[Cite as *Holston v. Adience, Inc.*, 2010-Ohio-2482.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93616

EDWARD HOLSTON, ET AL.

PLAINTIFFS-APPELLANTS

vs.

ADIENCE, INC., FKA BMI, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV- 682565

BEFORE: Blackmon, J., Rocco, P.J., and Jones, J.

RELEASED: June 3, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement

of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellants Edward and Karen Holston ("the Holstons") appeal the trial court's decision granting appellees Goodyear Tire & Rubber, Goodrich Corporation, f.k.a. the B.F. Goodrich Company, Inc., and Foseco, Inc.'s motion to administratively dismiss their complaint. The Holstons assign the following error for our review:

> **"I. The trial court erred by granting defendants The Goodyear Tire & Rubber, Goodrich Corporation, f/k/a the B.F. Goodrich Company, Inc., and Foseco, Inc.'s motion to administratively dismiss for failure to submit prima facie evidence of a physical impairment. Journal Entry dated July 8, 2009."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On February 26, 2008, Edward Holston was diagnosed with lung cancer.

{¶ 4} On January 21, 2009, he and his wife, Karen, filed an asbestos-related complaint against several companies, including Goodyear Tire & Rubber, Goodrich Corporation, formerly known as B.F. Goodrich Company, Foseco's, Inc., and Adience, Inc., as well as "John Does 1-100 Manufacturers, Sellers or Installers of Asbestos-Containing Products." ("appellees"). The

complaint alleged injury to Edward Holston from workplace exposure to products containing asbestos during the period from 1971 through 2000.

{¶ 5} On March 19, 2009, the appellees filed a motion to administratively dismiss the Holstons' complaint for failure to submit prima facie evidence of a physical impairment. In its motion, the appellees argued that the Holstons did not file a written report and supporting test results pursuant to the provisions of Am.Sub.H.B. ("H.B. 292"), R.C. 2307.91, et seq.

{¶ 6} On April 1, 2009, the Holstons filed a memorandum in opposition to appellees' motion to administratively dismiss, and provided a November 3, 2008 report of one of Edward Holston's treating physicians, Edgar H. Sanchez, M.D., which stated in pertinent part as follows:

> **"Mr. Holston's work history reveals he has substantial occupational exposure to asbestos while working at Wheeling-Pittsburgh Steel's Follansbee Coke Plant and Steubenville plant from 1971 to 2000. The type of work that he performed required that he work in close proximity to other workers who altered, repaired or otherwise worked with asbestosis [sic]-containing products in such a manner that exposed him to asbestos in a regular manner. In my medical opinion I feel that Mr. Holstons [sic] work history and his history of tobacco use directly contribute to his diagnosis of Lung Cancer."**

{¶ 7} The Holstons filed a supplement to the above report, which indicated that Dr. Sanchez is a board certified pulmonary specialist, who does not derive more than 20% of his revenue from providing expert consultations in connection with tort actions.

{¶ 8} On May 4, 2009, the appellees filed a reply memorandum to further support their motion to administratively dismiss the complaint and argued that Dr. Sanchez's letter did not fulfill the requirements of R.C. 2307.92.

{¶ 9} On June 12, 2009, the trial court held a hearing on appellees' motion to administratively dismiss the Holstons' complaint. On June 17, 2009, the trial court issued an order administratively dismissing the Holstons' complaint without prejudice. The Holstons now appeal.

Administrative Dismissal of Complaint

{¶ 10} In the sole assigned error, the Holstons argue the trial court erred when it granted appellees' motion to administratively dismiss the complaint.

{¶ 11} As a threshold matter, pursuant to the Ohio Supreme Court's pronouncements in *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596, we have jurisdiction to review the instant appeal. There, the court held that a prima facie finding is a provisional remedy pursuant to R.C. 2505.02(A)(3), that the order of the trial court determined the action and prevented a judgment with respect to the provisional remedy, and that the aggrieved parties will be unable to obtain a meaningful or effective remedy upon appeal from a final judgment. Id. Consequently, the trial court's administrative dismissal rendered a final appealable order, pursuant to R.C. 2505.02(B)(4), which states in pertinent part as follows:

> **"(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:**

"* * *

"(4) An order that grants or denies a provisional remedy and to which both of the following apply:

"(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.

"(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."

{¶ 12} Since the trial court's order with respect to the provisional remedy satisfies both requirements of R.C. 2505.02(B)(4) and is, therefore, final and appealable, we review the Holstons' assigned error.

{¶ 13} In granting appellees' motion to administratively dismiss the Holstons' complaint, the trial court found as follows:

"The sole issue is the meaning of Dr. Sanchez's opinion regarding the cause of Plaintiff's lung cancer when Dr. Sanchez concludes 'that Mr. Holston's work history and his history of tobacco use directly contribute to his diagnosis of lung cancer.' At issue is whether Dr. Sanchez's opinion fulfills the requirements of R.C. §2307.92(C)(1) and the opinion of the Ohio Supreme Court in *Ackinson v. Anchor Packing Company*, 120 Ohio St.3d. 228, 2008-Ohio-5243, that 'without the exposure to asbestos the injury would not have occurred.' In *Ackinson*, the Ohio Supreme Court approved this requirement as a 'but for' test of causation. As such, Dr. Sanchez's opinion does not fulfill requirements of the statute. * * *"

{¶ 14} On September 2, 2004, Am.Sub.H.B. 292 became effective, and its key provisions were codified in R.C. 2307.91 through 2307.98. *Farnsworth v.*

Allied Glove Corp., Cuyahoga App. No. 91731, 2009-Ohio-3890. The statutes require plaintiffs who assert asbestos claims to make a prima facie showing by a competent medical authority that exposure to asbestos was a substantial contributing factor to their medical condition resulting in a physical impairment. Stated in other words, the Ohio legislature found that prioritizing these cases "will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future." *Cross v. A-Best Prods. Co.*, Cuyahoga App. No. 90388, 2009-Ohio-3079; Am. Sub. H.B. 292, Section 3(A)(5). See, also, *Sinnott v. Aqua-Chem, Inc., et al.*, 116 Ohio St.3d 158, 160, 2007-Ohio-5584, 876 N.E.2d 1217 (stating that requiring prima facie evidence by an asbestos plaintiff "is an attempt to place those already ill at the head of the line for compensation").

{¶ 15} If the trial court finds that the plaintiff failed to make the requisite prima facie showing, the court must administratively dismiss the plaintiff's claim without prejudice. *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682; R.C. 2307.93(C). Any plaintiff whose case has been administratively dismissed may move to reinstate his or her case if the plaintiff makes a prima facie showing that meets the requirements of R.C. 2307.92(B), (C), or (D). R.C. 2307.93(C). Id.

{¶ 16} R.C. 2307.92 provides in pertinent part as follows:

> **"(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, 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:**
>
> **"(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer; * * *."**

{¶ 17} "Substantial contributing factor" is defined as "[e]xposure to asbestos [that] is the predominate cause of the physical impairment alleged in the asbestos claim" and that "[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." *Link v. Consol. Rail Corp.*, Cuyahoga App. No. 92503, 2009-Ohio-6216; R.C. 2307.91(FF)(1) and (2).

{¶ 18} In *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, the Ohio Supreme Court construed the statute as requiring that asbestos exposure be a significant, direct cause of the injury to the degree that without the exposure to asbestos, the injury would not have occurred. Id.

{¶ 19} In the instant case, Dr. Sanchez's statement fails to meet the requirement of the statute, which requires "but for" Holston's workplace exposure

to asbestos, he would not have developed lung cancer. The record indicates that Dr. Sanchez stated that Holston's work history and his history of tobacco use directly contributed to his diagnosis of lung cancer. As such, Holston fails to establish a prima facie case demonstrating that his alleged exposure to asbestos was a substantial contributing factor in causing his lung cancer.

{¶ 20} Based on the foregoing, the trial court did not err in administratively dismissing Holston's complaint without prejudice. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellees recover from appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR