[Cite as *James v. A-Best Prods. Co.*, 2009-Ohio-3335.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHARLES JAMES, et al.,	)	CASE NOS. 07-MA-42
	)	07-MA-43
PLAINTIFFS-APPELLEES,	)	07-MA-44
	)	07-MA-45
VS.	)	07-MA-46
	)	07-MA-47
A-BEST PRODUCTS CO., et al.,	)	07-MA-48
	)	07-MA-49
DEFENDANTS-APPELLANTS.	)	07-MA-50
	)	07-MA-51
	)	
	)	OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Mahoning County, Ohio Court Case Nos: 02CV151, 02CV743, 02CV1188, 02CV1710, 02CV150, 02CV2432, 02CV746, 02CV745, 02CV2062, 02CV742
JUDGMENT:	Reversed and Remanded

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: June 30, 2009

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DONOFRIO, J.

{¶1} Defendants-appellants, A-Best Products Co., et al, appeal decisions of the Mahoning County Common Pleas Court allowing plaintiffs-appellees', Charles James, et al., claims of asbestos-related injuries to move forward based on its determination that each appellee had submitted sufficient evidence to establish a prima-facie case in compliance with the requirements of R.C. 2307. The central issue of this appeal concerns appellees' ability to recover for asbestos-related injuries and whether recent legislation enacted governing asbestos litigation is unconstitutionally retroactive.

{¶2} This case involves one hundred nine plaintiffs-appellees in ten cases who brought asbestos-related claims against numerous defendants-appellants. In ten separate judgment entries, the trial court found that appellees had submitted evidence demonstrating a prima facie case complying with the requirements of R.C. 2307 thereby allowing the claims to move forward. Implicitly, those decisions were based on the court's previous conclusion that application of H.B. 292's new definitional requirements to such claims was an unconstitutional retroactive application. The court instead applied the common law standard. This appeal followed.

{¶3} A threshold matter concerns whether the judgment entries appealed from constitute final appealable orders. The trial court's judgment entries in each of these ten cases read identically:

{¶4} "Plaintiff's evidence submitted on October 16, 2006 showing a Prima Facie case herein is accepted and ordered filed thereby complying with the requirements of Section 2307 ORC."

{¶5} Such prima facie finding is a specific "provisional remedy" as defined by R.C. 2505.02(A)(3):

{¶6} "'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, *a prima-facie showing*

pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code."

{¶7} However, in order for a provisional remedy to be subject to immediate review, R.C. 2505.02(B)(4)(a) and (b) must be met:

{¶8} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶9} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶10} On March 14, 2007, this court found that subparagraph (a) was self-evident from the order, but that subparagraph (b) was not. Therefore, this court ordered the parties to file memoranda on the jurisdiction of the court to review the order appealed.

{¶11} However, in previous similar, asbestos related cases, this court concluded:

{¶12} "[W]e are persuaded that the legislative intent in expanding the definition of appealable orders to specifically include certain findings under asbestos litigation statutes is clear evidence that the legislature expected this Court to review the trial court's finding that the retroactive application of Am. Sub. H.B. 292 would impair a plaintiff's vested rights, before the actual trial could proceed. While it is not the province of this Court to micromanage trial court proceedings, the importance of the issue on appeal is such that the whole trial process could be affected." *Darrah v. A-Best Products Co.* (Jan. 19, 2007), 7th Dist. No. 06-JE-47. See, also, *McKee v. A-Best Products Co.* (Jan. 24, 2007), 7th Dist. No. 06-MA-164.

{¶13} On its face, the order appealed from is nonspecific giving rise to the question of whether it is a final appealable order. The order makes no reference to retroactive application of Am. Sub. H.B. 292. However, in each of appellees' motions to prove their prima facie case, their sole argument was that retroactive application of

Am. Sub. H.B. 292's requirements embodied in R.C. Chapter 2307 would substantively alter existing Ohio law and eliminate their previously vested rights. Thus, the trial court's orders in these cases effectively found that application of H.B. 292's new definitional requirements to such claims was an unconstitutional retroactive application and rendered the orders final and appealable. Indeed, appellees themselves concede that some of them may not meet the new threshold criteria to qualify under the new law. (Appellees' Brief, p. 1.) Therefore, the trial court's orders in these cases are final appealable orders.

{¶14} Additionally, it appears as though, at the time, the same trial court judge was handling all asbestos related cases filed in the Mahoning County Common Pleas Court. In a similar case and months prior to the judgment entries entered in this case, that same judge entered an order granting the plaintiff's prima-facie case under R.C. 2307 finding "that the retroactive application of H.B. 292 denies Plaintiffs a vested right and that the common law standard shall be applied. That common law standard is that 'asbestos has caused an alteration of the lining of the lung.' Thus Plaintiff has met his burden under ORC §2307 and this matter may proceed to trial." In other words, the judge found the retroactivity of H.B. 292 unconstitutional and applied what he perceived to be the pre-H.B. 292 common law standard. The defendants in that case appealed that decision to this court in *McKee v. A-Best Products Co.*, 7th Dist. No. 06 MA 164.

{¶15} In this case, appellants' sole assignment of error states:

{¶16} "The trial court erred because it failed to apply relevant portions of the asbestos reform statute (i.e. R.C. 2307.91-.93) to Appellees' claims."

{¶17} Appellant Owens-Illinois, Inc. has filed a separate brief setting forth the following three assignments of error:

{¶18} "HB 292's new definitions of preexisting statutory terms may constitutionally apply to cases that were pending when HB 292 became effective."

{¶19} "The plaintiffs' proffered evidence plainly failed to make a prima facie showing under the statutory criteria, as newly defined by the legislature in HB 292."

{¶20} "The plaintiffs' proffered evidence did not even make a prima facie showing under the standards of prior law."

{¶21} As noted at the outset, the central issue of this case is whether H.B. 292's evidentiary requirements embodied in R.C. 2307.91, 2307.92, and 2307.93 violate the Retroactivity Clause of the Ohio Constitution. Appellants assert that they do not and that they should have been applied to appellees' claims. Appellees argue that the requirements impair vested rights and affect substantive rights in violation of the Retroactivity Clause, and that the trial court correctly applied the common law standard.

{¶22} R.C. 2305.10 places limitations on certain types of tort actions. In 1980, the General Assembly amended the accrual statute for asbestos-related personal injury claims. R.C. 2305.10(B)(5) provides:

{¶23} "[A] cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first."

{¶24} Prior to September 2, 2004, the General Assembly did not define terms in R.C. 2305.10(B)(5) such as "competent medical authority," "bodily injury," or "caused by exposure to asbestos."

{¶25} In response to Ohio's asbestos litigation crisis, the General Assembly passed Am.Sub.H.B. No. 292 (H.B. 292) on September 2, 2004. 150 Ohio Laws, Part III, 3970. Key provisions were codified in R.C. 2307.91 to 2307.98. The legislative intent behind passage of the bill was to:

{¶26} "(1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3)

enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future." Section 3(B), Am.Sub.H.B. No. 292.

{¶27} H.B. 292 set forth certain requirements that a plaintiff must meet in order to proceed with an asbestos related claim. It is codified at R.C. 2307.91 through R.C. 2307.98. Pertinent sections include R.C. 2307.91 (definitions), 2307.92 (requirements for prima facie showing of physical impairment in certain asbestos claims), and 2307.93 (filing of reports and test results showing physical impairment; dismissals).

{¶28} The legislation divides asbestos claimants into three distinct categories: (1) those who allege a nonmalignant condition; (2) those who have lung cancer and are also a smoker; (3) and wrongful death claimants. R.C. 2307.92(B), (C), and (D). Appellees appear to be claimants who fall into the first category – those with a non-malignant condition. R.C. 2307.92(B).

{¶29} A person bringing an asbestos claim based on a nonmalignant condition must make a prima-facie showing that they have a physical impairment, that the physical impairment is a result of a medical condition, and that their exposure to asbestos is a substantial contributing factor to the medical condition. R.C. 2307.92(B). In order to establish a prima-facie case, R.C. 2307.92(B) goes on to set forth three detailed evidentiary requirements:

{¶30} "(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

{¶31} “(a) All of the exposed person’s principal places of employment and exposures to airborne contaminants;

{¶32} “(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

{¶33} “(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person’s past and present medical problems and the most probable causes of those medical problems;

{¶34} “(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

{¶35} “(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

{¶36} “(b) Either of the following:

{¶37} “(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person’s physical impairment, based at a minimum on a determination that the exposed person has any of the following:

{¶38} “(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

{¶39} “(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

{¶40} "(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

{¶41} "(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

{¶42} "(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

{¶43} "(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal."

{¶44} To advance their claim, a plaintiff must file a written report and supporting test results that demonstrates that they have made a prima-facie case under R.C. 2307.92. R.C. 2307.93(A). After a plaintiff has filed their prima-facie case, the defendant may challenge the adequacy of the evidence. The trial court is then to resolve the issue by summary judgment. R.C. 2307.93(B). If the court determines that the plaintiff failed to make their prima-facie case, it must administratively dismiss the action without prejudice. R.C. 2307.93(C). The plaintiff may move to reinstate the case if they can subsequently make a prima-facie showing that meets the requirements of R.C. 2307.92.

{¶45} In addition to R.C. 2307.92 and 2307.92's filing requirements, R.C. 2307.91 provides definitions for key terms such as competent medical authority, substantial contributing factor, and substantial occupational exposure to asbestos. As noted, the evidence for a prima-facie case must come from a competent medical authority. R.C. 2307.91(Z) defines a competent medical authority as:

{¶46} "[A] medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that

meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

{¶47} "(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

{¶48} "(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

{¶49} "(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

{¶50} "(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

{¶51} "(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

{¶52} "(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

{¶53} "(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services." R.C. 2307.91(Z).

{¶54} In addition to evidence from a competent medical authority, an asbestos claimant must make a prima-facie showing of causation; that is, that their

exposure to asbestos is a substantial contributing factor to the medical condition that is causing their physical impairment. R.C. 2307.92(B). R.C. 2307.91(FF) defines a substantial contributing factor as both the following:

{¶55} "(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

{¶56} "(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred."

{¶57} Lastly, R.C. 2307.91(GG) defines substantial occupational exposure to asbestos as:

{¶58} "[E]mployment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

{¶59} "(1) Handled raw asbestos fibers;

{¶60} "(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

{¶61} "(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;

{¶62} "(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers."

{¶63} Appellees in this case filed their claims before the passage of H.B. 292. Notably, though, H.B. 292 specifically provides that its threshold evidentiary requirements be applied to all pending asbestos cases regardless of whether they were filed before or after its effective date. R.C. 2307.93(A)(2) and (3).

{¶64} In support of their prima-facie case, each appellee in this case attached a one page form that had been completed by a doctor who read their chest x-ray. It has check boxes to mark for the presence of: parenchymal abnormalities consistent with pneumoconiosis, small and/or large opacities, pleural abnormalities consistent

with pneumoconiosis, pleural thickening, pleural calcification, and any other abnormalities. There seems to be little dispute that this form alone is insufficient to establish a prima-facie case under H.B. 292's threshold evidentiary requirements. Missing, among other requirements, is the claimant's occupational, asbestos exposure, medical, and smoking histories. Strikingly, there is never a mention of asbestos or asbestosis, let alone any causal link (i.e., substantial contributing factor) to the "conditions" noted on the form.

{¶65} In each of the ten judgment entries appealed from, the trial court concluded, "Plaintiff's evidence submitted on October 16, 2006 showing a Prima Facie case herein is accepted and ordered filed thereby complying with the requirements of Section 2307 ORC." Therefore, that conclusion can be based on nothing other than its application of the law as it existed prior to H.B. 292. And, because in attempting to make their prima-facie case appellees contended that H.B. 292's requirements were unconstitutionally retroactive, the only logical import of the trial court's judgment entries was that it implicitly found the requirements unconstitutionally retroactive and applied pre-existing law.

{¶66} Recently and during the pendency of this case, the Ohio Supreme Court took up the central issue of this case – whether H.B. 292's evidentiary requirements embodied in R.C. 2307.91, 2307.92, and 2307.93 are unconstitutionally retroactive for cases pending on September 2, 2004 – in *Ackinson v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118. There were conflicting decisions from the Fourth and Twelfth District Courts of Appeals on the issue. The Court considered four main arguments that the threshold evidentiary requirements were unconstitutionally retroactive: (1) that before H.B. 292, asbestos-related conditions "were compensable under Ohio law when there was merely an alteration of the lungs (such as 'pleural thickening'), irrespective of whether any impairment or disease had developed"; (2) that the definition of "competent medical authority" in R.C. 2307.91(Z) "substantively alters requirements for asbestos claims"; (3) that R.C. 2307.92 alters substantive elements of causation

by requiring prima facie evidence that exposure to asbestos was a "substantial contributing factor" to the claimant's medical condition; and (4) that the statutory definition of "substantial occupational exposure" in R.C. 2307.91(GG) cannot be retroactively applied because it is an attempt to adopt a test that the Ohio Supreme Court had previously rejected in *Horton v. Harwick Chem. Corp.,* 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196. *Ackinson,* 2008-Ohio-5243, at ¶19, 28, 30, and 50.

{¶67} The Court rejected each argument in turn and concluded:

{¶68} "The requirements in R.C. 2307.91, 2307.92, and 2307.93 are remedial and procedural and may be applied without offending the Retroactivity Clause of the Ohio Constitution to cases pending on September 2, 2004." *Ackinson v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, syllabus.

{¶69} Based on the Ohio Supreme Court's pronouncement in *Ackinson*, the trial court's decisions in this case have been rendered erroneous. Accordingly, appellants' sole assignment of error and appellant Owens-Illinois, Inc.'s first assignment of error have merit. Our disposition of those assignments of error renders appellant Owens-Illinois, Inc.'s second and third assignments of error moot. App.R. 12(A)(1)(c).

{¶70} As indicated earlier, the one-page form submitted by appellees plainly does not meet H.B. 292's threshold evidentiary requirements for a prima facie case. Consequently, administrative dismissal of the claims is required by R.C. 2307.93(A)(3)(c). The judgments are hereby reversed and the cases remanded with instructions to the trial court to administratively dismiss the claims. The dismissals

are without prejudice and the trial court retains jurisdiction to reinstate the claims upon a proper prima facie showing pursuant to R.C. 2307.93.

Vukovich, P.J., concurs.

Waite, J., concurs.