[Cite as *Whipkey v. Aqua-Chem, Inc.*, 2009-Ohio-3369.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88240

WILLIAM WHIPKEY, ET AL.

PLAINTIFFS-APPELLEES

vs.

AQUA-CHEM, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-521667

BEFORE: Jones, J., Cooney, A.J., and Celebrezze, J.

RELEASED: July 9, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANTS

FOR: General Motors Corp, et al.

Susan Squire Box
Brad A. Rimmel
Nathan F. Studeny
Roetzel & Andress
222 South Main Street
Akron, Ohio 44308

FOR: Cooper Industries, Inc.

L. John Argento
John W. Bruni
Stephen R. Mlinac
Anne L. Wilcox
Swartz Campbell LLC
4750 U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219

FOR: Garlock Sealing Technologies

Victoria D. Barto
Christina Tuggey Hidek
Matthew C. O'Connell
Douglas R. Simek
Sutter, O'Connell & Farchione Co. LPA
3600 Erieview Tower
1301 East 9th Street
Cleveland, Ohio 44114

Attorneys Continued

ATTORNEYS FOR APPELLEES

Mary Brigid Sweeney
Christopher J. Hickey
Brent Coon & Associates
Suite 303
1220 West Sixth Street
Cleveland Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendants-appellants General Motors Corporation ("GM") and Garlock Sealing Technologies ("Garlock") (jointly "appellants") appeal the judgment of the lower court finding that R.C. 2307.93 (Am. Sub. H.B. 292 ("H.B. 292")) cannot be retroactively applied to the lawsuit filed by plaintiffs-appellees, William and Marilyn Whipkey.[1] Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand to the lower court.[2]

{¶ 2} On or about February 9, 2004, William and Marilyn Whipkey filed a complaint against various defendants, including GM and Garlock, alleging injury due to exposure to asbestos-containing products manufactured and/or distributed by each defendant. More specifically, the Whipkeys' claim is based upon William Whipkey's development of lung cancer. GM argues in its brief to this court that Mr. Whipkey's own admission and medical documentation indicate that he had been a cigarette smoker for over 40 years of his life, even continuing to use tobacco following his lung cancer diagnosis.[3]

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[1]William Whipkey passed away in September 2007, but the action was maintained by Marilyn individually and on behalf of William's Estate.

[2]This appeal is on remand from the Ohio Supreme Court finding the May 4, 2006 journalized order of the Cuyahoga County Court of Common Pleas final and appealable pursuant to R.C. 2502.02(A)(3) and 2502.02(B)(4). *Whipkey v. Aqua-Chem, Inc.*, 116 Ohio St.3d 224, 2007-Ohio-6094, citing *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596.

[3]See General Motors' Motion to Administratively Dismiss, Record at Tab 6.

{¶ 3} On June 3, 2004, Governor Taft signed Ohio's asbestos litigation reform law, otherwise known as H.B. 292. The General Assembly acknowledged that Ohio has a very high number of asbestos claims and, therefore, additional guidance and direction was needed. The General Assembly provided additional guidance by clarifying certain previously undefined statutory terms, such as "competent medical authority" and "bodily injury" contained in R.C. 2305.10(B)(5). More specifically, H.B. 292, which went into effect on September 2, 2004, establishes minimum medical requirements for filing or maintaining certain asbestos claims, including claims for lung cancer brought by individuals who are smokers as defined under the statute. See R.C. 2307.91(DD); R.C. 2307.92(C).

{¶ 4} The act requires a plaintiff to produce a written report and supporting test results constituting prima facie evidence of a physical impairment meeting certain minimum requirements. Failure to make a prima facie showing subjects the case to administrative dismissal, without prejudice, and tolls the statute of limitations for the claim. R.C. 2307.93(C); R.C. 2307.94(A).

{¶ 5} In August 2005, GM moved to administratively dismiss the Whipkeys' lawsuit. GM argued that the Whipkeys failed to provide a prima facie case as required by H.B. 292. Specifically, GM maintained that the Whipkeys failed to submit a report from a competent medical authority concluding that William Whipkey's exposure to asbestos was a substantial contributing factor to

his lung cancer. GM argued that Mr. Whipkey's long history of smoking was a substantial contributing factor to his lung cancer, and the Whipkeys argued that the retroactive application of H.B. 292 affected a substantial right.

{¶ 6} After a hearing in February 2006, the trial court denied GM's motion, finding that the Whipkeys filed their complaint in February 2004, which was prior to the effective date of H.B. 292. Therefore, the court concluded that the case would proceed under the law that was in effect prior to September 2, 2004. It is from this order that appellants GM and Garlock appealed. The Whipkeys moved to dismiss the appeal for lack of final appealable order. This court granted the claimants' motion to dismiss in July 2006.

{¶ 7} Appellants then appealed to the Ohio Supreme Court, contending that the trial court's decision is a final appealable order. See *Whipkey v. Aqua-Chem, Inc.*, 112 Ohio St.3d 1440, 2007-Ohio-152, 860 N.E.2d 765. The Supreme Court reversed and remanded the matter, finding that the trial court's decision was a final appealable order pursuant to *In re Special Docket No. 73958*, supra. Appellants now appeal.

{¶ 8} Appellants assign one assignment of error on appeal:

{¶ 9} "[1.] The trial court erred by declining to retroactively apply the provisions of R.C. 2307.91, R.C. 2307.92, and R.C. 2307.93 to Plaintiffs-Appellees' case."

{¶ 10} The General Assembly enacted H.B. 292 in order to: "(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." Am.Sub.H.B. 292, Section 3(B).

{¶ 11} The key provisions of H.B. 292 are codified in R.C. 2307.91 through 2307.98. These provisions require plaintiffs who file an asbestos action based on allegations of nonmalignant conditions to present a prima facie showing that the exposed person has a physical impairment resulting from a medical condition, and that the person's exposure to asbestos was a substantial contributing factor to the medical condition. See R.C. 2307.92(B)-(D) and 2307.93(A)(1).

{¶ 12} If the plaintiff fails to make such a showing, then the trial court is required to administratively dismiss the action, without prejudice, until the claimant can satisfy the new prima facie requirements. R.C. 2307.93(C). In addition, the prima facie filing requirements apply retroactively to causes of action arising before September 2, 2004, unless the trial court determines that retroactive application would be unconstitutional. This "savings clause" allows the trial court to apply the law that existed before the effective date of the legislation. R.C. 2307.93(A)(3)(c). See, also,

In re Special Docket No. 73958, Cuyahoga App. Nos. 87777 and 87816, 2008-Ohio-4444.

{¶ 13} As we stated in *In re Special Docket No. 73958* and the Ohio Supreme Court concluded in *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, "[t]he 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." Id. at syllabus.

{¶ 14} The requirements in R.C. 2307.92 and 2307.93, regarding asbestos-related personal injury litigation, are remedial and procedural in nature and are, therefore, not unconstitutionally retroactive. Id.

{¶ 15} However, as previously mentioned, H.B. 292 also provides claimants with a "savings clause" that prevents a ruling that H.B. 292 itself is unconstitutional and directs courts to engage in a constitutional inquiry before applying H.B. 292 to pending cases.

{¶ 16} R.C. 2307.93(A)(3)(a) provides that for any cause of action arising before the effective date of this section, the provisions set forth in R.C. 2307.92(B), (C), and (D) are to be applied unless the court finds that: "[a] substantive right of a party to the case has been impaired" and "that impairment is otherwise in violation of Section 28 of Article II of the Ohio Constitution." If the court makes both of those findings, it must apply the law that was in effect prior to the effective date of R.C. 2307.93. Id.

{¶ 17} In the instant case, the trial court stated in its judgment entry:

> "Motion to Administratively Dismiss Plaintiffs' claims pursuant to R.C. § 2307.93 is denied. Plaintiff filed his complaint on February 8, 2004, prior to the effective date of H.B. 292. Therefore, this case shall proceed under the law that was in effect prior to the effective date of the Act."

{¶ 18} In reviewing this entry, we find that the trial court did not deny the dismissal by relying on the savings clause.

{¶ 19} In *Olson v. Consol. Rail Corp.*, Cuyahoga App. No. 90790, 2008-Ohio-6641, ¶15, the trial court had specifically found that "based on the unique factual circumstances of [Olson's] case, the retroactive application of the filing requirements of R.C. 2307.92 would impair Olson's substantive rights and such impairment [would violate] the Ohio Constitution. The trial court's holding was based on the fact that Olson had five other non-asbestos-related claims that would be precluded from going forward if R.C. 2307.92 was applied retroactively."

{¶ 20} We affirmed the application of the savings clause to Olson's case.

{¶ 21} Contrary to the Whipkeys' argument, there is nothing in the record to demonstrate that the trial court relied on the savings clause in its decision. A review of the entry, in its entirety, reveals no specific mention of the savings clause and/or its application to this case.

{¶ 22} Accordingly, based on the aforementioned case law, we find that the lower court erred in declining to retroactively apply the provisions of R.C. 2307.91, 2307.92, and 2707.93 to the Whipkeys' case. We hereby reverse the

judgment of the trial court and remand this case for further proceedings in accordance with this opinion.

{¶ 23} Accordingly, appellants' sole assignment of error is sustained.

{¶ 24} Judgment is hereby reversed and remanded.

{¶ 25} This case is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of appellees 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.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR