
IN THE SUPREME COURT OF OHIO
CASE NO. 2006-1025

Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio
Case No. 86339

NORFOLK SOUTHERN RAILWAY COMPANY

Plaintiff-Appellant

vs.

HOMER R. BOGLE, et al.

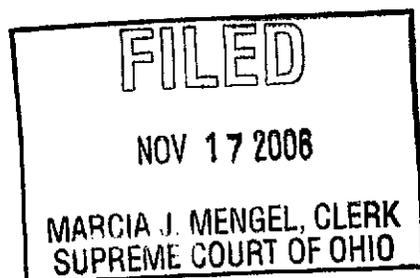
Defendants-Appellees

**SUPPLEMENT TO THE MERIT BRIEF BY PLAINTIFF-APPELLANT,
NORFOLK SOUTHERN RAILWAY COMPANY**

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CERTIFICATE OF SERVICE

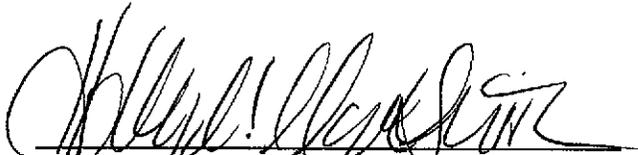
A true copy of the foregoing was served via regular U.S. mail, postage prepaid, this 17th

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FILED IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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MASTER CONSOLIDATED COMPLAINT

(Jury Trial Demanded)

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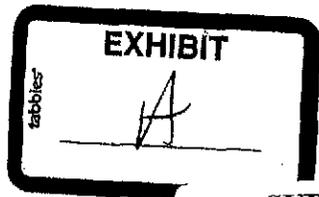
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LARRY ARNOLD WILES)
302 Sills Drive)
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WILES L012199HE)
Plaintiffs,)

vs.



6. In the performance of their duties, Plaintiffs worked in, on and around railroad cars, locomotives, locomotive boilers and the appurtenances, locomotive repair shops and/or other shops and/or buildings.

7. At the time of their exposure to asbestos dust and/or fibers and/or silica dust and/or coal dust, the Plaintiffs' duties were in furtherance of interstate commerce, and the Plaintiffs' work directly, closely and substantially affected the interstate commerce carried on by the Defendant Railroad and/or Defendant's predecessors.

8. While engaged in the course of their employment with the Defendant and/or Defendant's predecessors, the Plaintiffs were required to work with and around toxic substances, including but not limited to asbestos, and/or silica and/or silica dust, and/or coal and/or coal dust.

9. At all times relevant, Plaintiffs were unaware of the dangerous propensities of asbestos and/or asbestos containing products, and/or silica and/or silica dust, and/or coal and/or coal dust.

10. At all times material hereto, Defendant and/or Defendant's predecessors knew, or should have known, that exposure to the inhalation of dust, including but not limited to asbestos fibers and/or dust, and/or silica dust and/or coal dust was dangerous, toxic and potentially deadly.

11. At all times hereto, Defendant and/or Defendant's predecessors knew, or should have known, that Plaintiffs would be exposed to the inhalation of dust including, but not limited to asbestos fibers and/or dust, and/or silica dust, and/or coal dust resulting from the use of and/or handling of said products and/or said materials.

12. Despite this knowledge, Defendant and/or Defendant's predecessors:

(a) Failed to provide Plaintiffs with a reasonably safe place to work;

- (b) Failed to furnish Plaintiffs with safe and suitable tools and equipment including adequate protective masks and/or protective inhalation devices;
- (c) Failed to warn Plaintiffs of the true nature and hazardous effects of asbestos containing products and/or silica and/or coal;
- (d) Failed to operate the locomotive repair facility in a safe and reasonable manner;
- (e) Failed to provide instructions or a method for the safe use of asbestos containing products and/or silica and/or coal;
- (f) Failed to provide adequate, if any, instruction in the use and/or removal of asbestos products and/or the use, loading and/or hauling of silica and/or coal;
- (g) Failed to test said products and/or materials prior to requiring employees to work with the same, to determine their ultrahazardous nature;
- (h) Failed to formulate and use a method of handling said products and/or materials, exposing Plaintiffs to high concentration of asbestos dust and/or fibers and/or silica dust and/or coal dust;
- (i) Failed to provide Plaintiffs with safe and proper ventilation systems in the locomotive repair facility;
- (j) Allowed unsafe practices to become the standard of practice;
- (k) Failed to exercise reasonable care in publishing and enforcing a safety plan and method of handling asbestos-containing products and/or silica and/or coal.
- (l) Failed to inquire of the suppliers of asbestos and/or silica and/or coal of the hazardous nature(s) of asbestos and/or silica and/or coal;
- (m) Required employees to work with ultrahazardous products and/or materials;

- (n) Failed to exercise adequate, if any, care for the health and safety of employees, including the Plaintiffs;
- (o) Failed to periodically test and examine Plaintiffs to determine if he was subject to any ill effects of his exposure to said products and/or materials;
- (p) Failed to personally inspect the shops, building, equipment, railroad cars, locomotives, boilers, and their appurtenances in order to ascertain any dust and/or fiber contamination;
- (q) Failed to limit access where these products and/or materials were being used;
- (r) Failed to advise Plaintiffs to shower before going home, failed to provide such shower facilities and failed to enforce the use of such facilities;
- (s) Failed to advise Plaintiffs to have their clothing and belongings cleaned outside of the home, failed to provide such cleaning services and failed to enforce the use of such services;
- (t) Failed to provide Plaintiffs with separate lockers for clothing worn home to prevent such clothing from becoming contaminated with dust, including but not limited to asbestos fibers and/or dust and/or silica dust and/or coal dust from clothing worn at work; and
- (u) Failed to test said products and/or materials prior to the use by Defendant and/or Defendant's predecessors' employees.

12. The Defendant and/or Defendant's predecessors failed to comply with the provisions and requirements of the Federal Employer's Liability Act, 45 U.S.C. Secs. 51-60, as amended.

13. The Defendant and/or Defendant's predecessors, through its agents, servants and employees, violated the Locomotive Boiler Inspection Act, 45 U.S.C. Sec. 23, as amended, and Defendant and/or Defendant's predecessors failed to provide Plaintiffs with a locomotive and its appurtenances which were in a proper and safe condition, and safe to work on or around.

14. As a direct and proximate result of the above negligence and statutory violations of the Defendants and/or Defendant's predecessors, Plaintiffs were caused to contract occupational pneumoconiosis including but not limited to asbestosis, silicosis, and or coal workers lung disease and/or lung cancer.

15. As a direct and proximate result of the negligence and statutory violations described above, Plaintiffs have suffered great pain, extreme nervousness and mental anguish and believes that his illness is permanent in nature and that he will be forced to suffer from the same for the remainder of his life; Plaintiffs have been obliged to spend various sums of money for treatment and he will be obliged to continue to do so in the future. Plaintiffs have sustained loss of earnings and earning capacities, and his abilities to render services society, affection, counseling and support to his family has been diminished, his life expectancy has been shortened and his enjoyment of life has been impaired. As a direct result of the negligence and statutory violations described above, Plaintiffs suffer from extreme nervousness, mental anxiety and fear of progression of his occupational pneumoconiosis including, but not limited to, asbestosis, silicosis, and/or coal workers lung disease; fear of contracting mesothelioma, lung cancer and/or other cancers and/or conditions, including, but not limited to cor pulmonale. In addition, Plaintiffs, because of their occupational pneumoconiosis including, but not limited to asbestosis, silicosis, and or coal/workers lung disease, now has an increased risk of contracting

mesothelioma, lung cancer, and/or other cancers and/or conditions, including, but not limited to cor pulmonale.

WHEREFORE, the Plaintiffs pray: for judgment against the Defendant for actual damages in an amount to be determined by the trier of fact, but in excess of Twenty-Five Thousand Dollars (\$25,000.00) per Plaintiff, for the costs of this action against Defendant, and for any such further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED. Pursuant to Rule 38(b) of the Ohio Rules of Civil Procedure, Plaintiffs hereby requests a trial by jury.

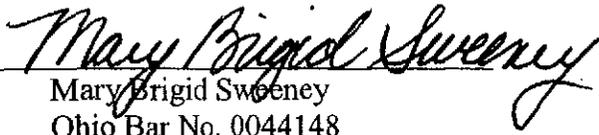
In accordance with Rule 42(A) of the Ohio Rules of Civil Procedure, Plaintiffs prays for a consolidated trial of common issues of fact as set forth above.

This the 17th day of SEPTEMBER 1999.

Attorneys for Plaintiffs

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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

NORFOLK SOUTHERN RAILWAY)
COMPANY)
Three Commercial Place)
Norfolk, Virginia 23510-9241)

Plaintiff,)

-vs-)

HOMER R. BOGLE)
1525 Barringer Road)
Salisbury, North Carolina 28147)

-and-)

WILLIAM H. MONROE, JR.,)
Administrator of the Estate of Worth)
Oliver Bryant)
Crown Center Building, Suite 600)
580 East Main Street)
Norfolk, Virginia 23510)

-and-)

CHARLES ODELL WELDON)
1331 Standish Street)
Salisbury, North Carolina 28144)

-and-)

ERIC A. WILES, Individually and in)
his capacity as Executor of the Estate)
of Larry Arnold Wiles)
302 Sills Drive)
Salisbury, North Carolina 28146)

Defendants.)

CIVIL ACTION - ASBESTOS

CASE NO.:

JUDGE:

**COMPLAINT FOR DECLARATORY
JUDGMENT**

(Jury Demand Endorsed Herein)

Plaintiff, Norfolk Southern Railway Company (hereinafter referred to as "Norfolk Southern" or "Plaintiff"), hereby submits this Complaint for Declaratory Judgment and alleges as follows:

PARTIES

1. This Complaint is brought for a declaratory judgment pursuant to Rule 57 of the Ohio Rules of Civil Procedure and Chapter 2721 of the Ohio Revised Code.
2. Plaintiff, Norfolk Southern, is a Virginia Corporation with its principle office located at Three Commercial Place, Norfolk, Virginia.
3. Defendant, Homer R. Boyle, is the plaintiff in Case No. 518146, currently pending in the Cuyahoga County Court of Common Pleas, Asbestos Docket. The Complaint for Declaratory Judgment arises from this pending case.
4. Defendant, William H. Monroe, Jr., is the plaintiff in Case No. 497980, currently pending in the Cuyahoga County Court of Common Pleas, Asbestos Docket. The Complaint for Declaratory Judgment arises from this pending case.
5. Defendant, Charles Odell Weldon, is a plaintiff in Case No. 391852 currently pending in the Cuyahoga County Court of Common Pleas, Asbestos Docket. The Complaint for Declaratory

Judgment arises from this pending case.

6. Defendant, Eric A. Wiles, Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, is a plaintiff in Case No. 391853 currently pending in the Cuyahoga County Court of Common Pleas, Asbestos Docket. The Complaint for Declaratory Judgment arises from this pending case.

COUNT I: DECLARATORY RELIEF

7. Plaintiff incorporates paragraphs 1 through 6 as if fully set forth herein.

8. Homer R. Bogle, William H. Monroe, Jr., Administrator of the Estate of Worth Oliver Bryant, Deceased, Charles Odell Weldon, and Eric A. Wiles, Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles (hereinafter collectively referred to as "Defendants") have cases currently pending in the Cuyahoga County Court of Common Pleas, Asbestos Docket.

9. Among the allegations set forth in the original Complaints, Defendants alleged that Norfolk Southern failed to comply with the provisions and requirements of the Federal Employers' Liability Act (hereinafter referred to as "FELA"), 45 U.S.C. §§51-60 as amended and that Norfolk Southern and/or its predecessors, through its agents, servants and employees violated the Locomotive Boiler Inspection Act (hereinafter referred to as "LBIA"), 45 U.S.C. §23 and 49 U.S.C. §§20701-20703 as amended.

10. Am.Sub. H.B. No. 292 of the 125th Ohio General Assembly was signed into law by Governor Taft on June 3, 2004 and went into effect on September 2, 2004.

11. Norfolk Southern asserts that Am.Sub. H.B. No. 292 encompasses Defendants' civil actions in the Cuyahoga County Court of Common Pleas alleging asbestos claims under the FELA and/or the LBIA and that its application to those cases does not infringe upon the Supremacy Clause

of the Constitution of the United States because it is a neutral rule of judicial administration.

12. Norfolk Southern asserts that it is Defendants' intention not to comply with the provisions of Am. Sub. H.B. 292, including but not limited to the requirement of filing a written report and supporting test results within one hundred and twenty days (120) from the effective date of the statute.

13. Norfolk Southern seeks a declaration that Am. Sub. H.B. No. 292 applies to the Defendants' causes of action that include FELA and LBIA claims for relief.

14. Declaratory judgment in this matter will serve a useful purpose in clarifying and settling the legal issues in question herein - to wit, whether or not Am. Sub. H.B. No. 292 applies to Defendants' civil actions filed in the Cuyahoga County Court of Common Pleas that allege asbestos claims arising under the FELA and the LBIA.

15. There is a justiciable controversy between the parties of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. This matter is most properly resolved through declaratory judgment issued by this Court. The matter presented involves important issues of law and the interpretation of the Constitution of the United States and of recently effective Ohio legislation.

WHEREFORE, Plaintiff, Norfolk Southern, respectfully requests the following relief:

A declaratory judgment finding that: (1) Am. Sub. H.B. No. 292 applies to Defendants' civil cases filed in the Cuyahoga County Court of Common Pleas that allege claims for relief arising under the FELA and the LBIA and that (2) Am. Sub. H.B. No. 292 does not infringe upon the Supremacy Clause of the Constitution of the United States.

Of Counsel:

Respectfully submitted,

**GALLAGHER, SHARP, FULTON
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JURY DEMAND

Plaintiff requests a trial by jury of the within action by the maximum number of jurors allowed.

Of Counsel:

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS,
CUYAHOGA COUNTY, OHIO

NORFOLK SOUTHERN RAILWAY CO.,)
)
) Plaintiff,)
)
) ENTRY AND OPINION
)
) -vs-)
)
) HOMER R. BOGLE,)
) WILLIAM H. MONROE, et al.,)
) CHARLES ODELL WELDON,)
) ERIC A. WILES, et al.,)
)
) Defendants.)

