[Cite as *McKee v. A-Best Prods. Co.*, 2009-Ohio-3348.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHARLES McKEE, et al. PLAINTIFFS-APPELLEES VS. A-BEST PRODUCTS CO., et al. DEFENDANTS-APPELLANTS	)))))))))	CASE NO. 06 MA 164 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 01 CV 853

JUDGMENT: Reversed and Remanded.

JUDGES:

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

Dated: June 30, 2009

[Cite as *McKee v. A-Best Prods. Co.*, 2009-Ohio-3348.]

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[Cite as *McKee v. A-Best Prods. Co.*, 2009-Ohio-3348.]
WAITE, J.

{¶1} Appellant A-Best Products, Co., is one of 80 named defendants in a personal injury case involving claims of asbestos-related injury filed in the Mahoning County Court of Common Pleas. The defendants include, inter alia, Union Carbide Corporation, Ingersoll-Rand Co., Ohio Valley Insulating Company, Inc., Honeywell International, Inc., Mobil Corporation, Metropolitan Life Insurance Company, Uniroyal Rubber Company, and Minnesota Mining and Manufacturing Company. The allegations include negligence, negligent installation, strict liability, breach of warranty, fraudulent concealment, and conspiracy. The particular ruling at issue in this appeal granted a motion filed by the plaintiffs requesting that the case be set for trial and that the case be tried under the law as it existed prior to the enactment of Am.Sub.H.B. 292, effective September 2, 2004 (hereinafter "H.B. 292"). H.B. 292 requires a plaintiff alleging asbestos-related injury to make a prima facie showing of asbestos-related injury through evidence prepared by a competent medical authority, as defined in R.C. 2307.91. This new law specifically states that it is to be applied to cases pending on the effective date of the statute. R.C. 2307.92-93. Appellees argued that the retroactive application of H.B. 292 was unconstitutional. The trial court granted Appellees' motion. The court held that H.B. 292 was unconstitutionally retroactive because it denied Appellees a vested right. The court ordered the case to proceed under common law standards rather than the new statutory standards found in R.C. 2307.91 et seq. This appeal followed.

{¶2} We ordered the parties to file jurisdictional memoranda as to whether there was a final appealable order in this case. While the appeal remained pending,

the Ohio Supreme Court released *In re Special Docket No. 73958,* 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596, which held that a trial court's ruling regarding the constitutionality of retroactively applying R.C. 2307.92 is a provisional remedy and may be a final and appealable order pursuant to R.C. 2505.02(A)(3). Such an order is a final appealable order if the order in effect determines the action and prevents a judgment in the action in favor of the appealing party. In *In re Special Docket No. 73958*, the trial court ruled that the retroactive application of R.C. 2307.92 was unconstitutional and ordered to case to proceed under the substantive law that existed prior to the enactment of H.B. 262. The Ohio Supreme Court determined that this determination by the trial court was a final appealable order. The matter was remanded to the Eighth District Court of Appeals to review the substantive issues in the appeal. The judgment entry under review in the instant appeal is factually and procedurally indistinguishable from the judgment entry in *In re Special Docket No. 73958*. We filed a journal entry on January 24, 2007, finding no jurisdictional error and allowed this appeal to proceed.

{¶3} Appellants argue on appeal that H.B. 292 does not impair vested rights, does not add new obligations or disabilities to past transactions, has a remedial and procedural effect, and therefore, is not unconstitutionally retroactive under Section 28, Article II of the Ohio Constitution. During the pendency of this appeal the Ohio Supreme Court issued its opinion in *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118. In *Ackison*, the Supreme Court held that the prima facie filing requirements of H.B. 292 do not offend the Retroactivity Clause of

the Ohio Constitution and should be applied to cases pending on the effective date of the legislation. The trial court in the instant case improperly held that H.B. 292 was unconstitutionally retroactive and incorrectly ordered this case to proceed to trial rather than require Appellees to make a prima facie showing pursuant to R.C. 2307.92-93. The trial court also incorrectly found that Appellee Joseph Shary met his prima facie evidentiary burden. The judgment of the trial court is reversed and the case is remanded for further proceedings. The trial court is also ordered to administratively dismiss, without prejudice, the claims of Appellee Joseph Shary.

Procedural History

{¶4} Appellees filed their complaint on March 30, 2001. The complaint listed 37 plaintiffs and 80 defendants. Joseph Shary, Philip Easton and John J. Maskarinec were three of the named plaintiffs. On July 25, 2005, the court ordered two of the plaintiffs, Phillip Easton and John J. Maskarinec, to submit prima facie evidence of asbestos-related injury as required by newly enacted R.C. 2307.91-98. On September 30, 2005, Easton and Maskarinec filed a "motion for trial setting," and in the motion they raised the objection that retroactive application of R.C. Chapter 2307 was unconstitutional. Appellants opposed the motion, and on November 15, 2005, they filed a motion requesting administrative dismissal of the complaint for failure to present a prima facie showing of asbestos-related injury pursuant to R.C. 2307.92-93. On November 30, 2005, plaintiff Joseph Shary filed a motion to prevent the application of the prima facie requirements of R.C. 2307.92-93 because the new legislation was unconstitutionally retroactive. Shary also filed two one-page

documents and two affidavits purporting to establish a prima facie case of asbestos-related injury.

{¶5} On September 18, 2006, the trial court ruled on the pending motions. The court ruled that H.B. 292 denied plaintiffs' vested rights and ordered that common law standards apply to the case. The court also ruled that plaintiff Joseph Shary met his burden under R.C. Chapter 2307. The court then ordered the case to proceed to trial. This appeal followed on October 17, 2006.

{¶6} On March 12, 2007, Attorney Robert H. Riley was granted permission to appear pro hac vice as attorney for the Appellants on appeal.

{¶7} On April 3, 2007, Attorney Vincent L. Greene was granted permission to appear pro hac vice as attorney for the Appellees on appeal.

{¶8} As earlier stated, on November 2, 2006, we filed a journal entry requiring the parties to brief the jurisdictional issue in this case regarding whether there was a final appealable order. On January 24, 2007, we determined that there was a final appealable order in the case and allowed the appeal to continue. While this appeal was pending, the Ohio Supreme Court heard the *Ackison* case to determine the same substantive issue in this appeal. Oral argument was scheduled after the resolution of *Ackison* by the Ohio Supreme Court.

{¶9} Appellants, CertainTeed Corporation and Union Carbide Corporation filed their merit brief on February 22, 2007. Several Appellants, together with their respective counsel, authorized the filing of this brief. Appellant, Owens-Illinois, Inc.

filed its own merit brief on February 26, 2007. The Appellees' brief was filed on March 14, 2007. Reply briefs were filed on March 23rd and 26th, 2007, respectively.

ASSIGNMENT OF ERROR

{¶10} "The trial court erred by ruling that applying H.B. 292 (R.C. 2307.91-2307.98) to Appellee's [sic] case would deny him a vested right."

{¶11} Appellants are challenging the trial court's interpretation and application of Section 28, Article II of the Ohio Constitution, which states:

{¶12} "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

{¶13} Determination of the constitutionality of a statute presents a question of law which is reviewed de novo on appeal. *Akron v. Callaway*, 162 Ohio App.3d 781, 2005-Ohio-4095, 835 N.E.2d 736, ¶23.

{¶14} H.B. 292 clarifies a variety of issues relating to the accrual date and limitations period in a cause of action for bodily injury caused by exposure to asbestos. R.C. 2305.10(B)(5) sets forth the statute of limitations governing these causes of actions. Prior to 1980, a two-year statute of limitations applied to asbestos actions. In 1980, R.C. 2305.10(B) was amended so that a cause of action for bodily injury for exposure to asbestos did not accrue until the date a plaintiff was informed,

or should have become aware, by competent medical authority, that he or she had been injured by such exposure.

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

{¶16} The Ohio State Legislature passed H.B. 292 to deal with a number of severe problems that had arisen in the voluminous asbestos litigation in Ohio. H.B. 292 became effective in September 2004, after Appellees' complaint was filed. According to the uncodified law included with H.B. 292, the prior method of dealing with asbestos cases was deemed to be, "* * * unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of $54 billion dollars have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range from two hundred billion to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick." Uncodified law accompanying H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3988.

{¶17} The General Assembly noted that, "Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings." (Emphasis omitted.) Id. at Section 3(A)(3)(b). The General Assembly also pointed out that, at the time H.B. 292 was being considered, Ohio had 35,000 pending asbestos cases and dockets were rapidly increasing. Between 1999 and 2003, the number of pending asbestos cases increased from 12,800 to 39,000. Id. at Section (3)(A)(3)(b)-(e). The General Assembly was aware that the entire nation was affected by these asbestos cases. Litigation had contributed to the bankruptcy of more than 70 companies, including nearly all manufacturers of asbestos textile and insulation products, and at least five Ohio-based companies were forced into bankruptcy because of asbestos cases brought by claimants who were not sick at the time they filed their complaints. Id. at Section (4) and (4)(c).

{¶18} The General Assembly concluded that the vast majority of claims are filed by individuals who allege exposure to asbestos and may have some physical signs of exposure, but do not have an asbestos-related impairment. Id. at Section 5. In response to its findings, the General Assembly devised a new statutory system that would force claimants to meet certain prima facie requirements in order to maintain tort actions that involve asbestos claims. Under the new rules established by H.B. 292, if the trial court finds that a claimant cannot meet this prima facie burden, the court must administratively dismiss the claim without prejudice. R.C. 2307.93(A)(3)(c).

{¶19} The key provisions of H.B. 292 are codified in R.C. 2307.91 to 2307.98. R.C. 2307.92(A) defines "bodily injury caused by exposure to asbestos" as, "physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor." R.C. 2307.92(B)-(D) sets forth the prima facie requirements that a plaintiff must meet before he or she may bring or maintain a tort action in an asbestos claim. Plaintiffs must make a prima facie showing that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. The prima facie evidence must be provided by "competent medical authority," which is defined in great detail in R.C. 2703.91(Z). This section requires, among other things, that the medical authority be a board-certified medical doctor, that the doctor has actually treated the patient, and that the doctor has not spent more than 25% of his time in consulting or expert services in tort cases. The new law establishes a detailed set of evidentiary requirements for three distinct types of asbestos claims: those who allege a nonmalignant condition; those who are smokers and have lung cancer; and wrongful death claimants. R.C. 2307.92(B)-(D). Under each subcategory are a series of further evidentiary requirements that the plaintiff must meet before the claim will be permitted to go forward.

{¶20} R.C. 2307.93 also contains a requirement that the new law be applied retroactively to asbestos injury cases already pending in the court system:

{¶21} "(A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

{¶22} "(2) *With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section.* Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

{¶23} "(3)(a) *For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of*

the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

{¶24} "*(i) A substantive right of a party to the case has been impaired.*

{¶25} "*(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.*

{¶26} "(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

{¶27} "(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

{¶28} "(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted

whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

{¶29} "(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code." (Emphasis added.)

{¶30} According to Appellants, the trial court should have applied R.C. 2307.91 et seq. to Appellees' claims, including the new prima facie evidence requirements, and by ruling that the new law was unconstitutional, the new prima facie test could not be applied. Under the new law, if the plaintiff does not meet the prima facie evidentiary test, the case is administratively dismissed without prejudice, but the trial court retains jurisdiction over the case. R.C. 2307.93(C). The case may be reinstated at a later date if a prima facie showing is made. Appellants contend that once the new law is properly applied, the case should not be permitted to proceed to trial until the plaintiffs have made their prima facie showing. Appellants

also argue that plaintiff Joseph Shary did not meet the prima facie evidentiary requirements either under H.B. 292 or under the rules that prevailed prior to H.B. 292.

{¶31} All legislation begins with a presumption of constitutionality, and it is not the court's duty to assess the wisdom of a particular statute when considering its constitutionality. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 217, 2008-Ohio-546, 883 N.E.2d 377, at ¶141. The fact that a statute contains a directive that it be applied retroactively does not mean it automatically offends the Ohio Constitution. A retroactive statute is unconstitutional, "if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 354, 721 N.E.2d 28. To decide if legislation is unconstitutionally retroactive, the court must first determine whether the General Assembly expressly intended the statute to apply retroactively. The court subsequently addresses the question as to whether the statute is substantive, rendering it unconstitutional. Merely remedial statutes do not offend Section 28, Article II of the Ohio Constitution.

{¶32} The Ohio Supreme Court in *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, held that R.C. 2703.91-98 was expressly made retroactive, does not impair substantive rights, and therefore does not run afoul of the prohibition against retroactive laws found in Section 28, Article II of the Ohio Constitution. Id. at ¶62. The Supreme Court held that R.C. 2703.91 et seq. does not relate to the rights and duties that give rise to a cause of action or otherwise make it more difficult for a

claimant to succeed on the merits of a claim. Id. at ¶16. Rather, R.C. 2703.91 et seq. pertains to the machinery for carrying on a suit, and is thus procedural in nature rather than substantive. Id. R.C. 2703.92-93 in particular establishes "a procedural prioritization" of asbestos-related cases. Id. at ¶17. " 'Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. No new substantive burdens are placed on claimants * * *.' " Id. quoting *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶17. Instead, the enactments, "merely substitute a new or more appropriate remedy for the enforcement of an existing right." Id. quoting *State v. Cook* (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570.

