

[Cite as *Rossi v. Consol. Rail Corp.*, 2010-Ohio-5788.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94628

**ELISE S. ROSSI,
AS REPRESENTATIVE OF THE
ESTATE OF ROBERT A. ROSSI**

PLAINTIFF-APPELLEE

VS.

**CONSOLIDATED RAIL CORPORATION
AND AMERICAN PREMIER
UNDERWRITERS, INC.**

DEFENDANTS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-682186

BEFORE: Stewart, J., Rocco, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: November 24, 2010

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Consolidated Rail Corporation, appeals from an order denying its motion for an administrative dismissal of asbestos-related claims brought by Elise Rossi, the representative of the estate of Robert Rossi, who died as this action was pending. Robert worked in various capacities for the railroad and died of lung cancer that he alleged

had been caused by asbestos exposure during his employment. The issue on appeal is whether the estate made the required prima facie showing that Robert's alleged exposure to asbestos was a substantial factor in the development of his lung cancer.

{¶ 2} Robert admitted to having smoked one to two packs of cigarettes per day for 48 years. When the plaintiff who claims that asbestos exposure caused lung cancer is a smoker, R.C. 2307.92(C) requires 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." If the plaintiff fails to make a prima facie showing, the court must administratively dismiss the claim without prejudice, although it retains jurisdiction to reinstate the case in the event the plaintiff is later able to make the required prima facie showing. R.C. 2307.93(C).

{¶ 3} In order to make its prima facie case, the estate had to submit a report from a competent medical authority indicating that exposure to asbestos was "a substantial contributing factor" in the development of Robert's lung cancer. "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.*, 8th Dist. No. 92503, 2009-Ohio-6216; R.C. 2307.91(FF)(1) and (2).

{¶ 4} The estate offered two medical opinions. The first, from Robert’s treating physician, did not meet the threshold requirement of showing to a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred. The doctor’s letter stated in full:

{¶ 5} “Robert Rossi, deceased, was a patient for many years. He died of lung cancer on 04/16/2009. He gave a history of asbestos exposure during his working career. Asbestos is a known carcinogen and exposure to asbestos increases one’s risk of developing cancer during his lifetime. I believe that this exposure may have played a role in the development of his lung cancer.”

{¶ 6} The doctor’s belief that Robert’s asbestos exposure “may have” played a role in the development of his lung cancer does not state an opinion to a reasonable degree of medical certainty. A person’s asbestos exposure must be a significant, direct cause of the injury to the degree that without the exposure to asbestos, the injury would not have occurred. *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶48. The doctor’s letter did not state an opinion that Robert’s lung cancer would

not have occurred without exposure to asbestos nor did it indicate that asbestos exposure was the substantial contributing factor of Robert's lung cancer. It offered conjecture that cannot suffice to make a prima facie case.

{¶ 7} The estate also offered the opinion of a certified B-reader¹ who conducted a records review of Robert's files. The B-reader stated:

{¶ 8} "After reviewing all the information provided I have come to a conclusion, within a reasonable degree of medical certainty that Mr. Rossi had lung cancer. The lung cancer was cited as the immediate cause of death.

I have also come to a conclusion within a reasonable degree of medical probability, that diaphragmatic plaque on the right side and diffuse pleural thickening on the left side were probably due to exposure to asbestos dust. Asbestos dust is a known carcinogen and all types of lung cancer occur with increased frequency. In addition he was a smoker and smoking increases the risk of lung cancer substantially in the presence of occupational exposure to asbestos dust. Therefore it is my opinion within a reasonable degree of medical probability that occupational exposure to asbestos dust substantially contributed in the development of cancer and eventual death. Asbestos

¹A "certified B-reader" is defined in R.C. 2703.91(J) by reference to 42 C.F.R. section 37.51(b) as an individual with "[p]roficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO Classification for interpreting chest roentgenograms for pneumoconiosis and other diseases" who has taken and passed a specially designed proficiency examination given on behalf of or by the National Institute for Occupational Safety and Health.

exposure acted synergistically with the cigarette smoking to greatly increase the risk of lung cancer beyond that expected from either exposure alone.”

{¶ 9} The railroad challenges whether the B-reader meets the statutory definition of a “competent medical authority.” R.C. 2307.91(Z) defines a “competent medical authority” and among the requirements listed in the statute is that “[t]he medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.”

See R.C. 2307.91(Z)(2).

{¶ 10} The estate failed to carry its burden of establishing that the B-reader qualified as a competent medical authority because there is nothing in the record to show that he had treated Robert or had a doctor-patient relationship with him. Robert died on April 16, 2009, and the B-reader’s report, dated November 2, 2009, referenced the receipt of certain documents from the estate’s attorneys. Nothing in that report mentions a doctor-patient relationship or that the B-reader had treated Robert. This failure rendered the B-reader statutorily incompetent to render an opinion as to whether Robert’s exposure to asbestos was a substantial contributing factor to his lung cancer.

{¶ 11} The estate argues that the court did not err by denying the railroad’s motion for administrative dismissal by citing to *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. No. 88062, 2008-Ohio-3806. It is unclear why the

estate cites to *Sinnott*, as that case stands for the proposition that a plaintiff who is treated by a team of doctors at a Veteran's Administration hospital sufficiently demonstrates a doctor-patient relationship for purposes of R.C. 2307.91(Z). *Id.* at ¶24. The record in this case shows that Robert was consistently treated by a single doctor and that the B-reader never treated Robert.

{¶ 12} With no medical authority able to competently testify to a reasonable degree of medical certainty that Robert's exposure to asbestos was a substantial contributing factor to his lung cancer, it follows that the court erred by denying the railroad's motion for administrative dismissal. The assigned error is sustained, and this case is remanded to the court with instructions to enter an administrative dismissal.

{¶ 13} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR