neglect, or default is alleged in the action to have been the aggravated murder or murder that caused the decedent's death.

CONTENT AND OPERATION

Background

Existing law authorizes an action for wrongful death to be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. The jury, or the court if the wrongful death action is not tried to a jury, may award specified types of damages, as it determines are proportioned to the injury and loss resulting to the beneficiaries by reason of the wrongful death, and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. (See **COMMENT 1.**) (R.C. 2125.02(A)(1) and (2).)

Period of limitation for wrongful death actions

Existing law

Existing law provides that, unless the period of repose applies (see below), an action for wrongful death must be commenced within two years after the decedent's death (see **COMMENT 2**) (R.C. 2125.02(D)(1)).

Operation of the bill

The bill subjects actions for wrongful death to a discovery rule. Under the bill, unless the period of repose applies (see below), an action for wrongful death must be commenced within two years after whichever of the following is applicable:

(1) If the decedent's death was caused by a violation of R.C. 2903.01 or 2903.02, which, respectively, contain the offenses of aggravated murder and murder, the date on which the plaintiff discovers, or the date on which the plaintiff by the exercise of reasonable diligence should have discovered, the identity of the party whose wrongful act, neglect, or default is alleged in the action to have been the violation of either of those sections that caused the decedent's death. If the decedent's death was caused by a violation of either of those sections, this provision applies regardless of whether, on the date on which the plaintiff discovers the identity of the relevant party or the date on which the plaintiff by the exercise of reasonable diligence should have discovered the identity of the relevant party or on the date on which the action is filed, any person has been charged with, convicted of, pleaded guilty to, or found to be a delinquent child for committing, the violation.

(2) If the decedent's death was not caused by a violation of R.C. 2903.01 or 2903.02, the date of the decedent's death. (See **COMMENT 2**.) (R.C. 2125.02(D)(1).)

Period of repose for wrongful death actions involving product liability claims

A provision of the Revised Code enacted in Am. Sub. H.B. 350 of the 121st General Assembly, effective January 27, 1997, specifies that, generally, no cause of action for wrongful death involving a product liability claim accrues against the manufacturer or supplier of a product later than 15 years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product. (See **COMMENT 3**.) This general period of repose is subject to the following exceptions (R.C. 2125.02(D)(2)):

(1) It does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim.

(2) It does not bar a wrongful death action involving a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than 15 years and that has not expired in accordance with the terms of that warranty.

(3) If the decedent's death occurs during the 15-year period of repose but less than two years prior to the expiration of that period, a wrongful death action involving a product liability claim may be commenced within two years after the decedent's death.

(4) If the decedent's death occurs during the 15-year period of repose and the claimant cannot commence an action during that period due to a disability described in R.C. 2305.16 (being of unsound mind or in the age of minority), a wrongful death action involving a product liability claim may be commenced within two years after the disability is removed.

(5) It does not bar a wrongful death action based on a product liability claim against a manufacturer or supplier of a product if the product involved is specified hazardous substance and the decedent's death resulted from exposure to the product during the 15-year period of repose. In such a case, the cause of action that is the basis of the wrongful death action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. The wrongful death action must be commenced within two years after the cause of action accrues and is prohibited from being commenced more than two years after the cause of action accrues.

The bill does not change the provision that contains the period of repose described above.

COMMENT

1. (a) The date of the decedent's death fixes the status of all beneficiaries of the action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action. (R.C. 2125.02(A)(3)(a).)

(b) Existing law authorizes compensatory damages to be awarded in an action for wrongful death for the following (R.C. 2125.02(B)): (i) loss of support from the reasonably expected earning capacity of the decedent, (ii) loss of services of the decedent, (iii) loss of the society of the decedent (including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education) suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent, (iv) loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death, and (v) the mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent. Under R.C. 2315.21, not in the bill, it appears that punitive or exemplary damages may be awarded in wrongful death actions in accordance with the Punitive and Exemplary Damages Law.

In determining the amount of compensatory damages to be awarded, the jury or court may consider all factors, including remarriage of the surviving spouse, existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death. In connection with an issue of recoverable future damages, a party to an action for wrongful death may present consistent with the Rules of Evidence, and the jury or court may consider, evidence of the cost of an annuity. If that evidence is presented, the present value in dollars of an annuity is its cost. (R.C. 2125.02(A)(3)(b).)

(c) A parent who abandoned a minor child who is the decedent is prohibited from receiving a benefit in an action for wrongful death (R.C. 2125.02(A)(1)).

2. The Ohio Supreme Court recently addressed the application of R.C. 2125.02's wrongful death statute of limitations to a fact situation in which a girl disappeared on July 31, 1992, her body was discovered on December 15, 1992, a suspect was secretly indicted for the girl's murder on January 4, 1993, the suspect pleaded guilty to aggravated murder and kidnapping in the case on February 5, 1993, the court journalized its sentence of the offender on February 10, 1993, and the administrator for the estate of the deceased girl filed a wrongful death action against the offender and another person on February 6, 1995. The trial court

dismissed the wrongful death action because it was not commenced within two years after the date of the girl's death, and the court of appeals affirmed the trial court's dismissal.

The Supreme Court on appeal reversed the court of appeals' decision, holding that: (1) the discovery rule applies to toll the two-year statute of limitations for wrongful death claims that is contained in division (D) of R.C. 2125.02 (normally, a civil cause of action accrues and the statute of limitations begins to run at the time the wrongful act in question was committed--the "discovery rule" is an exception to the general rule, and provides that a cause of action accrues when the plaintiff discovers, or in the exercise of reasonable care should have discovered, that he or she was injured by the wrongful conduct of the defendant), and (2) in a wrongful death action *that stems from a murder*, the statute of limitations begins to run when the victim's survivors discover, or through the exercise of reasonable diligence should have discovered, that the defendant has been convicted of and sentenced for the murder. *Collins v. Sotka* (1998), 81 Ohio St.3d 506.

Collins overruled a prior decision of the Supreme Court, *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, which had held that the General Assembly "intended that wrongful death actions be brought within two years regardless of the date of discovery of the cause of death" and that, thus, "[n]either fraud nor the discovery rule can toll R.C. 2125.02(D), Ohio's statute setting forth the time within which to commence wrongful death actions." In *Collins*, the Court determined that its prior analysis in *Shover* was flawed, generally because circumstances existed under which the injury complained of (i.e., the wrongful death) might not manifest itself immediately and might lead to the injured party's right of recovery being barred by the statute of limitations before the party even is aware of its existence.

3. R.C. 2125.02 was amended by Am. Sub. H.B. 350 of the 121st General Assembly (the 1997 Tort Reform bill) to do all of the following:

(a) Establish a statute of repose for wrongful death actions involving product liability claims;

(b) Revise the types of compensatory damages that may be awarded in an action for wrongful death to include the loss of society of the decedent suffered by the dependent (rather than minor) children of the decedent and the mental anguish incurred by the dependent (rather than minor) children of the decedent;

(c) Make changes of a more technical nature.

Subsequently, in *State ex rel. OATL v. Sheward* (1999), 86 Ohio St.3d 451, the Ohio Supreme Court held Am. Sub. H.B. 350 unconstitutional in its entirety for violating the one subject rule of the Ohio Constitution. The Court also found this section's statute of repose to be an unconstitutional usurpation of judicial power in violation of the separation of powers doctrine. The version of R.C. 2125.02 that appears in the bill is the version as amended by Am. Sub. H.B. 350. By amending that version of R.C. 2125.02, the bill effectively repeals and reenacts the provisions of the section that were found to be unconstitutional in *Sheward*. That repeal and reenactment probably eliminates any Am. Sub. H.B. 350 one subject rule problems with that language. It, of course, raises a one subject rule question with this bill. It is unclear whether the courts will consider the bill's discovery rule provisions to be the same subject as Am. Sub. H.B. 350's statute of repose or compensatory damage provisions. Although this bill would reenact the statute of repose, the statute's constitutional shortcomings have not been addressed; courts probably would continue to find the statute of repose to be unconstitutional. In addition, the title of the bill needs to be amended to reflect the reenactment of the Am. Sub. H.B. 350 provisions.

HISTORY

| ACTION | DATE | JOURNAL ENTRY |
|------------------------|----------|---------------|
| Introduced | 01-26-99 | p. 79 |
| Reported, S. Judiciary | 11-10-99 | p. 1163 |
| Passed Senate (33-0) | 11-10-99 | pp. 1169-1170 |

S0036-PS.123/rss