{¶33} It is clear from the *Ackison* case that R.C. Chapter 2703 is constitutional and must be applied to pending asbestos cases. The trial court's conclusion that H.B. 292 affects a vested right and is therefore unconstitutional is directly contradicted by the holding in *Ackison*. *Ackison* held that there was no vested right to have previously undefined terms, such as "competent medical authority," remain undefined. Id. at ¶29. *Ackison* held that H.B. 292 did not change the substantive common-law elements of causation when it required prima facie evidence that exposure to asbestos was a "substantial contributing factor" to the claimant's medical condition. Id. at ¶30. The Court found that H.B. 292 embodies, rather than changes, the common-law requirement that asbestos exposure be both a cause in fact and the direct cause of the plaintiff's illness. Id. at ¶49. The Supreme Court also stated that H.B. 292 did not contradict prior caselaw, e.g. *Horton v. Harwick Chem. Corp.* (1995),

73 Ohio St.3d 679, 653 N.E.2d 1196, by requiring a plaintiff to make a prima facie showing as to whether a plaintiff's claimed injuries are genuinely asbestos-related. Id. at 52. The various holdings in *Ackison*, then, support Appellants' argument on appeal. We hereby sustain Appellants' assignment of error and reverse the judgment of the trial court.

{¶34} The additional issue remaining in this appeal is whether the specific evidence presented by plaintiff Joseph Shary satisfies the prima facie requirements of R.C. 2307.92-93, or whether his case should be administratively dismissed. Mr. Shary submitted a one-page "B-Reader" form, which is a type of x-ray report, and a one-page report prepared by Ralph Shipley, M.D. Mr. Shary also submitted two affidavits setting forth the period he worked for Republic Steel and stating that he worked with asbestos products. Appellees are fully aware that the two pages of medical data and the affidavits likely do not meet the prima facie requirements of R.C. 2307.91-93. (Appellees' Brf., pp. 2, 20-21.)

{¶35} Plaintiff Shary alleged a nonmalignant condition, and was thus subject to the prima facie evidence requirements of R.C. 2307.92(B), which states:

{¶36} "(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial

contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

{¶37} "(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:

{¶38} "(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

{¶39} "(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.

{¶40} "(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;

{¶41} "(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:

{¶42} “(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.

{¶43} “(b) Either of the following:

{¶44} “(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:

{¶45} “(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;

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

{¶47} “(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.

{¶48} “(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:

{¶49} "(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;

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

{¶51} We cannot discern from Mr. Shary's evidence whether Dr. Shipley is a competent medical authority as defined by the statute, or whether he is a certified B-Reader. Appellee's evidence contains no detailed occupational and exposure history. There is no list of all of Mr. Shary's principal places of employment and exposures to airborne contaminants. There is no detailed medical history, including smoking history, reviewing past and present medical conditions and their probable causes. There is no diagnosis of permanent respiratory impairment. These are just a few of the deficiencies in the evidence submitted in support of Mr. Shary.

{¶52} According to R.C. 2307.93(B), the trial court should have ruled on the evidence submitted as if it were presented in summary judgment:

{¶53} "(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The

court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment."

{¶54} Summary judgment is reviewed de novo on appeal. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. Judgment is proper only when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude that no genuine issue as to any material fact remains to be litigated, and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer* (2001), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243.

{¶55} We are persuaded, based on our de novo review of the record, that the medical records that were submitted do not meet the new prima facie requirements of R.C. 2307.92-93. Administrative dismissal of the claims is required by R.C. 2307.93(A)(3)(c). The administrative dismissal is without prejudice and may be reinstated upon a proper prima facie showing:

{¶56} "(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the

plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose."

{¶57} In conclusion, we hold that the trial court erred in finding R.C. 2703.91 et seq. unconstitutional and in failing to apply it to this case. It is clear from the *Ackison* case that R.C. Chapter 2703 is constitutional and must be applied to pending asbestos cases. We also hold that Appellee Joseph Shary did not meet the prima facie requirements of R.C. 2703.92. The judgment of the trial court is reversed and the case remanded so that R.C. Chapter 2703 can be applied and for further proceedings. We further order the trial court to administratively dismiss the claims of Joseph Shary. The administrative dismissal is to be without prejudice, and the trial court is to retain jurisdiction over the claims pursuant to R.C. 2307.93.

Donofrio, J., concurs.

Vukovich, P.J., concurs.