[Cite as *Farnsworth v. Allied Glove Corp.*, 2009-Ohio-3890.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91731

ROBERT FARNSWORTH, ET AL.

PLAINTIFFS-APPELLANTS

vs.

ALLIED GLOVE CORPORATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-629507

BEFORE: Boyle, J., Kilbane, P.J., and Sweeney, J.

RELEASED: August 6, 2009

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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), is filed within ten (10) 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. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} The central question presented in this case is a narrow one, namely, who has the burden in a lung-cancer asbestos action to prove that an exposed person is a smoker as defined by R.C. 2307.91(DD). Plaintiffs-appellants, Robert and Betty Farnsworth, claim that defendants-appellees must prove, through competent medical authority, that Robert was a smoker. Defendants-appellees maintain that if they are compelled to do so, it would essentially eliminate the requirement under H.B. 292 that plaintiffs must establish a prima facie showing in a "smoker-lung-cancer" asbestos action. Because we agree with appellees that the Farnsworths' interpretation of the statute would obviate a plaintiff's burden to establish a prima facie case under R.C. 2307.92(C), we affirm the trial court's finding of fact that Robert was a smoker, as well as its subsequent administrative dismissal of the action.

Procedural Facts and History

{¶ 2} Robert Farnsworth was diagnosed with lung cancer in December 2005. He and his wife, Betty, filed an asbestos-related claim in July 2007, alleging that Robert's occupational exposure to asbestos at Ormet Aluminum Corporation, where

he was employed from 1958 until 1997, caused him to develop asbestosis first, and later, lung cancer. The Farnsworths named 25 defendants in the complaint, as well as "John Does 1-100 Manufacturers, Sellers or Installers of Asbestos-Containing Products."

{¶ 3} In February 2008, defendants moved to administratively dismiss the case, arguing that Robert was a smoker for purposes of R.C. 2307.92 and 2307.93. They maintained that because Robert was a smoker, plaintiffs were required to establish a prima facie case through competent medical authority, which they failed to do.

{¶ 4} In their memorandum in opposition, the Farnsworths only responded that Robert was not a smoker as defined under R.C. 2307.91(DD) and, therefore, they did not have to establish a prima facie showing. The Farnsworths argued to the trial court that defendants did not submit reports by competent medical authority establishing that Robert was a smoker. They further argue to this court that the evidence they submitted in their opposition memorandum, including Robert's affidavit, at least created a question of fact as to whether Robert was a smoker.

{¶ 5} The trial court found that Robert was a smoker and granted defendants' motion to administratively dismiss the case. It is from this judgment that the Farnsworths appeal, raising one assignment of error for our review:

{¶ 6} "The trial court erred by granting Defendants' The Goodyear Tire & Rubber Company, Koch Engineering Company, Inc., and its Operating Division

Maurice A. Knight Division, Foseco, Inc., Union Carbide Corporation and TRECO Construction Services, Inc., f/k/a The Rust Engineering Company's Renewed Motion for Administrative Dismissal [u]nder R.C. 2307.92 and R.C. 2307.93."

History of H.B. 292

{¶ 7} H.B. 292, which became effective on September 2, 2004, was enacted after the General Assembly "reviewed the state of asbestos litigation in Ohio and found that the number of asbestos cases pending in the Cuyahoga County Common Pleas Court had grown from approximately 12,800 in 1999 to more than 39,000, with 200 additional cases being filed every month." *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, _3, citing Section 3(A)(3)(e), 150 Ohio Laws, Part III, 3970, 3989. The General Assembly characterized asbestos litigation as:

{¶ 8} "*** unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of $54 billion 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 60 to 70 defendants, compared with an average of 20 named defendants two decades ago. The RAND report also suggests that at best, only 1/2 of all claimants have come forward and at worst, only 1/5 have filed claims to date. Estimates of the total cost of all claims range from $200 billion to $265 billion. Tragically, plaintiffs are receiving less than 43 [cents] on every dollar

awarded, and 65% of the compensation paid, thus far, has gone to claimants who are not sick." Uncodified law, Section 3(A)(2), accompanying H.B. 292.

{¶ 9} In enacting H.B. 292, the legislature's stated intent was 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 other 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.'" *In re Special Docket*, quoting Section 3(B), 150 Ohio Laws, Part III, 3991.

Review of R.C. 2307.91 through 2307.98

{¶ 10} H.B. 292 is codified at R.C. 2307.91 through R.C. 2307.98, which establishes various criteria for asbestos claims. R.C. 2307.91 contains definitions of terms used in H.B. 292. R.C. 2307.92 outlines minimum medical requirements for tort actions alleging asbestos claims. R.C. 2307.92(B), (C), and (D), respectively, prohibit plaintiffs from maintaining asbestos actions based upon: (1) nonmalignant

conditions; (2) smoker lung-cancer claims;[1] and (3) wrongful death, unless the plaintiffs in each of these situations can establish a prima facie showing in the manner described in R.C. 2307.93(A).

{¶ 11} R.C. 2307.93(A)(1) mandates that any plaintiff who bases his or her claim on any of the three circumstances listed in R.C. 2307.92(B), (C), or (D), must file "a written report and supporting test results constituting prima facie evidence of the exposed person's physical impairment" meeting the requirements specified in those sections.[2]

{¶ 12} Under R.C. 2307.93(A)(1), defendants may challenge the adequacy of the plaintiff's prima facie evidence. R.C. 2307.93(B) provides that if the defendant does challenge the adequacy of the plaintiff's prima facie evidence, the court "shall determine from all of the evidence submitted" whether the proffered prima facie evidence meets the minimum requirements for cases involving nonmalignant

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[1]The National Cancer Institute's "tobacco facts" state that "[t]obacco is one of the strongest cancer-causing agents." When it comes to lung cancer, the National Cancer Institute reports that "[l]ung cancer is the leading cause of cancer death among both men and women in the United States, with 90 percent of lung cancer deaths among men and approximately 80 percent of lung cancer deaths among women attributed to smoking." See http://www.cancer.gov/cancertopics/smoking.

[2]R.C. 2307.92(C)(1) sets forth the requirements a smoker with lung cancer must present to establish a prima facie case, including, inter alia, evidence from a competent medical authority that the exposed person has primary lung cancer, and that the exposure to asbestos is a substantial contributing factor; evidence that there was a ten-year latency period since the exposure and the diagnosis of lung cancer; and evidence of either the exposed person's substantial occupational exposure or evidence that the exposure to asbestos was at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a certified industrial hygienist or safety professional.

conditions, smoker lung cancer, or wrongful death, as specified in R.C. 2307.92(B), (C), or (D). If the court finds, after considering all of the evidence, that the plaintiff failed to make a prima facie showing, then "[t]he court shall administratively dismiss the plaintiff's claim without prejudice." R.C. 2307.93(C).

{¶ 13} R.C. 2307.93(C) further states that "[a]ny plaintiff whose case has been administratively dismissed *** may move to reinstate the plaintiff's case if the plaintiff makes a prima facie showing that meets the minimum requirements" needed.

R.C. 2307.91(DD): Smoker Defined

{¶ 14} Under R.C. 2307.91(DD), a smoker is defined as "a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections [R.C. 2307.92 and 2307.93], during the last fifteen years."[3] Both the Farnsworths and appellees contend that R.C. 2307.91(DD) is ambiguous regarding who has the burden to prove that an exposed person is a smoker for purposes of R.C. 2307.92(C). We agree.

{¶ 15} Appellees maintain that although "[t]he statute is silent on the exact mechanism a trial court should employ to determine a claimant's smoking status, *** the overall statutory scheme obviously places obligations on plaintiffs to proffer

[3]A "pack year" is "[a] way to measure the amount a person has smoked over a long period of time. It is calculated by multiplying the number of packs of cigarettes per day by the number of years the person has smoked. For example, one pack per year is equal to smoking one pack per day for one year, or two packs per day for half a year, and so on." See National Cancer Institute, Dictionary of Cancer Terms at http://www.cancer.gov/Templates/db_alpha.aspx?CdrID=306510.

evidence of asbestos-related injury" and "[f]or lung cancer claimants, a significant part of that proof is whether they have a history of smoking." Therefore, appellees argue that "*any* lung cancer claimant who contends he is exempt from establishing a prima facie case" must bear the burden of proving he or she is exempt through competent medical authority. (Emphasis added.)

{¶ 16} The Farnsworths contend that it should be a defendant's burden to prove, through competent medical authority, that the exposed person is a smoker. They claim that the defendants did not "show by competent medical authority that [Robert] qualifies as a smoker" under R.C. 2307.91(DD). The Farnsworths rely heavily on *Penn v. A-Best Prod. Co.*, 10th Dist. Nos. 07AP-404-407, 2007-Ohio-7145.