I. INTRODUCTION

Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") filed a Complaint for Declaratory Judgment¹ in four FELA/LBIA² cases: (1) Homer R. Bogle ("Bogle"), Case No. 518146; (2) William H. Monroe, Jr. ("Monroe"), Administrator of the Estate of Worth Oliver Bryant, Case No. 497980; (3) Charles Odell Weldon ("Weldon"), Case No. 391852; and (4) Eric C. Wiles ("Wiles"), Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, Case No. 391853. Norfolk Southern requests a Declaratory Judgment finding that: (1) Am. Sub. H.B. 292 applies to the four above-cited FELA/LBIA cases; (2) Am. Sub. H.B. 292 does not infringe upon the Supremacy Clause of the Constitution of the United States.

In response, Defendants Bogle, Monroe, Weldon, and Wiles filed a Motion to Dismiss³ Norfolk Southern's Complaint for Declaratory Judgment, asserting, inter alia, that the Complaint fails to raise a justiciable controversy because this Court has

¹ File & Serve I.D. #4196730

² Federal Employers Liability Act, 45 U.S.C. §51, et. seq., (FELA); Locomotive Boiler Inspection Act, 49 U.S.C. § 20701.

³ File & Serve I.D. #4572906

previously ordered that H.B. 292 does not apply to claims arising under the FEHA and the LBIA.

Norfolk Southern then filed a Brief in Opposition⁴ to Defendants' Motion to Dismiss, asserting a justiciable controversy exists as of January 3, 2005,⁵ which marks the one hundred and twenty day (120) deadline in which to file a written report and supporting test results pursuant to R.C. § 2307.93. Additionally, Norfolk Southern contends that the Court's August 23, 2004 Order⁶ is not binding on Bogle, Monroe, Weldon, and Wiles because that Order applied only to Special Docket 073958 cases and not to the instant actions.

II. LAW AND ARGUMENT

R.C. § 2721.03, the declaratory judgment statute, provides in part, " * * * any person whose rights, status, or other legal relations are affected by a * * * statute * * * may have determined any question of construction or validity arising under the * * * statute and * * * obtain a declaration of rights, status, or other legal relations under it."

"In order to obtain declaratory relief, [a] plaintiff must establish (1) that a real controversy exists between the parties, (2) that the controversy is justiciable, and (3) that speedy relief is necessary to preserve the rights of the parties. * * * Inherent in these requirements is the principle that Ohio courts do not render advisory opinions." *R.A.S. Entertainment, Inc. v. Cleveland* (1998), 130 Ohio App.3d 125, citing *Burger Brewing Co. v. Ohio Liquor Control Comm.* (1973), 34 Ohio St.2d 93; *Haig v. Ohio State Bd. of*

⁴ File & Serve I.D. #4694782

⁵ In their brief, Plaintiff's assert the 120-day deadline expired on January 3, 2004; however, this is clearly a clerical error since Am. Sub. H.B. 292 took effect on September 2, 2004.

⁶ File & Serve I.D. #4089851

Edn. (1992), 62 Ohio St.3d 507; *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176.

It has been repeatedly held in Ohio that "There are only two reasons for dismissing a complaint for declaratory judgment before the court addresses the merits of the case: (1) there is neither a justiciable issue nor an actual controversy between the parties requiring speedy relief to preserve rights which may otherwise be lost or impaired; or (2) in accordance with R.C. 2721.07, the declaratory judgment will not terminate the uncertainty or controversy." *Halley v. Ohio Co.* (1995), 107 Ohio App.3d 518, citing *Wagner v. Cleveland* (1988), 62 Ohio App.3d 8; *Burger Brewing Co.* supra. A controversy exists when there is a genuine dispute between parties with opposing legal interests and that dispute is of sufficient immediacy that declaratory judgment is necessary. *Wagner*, 62 Ohio App.3d 8.

There is no doubt that an actual dispute exists between the parties herein. On January 3, 2005, the one hundred and twenty day (120) deadline in which to file a written report and supporting tests results pursuant to R.C. § 2307.93 expired. To date, Defendants Bogle, Monroe, Weldon, and Wiles have not produced the required documentation. Therefore, Defendants are in violation of R.C. § 2307.93 *if* H.B. 292 applies to their FELA and LBIA claims.

We agree with Norfolk Southern that this Court's August 23, 2004 Order is not binding on Defendants' cases. In our Order we concluded: "The application of the Ohio statute *to the instant cases* is preempted by that extensive body of federal law" (emphasis added). The four cases now before the Court were not included in that Order, and are thus not binding on Defendants. However, we disagree with Norfolk Southern's

assertion that H.B. 292 encompasses Defendants' civil actions in the Cuyahoga County Court of Common Pleas alleging asbestos claims under the FELA and/or the LBIA.

The general congressional intent to promote liberal recovery for injured railroad workers is well established. See *Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261; *Urie*, 337 U.S. at 163, 69 S. Ct. at 1018, 93 L. Ed. at 1282. There can be no dispute that the FELA was designed to regulate the entire field of railroad injuries and supersede and replace state regulation of those injuries. The FELA was **"undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce, and that it is paramount and exclusive."** *New York Central Railroad Company v. Winfield*, 244 U.S. 147, 152, 37 S. Ct. 546, 61 L. Ed. 1045 (1917)(emphasis added).

The congressional purpose of the Act was to provide a national law of uniform operation throughout the states and to **"withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws."** *Id.* at 150.

This purpose is exemplified in the legislative history of the statute:

[The FELA] is intended in its scope to cover all commerce to which regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carries to their employees . . . **A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states.**

Id. at 150. (citations omitted)(emphasis added).

Accordingly, it has been an overriding principle of FELA jurisprudence, established by Congress, emphasized repeatedly by the Supreme Court of the United States and well-recognized here in Ohio, that a **"substantive right or defense arising**

under the act cannot be lessened or destroyed by a local rule . . ." *Norfolk Southern Railroad v. Ferebee*, 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303 (1915)(emphasis added); see also *South Buffalo Rail Company v. Ahern*, 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 395 (1952)("Peculiarities of local law may not gnaw at rights rooted in federal legislation.")(emphasis added). See August 23, 2004 Order at p. 4-5.

III. CONCLUSION

Norfolk Southern's Complaint for Declaratory Judgment, while procedurally correct, is substantively erroneous. The application of H.B. 292 to the instant cases is preempted by the FELA and LBIA. Furthermore, all pending and future FELA/LBIA cases filed by plaintiffs pursuant to R.C. § 2307.93, et seq., are preempted by that extensive body of federal jurisprudence.

IT IS SO ORDERED.

Judge Leo M. Spellacy
Judge Harry A. Hanna
Justice Francis E. Sweeney

February 24, 2005

THE STATE OF OHIO Cuyahoga County	} SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL.	
NOW ON FILE IN MY OFFICE.	
WITNESS MY HAND AND SEAL OF SAID COURT THIS 15 DAY OF April A.D. 20 05	
GERALD E. FUERST, Clerk	
By _____ Deputy	

Harry A. Hanna
JUDGE HARRY A. HANNA

4-15-05

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GERALD E. FUERST, CLERK
By _____ Deputy

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

**NORFOLK SOUTHERN RAILWAY
COMPANY**

Plaintiff,

-vs-

**HOMER R. BOGLE
WILLIAM H. MONROE, et al.
CHARLES ODELL WELDON
ERIC A. WILES, et al.**

Defendants.

CIVIL ACTION - ASBESTOS

CASE NO.: CV-04-542998

JUDGMENT ENTRY

The Court wishes to clarify its February 24, 2005 Entry and Opinion. Defendant's Motion to Dismiss Norfolk Southern Railway Company's Complaint for Declaratory Judgment is denied. Plaintiff's Motion for Summary Judgment is denied. The February 24, 2005 Entry and Opinion represents the declaration of the rights and obligations of the respective parties. As explained therein, Plaintiff's Complaint for Declaratory Judgment while procedurally correct is substantively erroneous. Plaintiff's request for declaratory relief as set forth in its Complaint is denied. The Court declares that the application of H.B. 292 to the instant cases is preempted by the FELA and LBIA.

IT IS SO ORDERED.

THE STATE OF OHIO Cuyahoga County	SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <i>Civil</i>	
<i>Writs Entered April 15, 2005</i>	
NOW ON FILE IN MY OFFICE.	
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>15</u>	
DAY OF <u>April</u> A.D. 20 <u>05</u>	
GERALD E. FUERST, Clerk	
By <i>[Signature]</i>	Deputy

[Signature]
JUDGE HARRY A. HANNA

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APR 15 2005

GERALD E. FUERST, CLERK
By *[Signature]* Deputy

SUPP. 019

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CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

ASBESTOS LITIGATION DOCKET

**NORFOLK SOUTHERN RAILWAY
COMPANY**

Plaintiff,

-vs-

**HOMER R. BOGLE,
WILLIAM H. MONROE,
CHARLES ODELL WELDON and
ERIC A. WILES**

Defendants.

**CIVIL ACTION - ASBESTOS
CASE NO.: CV-04-542998**

JUDGE HARRY A. HANNA

**PLAINTIFF, NORFOLK SOUTHERN
RAILWAY COMPANY'S NOTICE
OF APPEAL**

Judge:



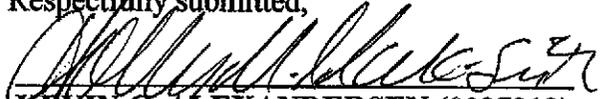
CA 05 086339

Now comes Plaintiff, Norfolk Southern Railway Company, by and through the undersigned counsel and pursuant to App.R. 3(A) and App.R. 3(D), and hereby gives notice of its appeal to the Court of Appeals of Cuyahoga County, Eighth Appellate District, from the following judgments: (1) the April 15, 2005 judgment entry denying Defendants' motion to dismiss, denying Plaintiff's motion for summary judgment, denying Plaintiff's request for declaratory relief as set forth in its complaint and declaring the rights of the respective parties; and (2) the April 15, 2005 final judgment entry denying Defendants' motion to dismiss, denying Plaintiff's motion for summary judgment, and denying Plaintiff's request for declaratory relief as set forth in its complaint. These judgment entries, copies of which are attached hereto, are final appealable orders.

Copies of the above-referenced judgment entries are attached hereto pursuant to Eighth District Loc.App.R. 3(B)(1).

FILED
COURT OF APPEALS
MAY 03 2005
GERALD E. FUERS
CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

Respectfully submitted,



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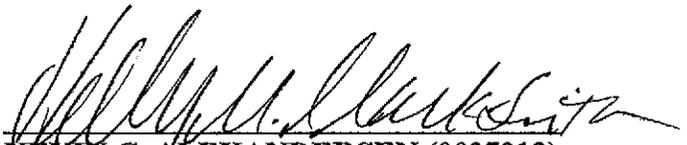
Norfolk Southern Railway Company

CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff Norfolk Southern Railway Company's Notice of Appeal was mailed this 3rd day of May, 2005 to the following:

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Odell Weldon, and Eric A. Wiles,
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Executor of the Estate of Larry
Arnold Wiles


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HOLLY M. OLARCZUK-SMITH (0073257)

doc. no. 786434
20014-42399

**IN THE COURT OF COMMON PLEAS,
CUYAHOGA COUNTY, OHIO**

NORFOLK SOUTHERN RAILWAY CO.,)

CASE NO. 542998

Plaintiff,)

ENTRY AND OPINION

-vs-

HOMER R. BOGLE,
WILLIAM H. MONROE, et al.,
CHARLES ODELL WELDON,
ERIC A. WILES, et al.,

Defendants.)

I. INTRODUCTION

Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") filed a Complaint for Declaratory Judgment¹ in four FELA/LBIA² cases: (1) Homer R. Bogle ("Bogle"), Case No. 518146; (2) William H. Monroe, Jr. ("Monroe"), Administrator of the Estate of Worth Oliver Bryant, Case No. 497980; (3) Charles Odell Weldon ("Weldon"), Case No. 391852; and (4) Eric C. Wiles ("Wiles"), Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, Case No. 391853. Norfolk Southern requests a Declaratory Judgment finding that: (1) Am. Sub. H.B. 292 applies to the four above-cited FELA/LBIA cases; (2) Am. Sub. H.B. 292 does not infringe upon the Supremacy Clause of the Constitution of the United States.

In response, Defendants Bogle, Monroe, Weldon, and Wiles filed a Motion to Dismiss³ Norfolk Southern's Complaint for Declaratory Judgment, asserting, inter alia, that the Complaint fails to raise a justiciable controversy because this Court has

¹ File & Serve I.D. #4196730

² Federal Employers Liability Act, 45 U.S.C. §51, et. seq., (FELA); Locomotive Boiler Inspection Act, 49 U.S.C. § 20701.

³ File & Serve I.D. #4572906

previously ordered that H.B. 292 does not apply to claims arising under the FEELA and the LBIA.

Norfolk Southern then filed a Brief in Opposition⁴ to Defendants' Motion to Dismiss, asserting a justiciable controversy exists as of January 3, 2005,⁵ which marks the one hundred and twenty day (120) deadline in which to file a written report and supporting test results pursuant to R.C. § 2307.93. Additionally, Norfolk Southern contends that the Court's August 23, 2004 Order⁶ is not binding on Bogle, Monroe, Weldon, and Wiles because that Order applied only to Special Docket 073958 cases and not to the instant actions.

II. LAW AND ARGUMENT

R.C. § 2721.03, the declaratory judgment statute, provides in part, " * * * any person whose rights, status, or other legal relations are affected by a * * * statute * * * may have determined any question of construction or validity arising under the * * * statute and * * * obtain a declaration of rights, status, or other legal relations under it."

"In order to obtain declaratory relief, [a] plaintiff must establish (1) that a real controversy exists between the parties, (2) that the controversy is justiciable, and (3) that speedy relief is necessary to preserve the rights of the parties. * * * Inherent in these requirements is the principle that Ohio courts do not render advisory opinions." *R.A.S. Entertainment, Inc. v. Cleveland* (1998), 130 Ohio App.3d 125, citing *Burger Brewing Co. v. Ohio Liquor Control Comm.* (1973), 34 Ohio St.2d 93; *Halg v. Ohio State Bd. of*

⁴ File & Serve I.D. #4694782

⁵ In their brief, Plaintiff's assert the 120-day deadline expired on January 3, 2004; however, this is clearly a clerical error since Am. Sub. H.B. 292 took effect on September 2, 2004.

⁶ File & Serve I.D. #4089851

Edn. (1992), 62 Ohio St.3d 507; *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176.

It has been repeatedly held in Ohio that "There are only two reasons for dismissing a complaint for declaratory judgment before the court addresses the merits of the case: (1) there is neither a justiciable issue nor an actual controversy between the parties requiring speedy relief to preserve rights which may otherwise be lost or impaired; or (2) in accordance with R.C. 2721.07, the declaratory judgment will not terminate the uncertainty or controversy." *Halley v. Ohio Co.* (1995), 107 Ohio App.3d 518, citing *Wagner v. Cleveland* (1988), 62 Ohio App.3d 8; *Burger Brewing Co.* supra. A controversy exists when there is a genuine dispute between parties with opposing legal interests and that dispute is of sufficient immediacy that declaratory judgment is necessary. *Wagner*, 62 Ohio App.3d 8.

There is no doubt that an actual dispute exists between the parties herein. On January 3, 2005, the one hundred and twenty day (120) deadline in which to file a written report and supporting tests results pursuant to R.C. § 2307.93 expired. To date, Defendants Bogle, Monroe, Weldon, and Wiles have not produced the required documentation. Therefore, Defendants are in violation of R.C. § 2307.93 *if* H.B. 292 applies to their FELA and LBIA claims.

We agree with Norfolk Southern that this Court's August 23, 2004 Order is not binding on Defendants' cases. In our Order we concluded: "The application of the Ohio statute *to the instant cases* is preempted by that extensive body of federal law" (emphasis added). The four cases now before the Court were not included in that Order, and are thus not binding on Defendants. However, we disagree with Norfolk Southern's

assertion that H.B. 292 encompasses Defendants' civil actions in the Cuyahoga County Court of Common Pleas alleging asbestos claims under the FELA and/or the LBIA.

The general congressional intent to promote liberal recovery for injured railroad workers is well established. *See Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261; *Urie*, 337 U.S. at 163, 69 S. Ct. at 1018, 93 L. Ed. at 1282. There can be no dispute that the FELA was designed to regulate the entire field of railroad injuries and supersede and replace state regulation of those injuries. The FELA was **"undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce, and that it is paramount and exclusive."** *New York Central Railroad Company v. Winfield*, 244 U.S. 147, 152, 37 S. Ct. 546, 61 L. Ed. 1045 (1917)(emphasis added).

The congressional purpose of the Act was to provide a national law of uniform operation throughout the states and to **"withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws."** *Id.* at 150.

This purpose is exemplified in the legislative history of the statute:

[The FELA] is intended in its scope to cover all commerce to which regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carries to their employees . . . **A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states.**

Id. at 150. (citations omitted)(emphasis added).

Accordingly, it has been an overriding principle of FELA jurisprudence, established by Congress, emphasized repeatedly by the Supreme Court of the United States and well-recognized here in Ohio, that a **"substantive right or defense arising**

under the act cannot be lessened or destroyed by a local rule . . ." *Norfolk Southern Railroad v. Ferebee*, 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303 (1915)(emphasis added); see also *South Buffalo Rail Company v. Ahern*, 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 395 (1952)("Peculiarities of local law may not gnaw at rights rooted in federal legislation.")(emphasis added). See August 23, 2004 Order at p. 4-5.

III. CONCLUSION

Norfolk Southern's Complaint for Declaratory Judgment, while procedurally correct, is substantively erroneous. The application of H.B. 292 to the instant cases is preempted by the FELA and LBIA. Furthermore, all pending and future FELA/LBIA cases filed by plaintiffs pursuant to R.C. § 2307.93, et seq., are preempted by that extensive body of federal jurisprudence.

IT IS SO ORDERED.

Judge Leo M. Spellacy
Judge Harry A. Hanna
Justice Francis E. Sweeney

February 24, 2005

Harry Hanna

JUDGE HARRY A. HANNA

4-15-05

THE STATE OF OHIO } Cuyahoga County	SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <i>Clk</i>	
NOW ON FILE IN MY OFFICE.	
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>15</u> DAY OF <u>April</u> A.O. 20 <u>05</u>	
GERALD E. FUERST, Clerk	
By <i>[Signature]</i>	Deputy

RECEIVED FOR FILING
APR 15 2005

GERALD E. FUERST, CLERK
By *[Signature]* Deputy

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

**NORFOLK SOUTHERN RAILWAY
COMPANY**

Plaintiff,

-vs-

**HOMER R. BOGLE
WILLIAM H. MONROE, et al.
CHARLES ODELL WELDON
ERIC A. WILES, et al.**

Defendants.

CIVIL ACTION - ASBESTOS

CASE NO.: CV-04-542998

JUDGMENT ENTRY

The Court wishes to clarify its February 24, 2005 Entry and Opinion. Defendant's Motion to Dismiss Norfolk Southern Railway Company's Complaint for Declaratory Judgment is denied. Plaintiff's Motion for Summary Judgment is denied. The February 24, 2005 Entry and Opinion represents the declaration of the rights and obligations of the respective parties. As explained therein, Plaintiff's Complaint for Declaratory Judgment while procedurally correct is substantively erroneous. Plaintiff's request for declaratory relief as set forth in its Complaint is denied. The Court declares that the application of H.B. 292 to the instant cases is preempted by the FELA and LBIA.

IT IS SO ORDERED.

THE STATE OF OHIO Cuyahoga County	SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <i>True</i>	
NOW ON FILE IN MY OFFICE. <i>April 15, 2005</i>	
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>15</u> DAY OF <u>April</u> A.D. 20 <u>05</u>	
GERALD E. FUERST, Clerk	
By <i>[Signature]</i>	Deputy

[Signature]
JUDGE HARRY A. HANNA

RECEIVED FOR FILING *4-15-05*

APR 15 2005

GERALD E. FUERST, CLERK
By *[Signature]* Deputy

SUPP. 028

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86339

NORFOLK SOUTHERN RAILWAY
COMPANY

Plaintiff-Appellant

vs.

HOMER R. BOGLE, ET AL.

Defendants-Appellees

CA05086339

38642985



JOURNAL ENTRY

and

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

March 30, 2006

CHARACTER OF PROCEEDING:

Civil appeal from
Common Pleas Court
Case No. CV-542998

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

APR 10 2006

APPEARANCES:

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COLLEEN A. MOUNTCASTLE
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Eric Wiles, Individually
and in his capacity as
Executor of the Estate of
Larry Arnold Wiles)

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CA05086339

38882106



SUPP. 029

COLLEEN CONWAY COONEY, P.J.:

Plaintiff-appellant, Norfolk Southern Railway Company ("Norfolk"), appeals the trial court's decision denying its request for declaratory relief and finding that Am. Sub. H.B. 292 is preempted by the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 et. seq., and/or the Locomotive Boiler Inspection Act ("LBIA"), as amended, 49 U.S.C. § 20701, et. seq. Finding no merit to the appeal, we affirm.

Between September 1999 and March 2004, defendants-appellees, Charles Odell Weldon, and Eric A. Wiles, Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, deceased, (collectively "appellees"), filed claims against Norfolk alleging injuries caused by occupational exposure to various products, including those containing asbestos, during the course and scope of their employment with Norfolk.¹ Appellees brought these causes of action under the FELA and LBIA.

On September 13, 2004, Norfolk filed a complaint for declaratory judgment concerning the above pending cases. Norfolk requested a declaratory judgment to declare that (1) the newly enacted Am. Sub. H.B. 292, effective September 2, 2004, applied to those pending cases, and (2) that Am. Sub. H.B. 292 did not infringe on the Supremacy Clause of the United States Constitution.

¹ Defendants-appellees, Homer Bogle and William H. Monroe, Jr., as Administrator of the Estate of Worth Oliver Bryant, were voluntarily dismissed from this appeal.

Following various procedural motions and an oral hearing, the trial court denied the relief sought by Norfolk by declaring that Am. Sub. H.B. 292 did not apply to FELA/LBIA cases because it was preempted by federal law.

Norfolk appeals this decision, raising three assignments of error, which will be addressed together.

Standard of Review

The issue before us is whether the application of Am. Sub. H.B. 292 to asbestos claims arising under the FELA and/or LBIA infringes on the Supremacy Clause of the United States Constitution and thus, is preempted by federal law. This issue is a question of law. Accordingly, we apply a de novo standard of review without deference to the trial court's decision on this issue. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 514, 2002-Ohio-2842, 769 N.E.2d 835; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889.

Am. Sub. H.B. 292 Applicability to the FELA and/or LBIA

In its first and second assignments of error, Norfolk argues that the trial court erred as a matter of law by declaring that Am. Sub. H.B. 292 ("the Act") does not apply to asbestos claims arising under the FELA and/or LBIA because the plain language of the Act demonstrates that it was intended to apply to all asbestos cases filed in the state courts of Ohio. It further argues that the Act is procedural in application, rather than substantive and, thus, it

does not infringe on the Supremacy Clause and is not preempted by federal law.

In construing a statute, a court's paramount concern is the legislative intent in enacting the statute. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319. To determine the legislative intent, a court must look to the language of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 104, 304 N.E.2d 378. Words used in a statute are to be given their usual, normal, and customary meaning. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 1996-Ohio-161, 661 N.E.2d 1049. Further, unless a statute is ambiguous, the court must give effect to the plain meaning of a statute. *Id.*

The preemption doctrine arises out of the Supremacy Clause of the United States Constitution, which provides that the laws of the United States shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, United States Constitution. Therefore, pursuant to the Supremacy Clause, Congress possesses the power to preempt state law. *Minton v. Honda of Am. Mfg., Inc.*, 80 Ohio St.3d 62, 68, 1997-Ohio-356, 684 N.E.2d 648. Moreover, "pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'" *Id.*, quoting *In re Miamisburg*

Train Derailment Litigation, 68 Ohio St.3d 255, 260, 1994-Ohio-490, 626 N.E.2d 85.

Federal preemption of state law can occur where Congress has occupied the entire field (field preemption) or where there is an actual conflict between federal and state law (conflict preemption). *Carter v. Consol. Rail Corp.* (1998), 126 Ohio App.3d 177, 181, 709 N.E.2d 1235. Field and conflict preemption are both forms of implied preemption. *Id.*, citing *Minton*, supra at 69.

Absent express statutory language preempting state law, preemption should be strictly construed in favor of finding against preemption. "In the interest of avoiding unintended encroachment on the authority of the States * * *, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *CSX Transportation, Inc. v. Easterwood* (1993), 507 U.S. 658, 663-664, 113 S.Ct. 1732, 123 L.Ed. 2d 387. The critical question in any preemption analysis is whether Congress intended state law to be superseded by federal law. *Minton*, supra at 69.

However, when the Federal government completely occupies a given field or an identifiable portion of it, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the Federal Act." *Carter*, supra at 182, quoting *Burlington Northern RR. Co. v. City of Connell* (E.D. Wash. 1993), 811 F. Supp. 1459, 1465. See, also,

Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm. (1983), 461 U.S. 190, 212-213, 103 S.Ct. 1713, 75 L.Ed.2d 752.

In the seminal case of *Napier v. Atlantic Coast Line RR. Company* (1926), 272 U.S. 605, 613, 47 S.Ct. 207, 71 L.Ed. 432, the United States Supreme Court held that Congress, through the LBIA, intended the federal government to occupy the field of locomotive safety. The LBIA was enacted to protect employees and the traveling public from defective locomotive equipment. *Urie v. Thompson* (1949), 337 U.S. 163, 188, 190-191, 69 S.Ct. 1018, 93 L. Ed. 1282. The LBIA imposes an absolute duty on interstate railroads to provide safe equipment, and subjects railroads to FELA suits by their employees for LBIA violations. *Id.* at 189.

Addressing the breadth of the federal government's authority under the LBIA, the Supreme Court found it extended "to the design, the construction and the material of every part of the locomotive and tender and all appurtenances." *Seaman v. A.P. Green Industries* (2000), 184 Misc.2d 603, 604, 707 N.Y.S.2d 299, quoting *Napier*, supra at 611. The field preemption of the LBIA applies not only to State legislative regulation, but also to State tort claims. *Seaman*, supra at 605. The LBIA preempts any state law that regulates locomotive equipment because the LBIA was enacted with the congressional intent to occupy the field of locomotive equipment and safety, particularly as it relates to injuries

suffered by railroad workers in the course of their employment. *Law v. General Motors Corp.* (9th Cir. 1997), 114 F.3d 908, 910.

Ohio, and other jurisdictions, have held that the LBIA preempts State tort actions brought by railroad employees injured by exposure to asbestos-containing locomotive components against railway companies and manufacturers. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117; *Seaman, supra*; *Scheiding v. General Motors Corp.* (2000), 22 Cal.4th 471, 993 P.2d 996; *In re: West Virginia Asbestos Litigation* (2003), 215 W.Va. 39, 592 S.E.2d 818. Therefore, the FELA and/or the LBIA entirely preempts the field of locomotive safety and bars State tort claims, including those related to asbestos injuries.

When field preemption has been found, there is no need for legislative intent specifically directed at tort law, product liability claims, or any other particular type of state regulation. *Carter, supra* at 183. When state law is preempted, the claims that depend on it are necessarily precluded. *Id.*, citing *Napier, supra* at 613. Therefore, it is not required that the General Assembly expressly exclude or include FELA and/or LBIA claims from the Act, because those claims are necessarily precluded.

Instead of state tort claims, injured railroad workers asserting injury under the LBIA must bring their claims under the FELA. *Seaman, supra* at 605, citing *Wabash R. Co. v. Hayes* (1914), 234 U.S. 86, 34 S.Ct. 729, 58 L.Ed. 1226. "Whether a locomotive is

off-line in a repair shop or moving interstate, the LBIA preempts state tort law, and the FELA replaces it in the railroad workplace environment." *Darby v. A-Best Products Co.*, Cuyahoga App. No. 81270, 2003-Ohio-6001, affirmed, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117.

"One of the purposes of the FELA was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 393, 2005-Ohio-5408, 835 N.E.2d 679, quoting *Norfolk & W. Ry. Co. v. Liepelt* (1980), 444 U.S. 490, 493, 100 S. Ct. 755, 62 L.E.2d 689. "The Supreme Court has long emphasized that uniform application of the FELA is 'essential to effectuate its purposes' and that 'state laws are not controlling in determining what the incidents of this federal right shall be.'" *Id.*, quoting *Dice v. Akron, Canton & Youngstown RR. Co.* (1952), 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398.

FELA cases may be brought, at plaintiff's option, in federal court or in state court. 45 U.S.C. § 56. Therefore, "as a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *Hess, supra*, quoting *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 84 L.Ed.2d 303. Therefore, it is clear that the FELA and/or the LBIA preempts any state law that is deemed substantive. However, the Act may be

applicable to the federal claims if the Act is procedural in nature. Fortunately, we need not address the issue of whether the overall application of the Act is procedural or substantive because even if we deemed it procedural, which we reserve for discussion at a later date, a substantive right under federal law cannot be lessened or destroyed by a state rule of practice. *Norfolk Southern R. Co. v. Ferebee* (1915), 238 U.S. 269, 35 S.Ct. 781, 59 L.Ed. 1303, paragraph two of the syllabus. The Supreme Court acknowledged that the extent to which the rules of practice and procedure may "dig" into substantive rights is "troublesome." *Brown v. Western R. Co. of Ala.* (1949), 338 U.S. 294, 296, 70 S.Ct. 105, 94 L.Ed. 100. The Court further noted the impossibility of laying down a precise rule to distinguish "substance" from "procedure." *Id.* Therefore, we must look at the application of the Act to determine its effect on asbestos claims filed under FELA and/or the LBIA.

The Act, as codified at R.C. 2307.91 et seq, took effect on September 2, 2004. It reformed asbestos litigation in Ohio by establishing a uniform process for asbestos claimants to use in advancing their claims. The General Assembly, in enacting the Act, stated the following goals:

"(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).

To maintain a tort action under R.C. 2307.92, a claimant must file, within thirty days of filing their action, "a written report and supporting test results constituting prima facie evidence of the exposed person's physical impairment that meets the medical requirements" of the applicable section of R.C. 2307.92. See, R.C. 2307.93(A)(1). However, if the claim was pending prior to the effective date of the Act, then the written report is required to be filed within one hundred and twenty days following the effective date of the Act. R.C. 2307.93(A)(2).

In the instant case, appellees' claims were pending prior to the effective date of the Act, thus the "post-complaint" report was required to be filed by January 3, 2005. Failure to file the required report results in an administrative dismissal of the claim without prejudice. R.C. 2307.93(C). However, the case may be reinstated once the plaintiff makes a prima facie showing that meets the minimum medical requirements specified in the applicable section under R.C. 2307.92.

The applicable section in the instant case is R.C. 2307.92(B), an asbestos claim based on a nonmalignant condition. R.C. 2307.92(B) provides that before a claimant can maintain a tort

action under this section, the prima facie showing/report must include "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 the substantial contributing factor to the medical condition." That prima facie showing shall include all of the following minimum requirements:

"(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:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(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.

(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;

(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:

(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.

(b) Either of the following:

(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:

(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;

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

(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.

(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:

(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;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal."
R.C. 2307.92(B).

Failure to make such a prima facie showing results in an administrative dismissal until such time that the plaintiff can make such showing. Consequently, a claimant asserting a cause of action under the FELA and/or LBIA in an Ohio state court would be

precluded from proceeding on their cause of action until they file this mandated post-complaint report making the requisite prima facie showing. No other state, except Georgia, has such a requirement.²

It has clearly been decided that a federal right cannot be defeated by the forms of local practice. *Brown*, supra at 297. This rule has been held to apply to FELA cases. *Id.*, citing *Reynolds v. Atlantic Coast Line R. Co.*, 336 U.S. 207, 69 S.Ct. 507, 93 L.Ed. 618. Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. *Id.* "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Brown*, supra at 298-299, quoting *Davis v. Wechsler*, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143. "Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved." *Brown*, supra at 299, citing *Brady v. Southern R. Co.*, 320 U.S. 476; 479, 64 S.Ct. 232, 88 L.Ed. 239. "Peculiarities of local law may not gnaw at

² In 2005, Georgia passed legislation requiring asbestos claimants to file a similar report before proceeding on the merits of their claims. No appellate decisions have been rendered interpreting those statutes. Georgia's statutes contain similar language as the Ohio Act.

rights rooted in federal legislation." *South Buffalo R. Co. v. Ahern* (1953), 344 U.S. 367, 73 S.Ct. 340, 91 L.Ed. 395, citing *American Railway Express Co. v. Levee* (1923), 263 U.S. 19, 21, 44 S.Ct. 11, 68 L.Ed. 140.

In the instant case, the Act requires that claimants seeking to bring a claim for injury allegedly from asbestos exposure, submit a report after their initial claim is filed. The new Ohio requirement precludes the FELA/LBIA claimants from proceeding on their claims until filing the report satisfying the requirements of R.C. 2307.92 et seq. We find that this requirement would "gnaw" at the FELA/LBIA claimants' substantive rights to assert a cause of action under federal law in a state court. FELA claimants would essentially be indefinitely precluded from asserting their federal rights until they complied with these requirements. This would not further Congress' intent of creating "uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." *Liepelt*, supra at 493.

Norfolk argues that federal courts employ a procedure similar to the Act to prioritize and administratively dismiss FELA asbestos claims. Therefore, Norfolk claims that if the FELA actions at issue had been filed in federal court, appellees would have been subject to similar procedural requirements. Norfolk points to the Administrative Order No. 8 of the United States District Court Judge Charles R. Weiner, filed January 16, 2002, which implemented

a prioritization and administrative dismissal process for FELA cases. A cursory reading of the Order provides that a doctor-patient medical report setting forth an asbestos-related disease is required. However, we have no evidence before us demonstrating or identifying what requirements the report must include. The Order provides:

"1. [a]ll non-malignant, asbestos related, personal-injury cases assigned to MDL 875 which were initiated through a mass-screening shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statute of limitations.

* * *

3. Any party may request reinstatement to active status of a case by filing with the Court a request for reinstatement together with an affidavit setting forth the facts that qualify the case for active processing. * * * The burden at any hearing to reinstate shall be upon the plaintiff to show some evidence of asbestos exposure and evidence of an asbestos-related disease. Exposure to specific products shall not be a requirement for reinstatement."

Clearly, the mandates that this administrative order imposes on a FELA plaintiff are not as detailed and stringent as those required under R.C. 2307.92(B). Therefore, contrary to Norfolk's assertion, appellees would not have been subject to the same administrative dismissal and reinstatement process had they filed their claims in federal court. Accordingly, we conclude that the Act, as applied to FELA/LBIA claimants is not merely procedural as it might preclude claimants from vindicating a substantive right to bring a claim under FELA/LBIA. Moreover, federal law preempts the

entire field of locomotive safety, including asbestos-related injury claims.

Norfolk makes a policy argument as its final assignment of error. Norfolk argues that if we exclude FELA actions from the application of the Act, certain fundamental rights of the FELA defendants will be infringed upon, including the rights of contribution and indemnification. We find that this argument is not ripe for our review because the FELA defendants have not suffered any infringement of their rights concerning indemnification or contribution. Although we understand the proactive argument raised by Norfolk, we find that such policy arguments are better suited for the General Assembly. Nevertheless, in *Hess*, the Ohio Supreme Court held that the proper measure of damages under the FELA is governed by federal law rather than state law. Therefore, any indemnification or contribution sought by Norfolk should be pursued under the jurisdiction of federal law. The Act would seemingly have no application or effect.

Therefore, we hold that the application of Am. Sub. H.B. 292 to asbestos claims arising under the FELA and/or the LBIA infringes on the Supremacy Clause of the United States Constitution and thus is preempted by federal law. Accordingly, Norfolk's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing 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.

MARY EILEEN KILBANE, J. and
CHRISTINE T. McMONAGLE, J. CONCUR

Colleen Conway Cooney
PRESIDING JUDGE
COLLEEN CONWAY COONEY

**FILED AND JOURNALIZED
PER APP. R. 22(E)**

APR 10 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

MAR 30 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

FOR ALL PARTIES-COSTS TAXED

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) 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(E). See, also, 5.Ct.Prac.R. II, Section 2(A)(1).

In the Court of Common Pleas
Cuyahoga County, Ohio

Special Docket 73958
Cuyahoga County Asbestos Cases

As the plaintiffs' firms begin to furnish the court with the inventory requested by the order of August 19, 2004, the court intends to initiate an administrative dismissal docket for those plaintiffs who are unimpaired. This action is consistent with the court's inherent authority to control its docket, irrespective of similar provisions found in Amended Substitute House Bill Number 292. The court will defer classification of the pending cases under the criteria set forth in that bill until the constitutionality of the bill has been resolved by Ohio Courts. All other aspects of the statute will be addressed during the normal course of litigation.

The court will administratively dismiss the cases of those plaintiffs who have been diagnosed with pleural plaques or with a condition "consistent with asbestosis" and who have not failed a pulmonary function test. The court will retain jurisdiction over these cases; if and when a plaintiff so classified becomes impaired, he/she may apply to the court for reinstatement of the claim. There are no time lines nor periods of limitation for the reinstatement of these cases.

For purpose of appeal, any order of administrative dismissal is not a final order; it is a temporary classification to allow the court to advance the cases of those with evidence of impairment. Cases that are administratively dismissed will be restored to the regular trial docket when the plaintiff develops evidence of impairment or when all impaired plaintiffs' cases are resolved.

IT IS SO ORDERED.

Judge Richard J. McMonagle

September 16, 2004

**In the Court of Common Pleas
Cuyahoga County, Ohio**

Special Docket 73958
Cuyahoga County Asbestos Cases

The Court having determined that the enforcement of the medical criteria of Ohio Revised Code § 2307.92 with respect to the unimpaired plaintiffs on this Court's docket would not affect any substantive right of these plaintiffs, since, by Court order, they were ineligible for placement on the trial list prior to the passage of HB 292, there is no reason to abstain from enforcement of the statute. The statute merely articulates the criteria for determining impairment, and thus eligibility for the trial list, and creates a procedural device (administrative dismissal) for classifying these plaintiffs unless and until their diagnoses entitle them to admission to the trial list. Further, since the administrative dismissal does not constitute a dismissal under Rule 41, Ohio Rules of Civil Procedure, it does not count against the plaintiff under the two-dismissal rule, and does not impact any rights of the plaintiff.

It is so ordered

Judge Harry A. Hanna
Judge Leo M. Spellacy
Justice Francis E. Sweeney

October 11, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS
LIABILITY LITIGATION (NO. VI)

CIVIL ACTION NO. MDL 875
(Including MARDOC, FELA,
and TIREFORKER cases)

This Document Relates to:
ALL ACTIONS

FILED JAN 15 2002

ADMINISTRATIVE ORDER NO. 8

THE COURT, has previously received the Motion For Case Management Order Concerning Mass Litigation Screenings, and has held a hearing thereon and reviewed the briefs and comments from counsel regarding the issue. The Court notes that a similar situation regarding the massive MARDOC filings was resolved by an administrative order dismissing those cases without prejudice and tolling the applicable statutes of limitations while retaining those actions in a special active status category. The Court feels that this administrative process has worked well with the Court's continued supervision as well as counsel monitoring the cases that become ready for trial or disposition.

Priority will be given to the malignancy and other serious health cases over the asymptomatic claims.

Furthermore, the position of the moving parties, that the screening cases have been filed without a doctor-patient medical report setting forth an asbestos related disease, has not been refuted. The basis of each filing, according to the evidence of the moving parties, is a report to the attorney from the screening company which states that the potential plaintiff has an x-ray reading 'consistent with' an asbestos related disease. Because this report may set in motion the running of any applicable statutes of limitations, a suit is then commenced without further verification. Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may

not suffer any symptoms in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.

~~The Court has the responsibility to administratively manage these cases so as to protect the rights of all of the parties, yet preserve and maintain any funds available for compensation to victims.~~

THE COURT FINDS that the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs.

IT IS THEREFORE THE ORDER OF THIS COURT:

1. All non-malignant, asbestos related, personal-injury cases assigned to MDL 875 which were initiated through a mass screening shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statutes of limitations. A dismissal order may be prompted by motion of any party and, upon request, shall be subject to a hearing at which time the Court may receive evidence that such case does or does not qualify for administrative dismissal hereunder.
2. Once a case is administratively dismissed, the case will remain active for the Court to continue to entertain settlement motions and orders, motions for amendments to the pleadings, substitutions, and other routine matters not requiring a formal hearing.
3. Any party may request reinstatement to active status of a case by filing with the Court a request for reinstatement together with an affidavit setting forth the facts that qualify the case for active processing. The motion for reinstatement shall be served by mail (known counsel of record for a particular defendant shall suffice) upon all parties (whether previously served or not) and any party may within ten (10) days request a hearing on the motion. The burden at any hearing to reinstate shall be upon the plaintiff to show some evidence of asbestos exposure and evidence of an asbestos-related disease. Exposure to specific products shall not be a requirement for reinstatement.

4. Following reinstatement, counsel shall have thirty (30) days to complete initial service of process and answers will be due twenty (20) days following service.

The Court encourages the parties to work informally upon discovery and settlement of these cases during any period of administrative dismissal and will entertain necessary discovery motions to facilitate the process. The Court will also be available to convene all the necessary parties and to facilitate the progress of the cases that are ready for early settlement decisions, setting of trial dates, and/or remand if desired.

BY THE COURT

Charles R. Weiner

Charles R. Weiner

S.J.

Date: 1/14/02

ENTERED

JAN 16 2002

CLERK OF COURT