{¶ 17} In *Penn*, the defendants argued that the plaintiffs had to file a written report by competent medical authority explaining the exposed person's smoking history. The Tenth District disagreed, stating that "[t]here is no requirement in R.C. 2307.91(DD) that a nonsmoker must submit evidence via a competent medical authority indicating such." Id. at _26. The *Penn* court further concluded that neither R.C. 2307.93(A)(1) nor R.C. 2307.92(C) places a burden upon a nonsmoker to submit evidence via a competent medical authority to prove his smoking status. Id. at _27-28.

{¶ 18} Appellees, however, correctly point out that in *Penn*, the Tenth District "never addressed the question of how a court should determine whether a claimant

is a smoker or not." In fact, unlike the case sub judice, there was no question that the exposed person in *Penn* was a nonsmoker because he had quit smoking entirely in 1976. Id. at _25.

{¶ 19} We agree with the *Penn* court that nonsmokers do not have to provide a written report from a competent medical authority to prove their nonsmoking status. We therefore disagree with appellees' proposition that "*any* [which would include a nonsmoker] lung cancer claimant who contends he is exempt from establishing a prima facie case" must bear the burden of proving he or she is exempt through competent medical authority. (Emphasis added.) But *Penn* did not answer the question presented here, that is, whose burden is it to prove that an exposed person is a smoker as defined by R.C. 2307.91(DD)?

{¶ 20} To address this issue, we must first look to the statute itself. In determining the meaning of a statute, a court must give effect to the intent of the legislature. See *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, _17; *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123, _27.

Logical Fallacies in R.C. 2307.91(DD)

{¶ 21} Again, R.C. 2307.91(DD) defines smoker as "a person who has smoked the equivalent of one-pack year, as specified in *the written report* of a competent medical authority pursuant to [R.C. 2307.92 and 2307.93], during the last fifteen years." (Emphasis added.) Under R.C. 2307.93(A)(1), it is the plaintiff who must file

the "*written report* and supporting test results constituting prima facie evidence." (Emphasis added.) But the plaintiff does not have to file the written report *unless* the exposed person is a smoker as defined by R.C. 2307.91(DD). Moreover, competent medical authority is defined as 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 [R.C. 2307.92]." See R.C. 2307.91(Z).[4] By definition then, competent medical authority applies *only* to

[4]R.C. 2307.91(Z) provides: "'Competent medical authority' means 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:

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

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

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

"(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;

"(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;

"(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.

"(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."

those medical doctors *who are providing a diagnosis for purposes of establishing prima facie evidence* of an exposed person's physical impairment. But again, the plaintiff does not have to establish a prima facie case *unless* the exposed person is a smoker as defined by R.C. 2307.91(DD).

{¶ 22} We further note that the defendant would never meet the full requirements seemingly necessary for competent medical authority – since the defendant will never have access to 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 [R.C. 2307.92]." Thus, defendants would never be able to establish that an exposed person is a smoker. This would mean that smokers with lung cancer bringing an asbestos claim would never have to establish a prima facie case, which would thwart the General Assembly's intent in enacting H.B. 292, specifically R.C. 2307.92(C).

{¶ 23} Thus, we agree that the definition of a smoker under R.C. 2307.91(DD) is indeed ambiguous. The definition refers to terms to define "smoker" that only apply to plaintiffs who are smokers. The phrase refers to a medical doctor's *written report* that a plaintiff must submit to meet the prima facie showing – *after* it has already been determined that the person is a smoker. It is nonsensical. It raises the question (or more colloquially, begs the question): what comes first, the smoker or the written report; the smoker or competent medical authority?

<u>What Comes First?</u>

{¶ 24} The short answer to our question is that the smoker must come first – since the written report, which will include the diagnosis from a competent medical authority, is not required until after it has been determined that the person is a smoker. This is so because if the exposed person is not a smoker, the plaintiff does not have to establish a prima facie case (and thus, will not need to file a written report or obtain a diagnosis from competent medical authority).

{¶ 25} We conclude then that the phrase in R.C. 2307.91(DD), "as specified in *the written report* of a competent medical authority pursuant to [R.C. 2307.92 and 2307.93]," cannot mean that competent medical authority is required to establish who is or is not a smoker. The smoker must come first – meaning that it must first be determined whether the exposed person is a smoker. If so, then the plaintiff must meet the requirements under H.B. 292 by filing the written report establishing a prima facie case through competent medical authority and the other evidence that is required. See R.C. 2307.92 and 2307.93.

{¶ 26} If we were to find that defendants are required to prove through competent medical authority that an exposed person is a smoker, then unreasonable and absurd results would occur. See *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238 ("[i]t is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences"); *State v. Wells*, 91 Ohio St.3d 32, 2001-Ohio-3. Defendants will never have access to a "written report" prepared by a competent medical authority – unless they compel plaintiffs to undergo involuntary

medical treatment. But even then, it still would not be for the purpose of a diagnosis for establishing a prima facie case, which is what the definition of competent medical authority requires. Defendants would then simply have to wait to learn if an exposed person told the doctor the truth (assuming the exposed person is a smoker), knowing the purpose of the visit would not genuinely be "treatment," but for litigation, i.e., litigation against the plaintiff.

{¶ 27} Notably, if we were to construe the statute to require defendants to prove through competent medical authority the exposed person's smoking status, then even more troubling consequences would result. For example, defendants would also have to prove through competent medical authority that an exposed person is a nonsmoker. Thus, defendants would have to force *all exposed persons with lung cancer*, including nonsmokers, to undergo involuntary medical treatment to determine their smoking status. This would be a waste of time and resources, since the information could be determined in much simpler and cheaper ways through discovery. For example, the defendants in *Penn*, supra, would have had to force the exposed person, who had not smoked since 1976, to undergo involuntary medical treatment to prove that he was not a smoker (in order to prove through competent medical authority that the exposed person was not a smoker). The legislature could not have intended such absurd results.

{¶ 28} Similarly, if we were to conclude that plaintiffs are required to prove by competent medical authority that they are not smokers, absurd results would also

occur. Plaintiffs would have incentive to lie to their doctor about smoking or at least refrain from telling their doctor about smoking.

{¶ 29} Moreover, some people do not go to the doctor until it is an emergency. They may have a very short medical history or no history at all. If that was the case, certainly other evidence, including a plaintiff's own testimony, could establish that the exposed person was a smoker – if indeed he or she was.

{¶ 30} Thus, it is our view that at this preliminary stage of the litigation, when courts are simply attempting to prioritize its asbestos docket, *neither plaintiffs nor defendants* are required to use a competent medical authority – which again is a medical doctor who provides a diagnosis for purposes of establishing prima facie evidence of an exposed person's physical impairment – to prove that an exposed person is or is not a smoker.

{¶ 31} Thus, when there is a dispute as to whether a person is or is not a smoker, we conclude that the parties must submit evidence (that would be admissible under the rules of evidence) to prove their contention. This evidence may very well include the exposed person's medical history, if indeed there is one. Whether a person is a smoker may be very clear. It may be equally as clear that a person is not a smoker. But when there is a question as to whether the person is or is not a smoker, as in the case sub judice, the trial court must review the evidence submitted by both parties to resolve the issue.

{¶ 32} Based on the requirements of these provisions, it logically follows that if a defendant submits competent, credible evidence establishing that a plaintiff is a smoker, then the burden should shift to a plaintiff to establish that the exposed person is not a smoker as defined in R.C. 2307.91(DD). We therefore agree it is the plaintiff who has the ultimate burden to prove that the exposed person is not a smoker, since it is the plaintiff who ultimately must establish a prima facie case, if the exposed person is indeed a smoker, to prevent the case from being dismissed. For plaintiffs who are not smokers, this will not be an issue. For plaintiffs who have a recent history of smoking, as in the case here, it will be more difficult.

{¶ 33} The Evidence in this Case

{¶ 34} Here, defendants moved to administratively dismiss the Farnsworths' case, arguing that they did not establish a prima facie showing. Defendants attached four documents to their motion: (1) a letter from Dr. Boes, a board- certified pulmonologist, to Dr. Clare; Dr. Boes saw Robert in December 2005 to conduct a pulmonary examination of him; (2) a 1996 progress report from Dr. Clare, Robert's family doctor; (3) progress notes from Dr. Shah at the Strecker Cancer Center in 2006; and (4) a history and physical report of Robert in 2006 by Ohio Health. All four documents show that Robert smoked until he was diagnosed with lung cancer in December 2005.

{¶ 35} Dr. Boes stated in a letter to Dr. Clare that "[t]he patient is a chronic and currently active 1 pack per day smoker with greater than 30 pack-year exposure."

Dr. Clare indicated in a treatment note in July 1996 that Robert smoked "approximately 1 pack of cigarettes per day for the last 40 years." Dr. Shah's treatment notes from August 2006 stated that Robert "stopped smoking about 8 months ago and smoked for 50 years." In addition, the documents from Ohio Health, dated December 2005, show that Robert quit smoking that month, and had smoked for 50 years.

{¶ 36} Further, in his deposition, Robert testified that he began smoking a pack of cigarettes a day when he was a teenager and stopped smoking "[w]hen I found out I had this tumor," which was "the very last part of 2005." He explained that he stopped smoking a pack a day in 1985. He further testified that from 1985 until he was diagnosed with lung cancer (in December 2005), he "was smoking probably six cigarettes a day." He did try to quit smoking from 1985 to 2005, at least "three or four times." During those times, he said that he "did quit completely for a month or two."[5] He explained, "then I thought well, I can smoke *** two or three cigarettes a day but it ended up being more than that."

{¶ 37} In their opposition memorandum, the Farnsworths attached Robert's affidavit, where he averred that from 1950 to 1985, he smoked one pack of cigarettes a day. From 1985 to 2005, he "did smoke cigarettes intermittently." But he said that he stopped completely in January 2006 and further averred that

[5]At another point in his deposition, however, he agreed that he only quit smoking one time (not three or four times) for "a month or two."

"[b]etween January, 1991 and January, 2006, [he] smoked less than 365 packs of cigarettes."

{¶ 38} Robert agreed at his deposition that there was a huge discrepancy between 480 cigarettes per year (his affidavit number) and 2190 per year (his deposition number). January 1999 to January 2006 is fifteen years. 365 packs of cigarettes divided by 15 years equals 24 packs per year. 24 packs (multiplied by 20 cigarettes per pack) equals 480 cigarettes per year. In his deposition, Robert said that he smoked six cigarettes per day, which would amount to 2190 per year, or approximately 91 packs per year.

{¶ 39} In addition to Robert's affidavit, the Farnsworths also attached to their opposition memorandum two other documents: (1) Dr. Boes's treatment notes from December 12, 2005 stating that Robert "smoked 1 p/d for 20-30 years *** smokes 2 cigs daily presently" and (2) Dr. Clare's treatment notes from December 2001 stating that Robert is "an occasional smoker."

{¶ 40} We first note that neither party submitted evidence meeting the full definition of a competent medical authority. But nor were they required to at this stage of the litigation. Plaintiffs are not required to submit "the written report of a competent medical authority" *until it has been determined that they are smokers.* Defendants are never required to submit a written report by competent medical authority, although if they challenge a plaintiff's *prima facie case* using a physician, "the physician must meet the requirements in divisions (Z)(1), (3) and (4) of [R.C.

2307.91]" (doctor must be board certified, did not rely on reports or opinions as specified in R.C. 2307.91(Z)(3)(a), (b), and (c), and does not spend more than 25 percent of his or her time in connection with tort cases).

{¶ 41} After reviewing the record in its entirety, we agree with appellees that Robert's affidavit is self-serving. His deposition testimony, given three months later, contradicts what he averred in his affidavit. And the two other documents that Robert submitted (Dr. Boes's treatment notes and Dr. Clare's treatment notes) do not outweigh the overwhelming evidence submitted by appellees, especially Robert's own deposition testimony regarding how much he smoked until he was diagnosed with lung cancer in 2005.

{¶ 42} We conclude that the record establishes that the trial court had competent, credible evidence before it to support its decision finding Robert to be a smoker. "An appellate court should not substitute its judgment for that of the trial court where some competent and credible evidence supports the trial court's factual findings." *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 355, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77.

{¶ 43} We further note that an administrative dismissal is not an outright dismissal. An administrative dismissal "simply permits the court to prioritize claims for trial purposes." *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, _24. The Farnsworths can request that their case be reinstated when and if

they can establish a prima facie case meeting the requirements of R.C. 2307.92(C) (smoker lung cancer) and R.C. 2307.93.

{¶ 44} Finally, we disagree with the Farnsworths that the trial court should reverse, remand, and reinstate this case to hold an evidentiary hearing on the issue of whether Robert was a smoker. The statute does not require a hearing at the preliminary stage of determining if an exposed person is a smoker and furthermore, the Farnsworths did not request an evidentiary hearing on the matter.

{¶ 45} Accordingly, we overrule the Farnsworths' sole assignment of error.

{¶ 46} Judgment affirmed.

It is ordered that Nina I. Webb-Lawton of Vorys, Sater, Seymour & Pease, 52 East Gay Street, Post Office Box 1008, Columbus, Ohio 43216-1008 be designated as liaison counsel. Liaison counsel agrees to receive and disseminate this opinion, both upon release and journalization, to the counsel of all appellees listed in this opinion. All documents sent to liaison counsel from the clerk of courts shall be promptly disseminated electronically by liaison counsel to counsel for appellees.

It is ordered that appellants shall pay the 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.

MARY J. BOYLE, JUDGE

JAMES J. SWEENEY, J., CONCURS;
MARY EILEEN KILBANE, J., CONCURS IN JUDGMENT ONLY