

IN THE SUPREME COURT OF OHIO

NORFOLK SOUTHERN RAILWAY CO.,)	CASE NO. 06-1025
Appellant,)	On Appeal from the Cuyahoga County
v.)	Court of Appeals, Eighth Appellate District
HOMER R. BOGLE, ET AL.,)	Court of Appeals Case No. 86339
Appellees.)	

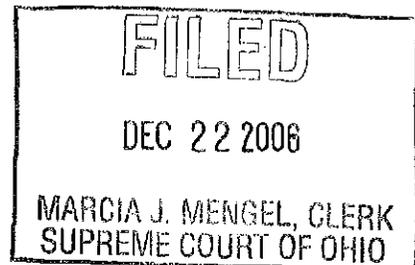
MOTION OF APPELLEES CHARLES ODELL WELDON AND ERIC A. WILES,
INDIVIDUALLY AND IN HIS CAPACITY AS EXECUTOR OF THE
ESTATE OF LARRY ARNOLD TO PARTICIPATE IN ORAL ARGUMENT

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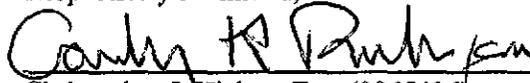
Attorneys for Appellant
Norfolk Southern Railway Co.



MOTION TO PARTICIPATE IN ORAL ARGUMENT

Appellees, Charles Odell Weldon and Eric A. Wiles, individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, respectfully move this honorable Court to participate in and/or be present at oral argument. The reasons for this request are set forth in the attached memorandum in support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND PROCEDURAL POSTURE

Appellees herein, by and through counsel, move this Court to allow their participation in the upcoming oral argument and all other court proceedings despite the striking of their Merit Brief as untimely filed on December 19, 2006. Appellees respect the rules of this Court and do not make this request lightly. However, the facts at issue demonstrate that a good faith mistake was made and that no prejudice will occur to either party if the Court exercises its inherent discretion and grants the request.

Appellant Norfolk Railroad filed the instant appeal on May 24, 2006 which was ultimately accepted as a discretionary appeal on August 23, 2006. After transmission of the record, Appellant's Merit Brief was due on October 30, 2006. However, at the request of Appellant, the parties entered into a stipulation allowing an additional twenty (20) days to file the Brief which extended the deadline until November 20, 2006. In accordance with Supreme Court Rule VI, Appellees' Merit Brief was then due thirty days from the date of filing. On or about November 17, 2006, Appellant filed its Merit Brief with the Court and served written copies of the Brief by regular U.S. Mail. On November 20, 2006, an Amicus Curiae Brief in Support was filed by the Association of American Railroads within the time period proscribed by Rule VI, Section 6.

In accordance with Supreme Court Rule VI, Section 3 C, Appellees calculated the date for filing of their Merit Brief as thirty days from the date the last appellant's brief was filed, believing in good faith that the Amicus Curiae Brief was to be considered as an appellant's brief. Accordingly, Counsel for Appellees believed that the due date for filing was December 19, 2006

pursuant to the time period set forth in Supreme Court Rule VI and thought that the Brief was indeed timely filed on this date. The Clerk of Courts rejected the filing of Appellees' Merit Brief when received on December 19, 2006. As explained by the Clerk of Court from the Supreme Court, in actuality, the Merit Brief of Appellees was due within thirty (30) days from the date that the Appellant's Merit was filed, rather than the Amicus Curiae Brief in Support or December 18, 2006.

Further, pursuant to Ohio Supreme Court Rule IX(3)(B), Appellees will not be entitled to participate in oral argument because it did not file its merit brief on December 18, 2006 as required by Ohio Supreme Court Rule XIX. Appellees respectfully ask this Court, however, to exercise its inherent jurisdiction and grant them permission to participate in oral argument in this case. Appellees assert that this is a reasonable request in the interest of fairness because if a timely request for an additional twenty days had been made, as was extended to Appellant, the Court would have allowed the extension and moved the deadline until December 28, 2006. Accordingly, Appellant will not be prejudiced by the granting of this request.

II. ARGUMENT

A. This Court Has Precedent to Grant Appellees' Request

Appellees ask this Court to use its inherent discretion to grant this motion as there is case precedence for its granting. The appellant, in the *Robson v. Allstate Insurance Co.* case, failed to file its merit brief. Pursuant to Supreme Court Rule VI(7), this Court may dismiss the appeal if the appellant fails to file its merit brief. The appellant in *Robson* filed a motion not to dismiss appeal and proceed with consideration of the merits as well as motion to participate in oral

argument. This Court granted both motions on April 8, 2002. See *Robson v. Allstate Insurance Co.*¹ docket sheet, case no. 01-1957, attached as exhibit A. Similarly, in the case of *In Re Adoption Asente*², when appellant failed to file its merit brief on time this Court granted appellant's motion to not dismiss appeal and proceed with consideration of the merits. See *In Re Adoption Asente* docket sheet, case no. 99-2158, attached as exhibit B. This Court did however deny the appellant's motion to participate in oral argument but did grant amicus curiae, Grassroots Citizens for Children's, motion to participate in oral argument.

In addition, the Ohio Supreme Court has reversed appellate cases wherein a party failed to timely file its merit brief and the appeal was dismissed. In so doing, the Court has stated that a fundamental tenet of legal principles mandates the deciding of cases on the merits rather than procedure alone. In *Hawkins v. Marion Correctional Institute*³, the Court reversed a lower court decision that dismissed the appeal after Appellant filed its brief one day late following a miscalculation of time pursuant to App. R. 14 C. In so holding, the Court determined that

"In applying these factors to this case, we find that appellant believed its brief was timely filed, and its mistake, if any, was in good faith. Neither the opposing party nor the court was prejudiced since appellee's briefing time did not commence until appellant's brief was filed and the court [***6] would not have considered the case until after all the briefs were filed. Dismissal was clearly disproportionate to any error appellant may have made since the date on which counsel filed the brief was based on his good faith reading of the rule and was not caused by lack of diligence or disregard for court proceeding. Obviously, appellant will be unfairly prejudiced if the dismissal is allowed to stand, and the alleged tardiness in filing would have had no effect on the substantive issues or the course of the appeal. Therefore, we find that the court of appeals abused its discretion in dismissing appellant's appeal."

¹ (2002), 96 Ohio St. 3d 1458; 772 N.E. 2d 641

² (2000), 90 Ohio St. 3d 91; 733 N.E. 2d 619

³ 28 Ohio St.3d 4; 501 N.E.2d 1195

Similarly, in *State ex rel. Montgomery v. R & D Chem. Co.*⁴, the Court again reversed a lower court decision wherein sanctions were entered for failure to timely file a merit brief. This Court found that

“Appellee attempted to file its brief beyond the thirty-day period set forth in S.Ct.Prac.R. VI(2) and, as such, appellee's brief was properly rejected by the Clerk. Accordingly, we also denied appellee's request for leave to participate in oral argument. [**823] Hence, given appellee's omission in this court, we are tempted to borrow from App.R. 18(C) and find that the facts, issues and assertions properly set forth in appellants' brief, when accepted as correct, reasonably appear to sustain a reversal of the judgment of the court of appeals. However, rather than attempt to assess which party is more at fault or which party has committed the more egregious omission, we believe, given the important issues involved in this case and the fact that a trial transcript is indeed available, n1 that this case should be decided on the merits. This court has long [**5] recognized the fundamental tenet of judicial review in Ohio that HN2courts should decide cases on the merits. *Hawkins v. Marion Correctional Inst.* (1986), 28 Ohio St.3d 4, 28 OBR 3, 501 N.E.2d 1195. “Fairness and justice are best served when a court disposes of a case on the merits.” *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193, 23 O.O.3d 210, 213, 431 N.E.2d 644, 647.”

Appellees therefore assert that the facts of the case now pending demonstrate a similar good faith mistake for the late filing and a reasonable basis for the exercise of its inherent discretion in allowing their participation in the Oral Argument of this matter.

B. Appellant Railroad Would Not Be Prejudiced by the Granting of this Motion

The granting of this motion would not prejudice Appellant. The Appellees' Brief was completed on December 18, 2006 and placed into an overnight express mail package rather than driven down to Columbus for filing. This decision was obviously made with the assumption and good faith belief that the Brief was being timely filed on December 19, 2006. While this Court should not condone the mistake of undersigned counsel, it is clear that Appellant should not be allowed to profit because of a late filing when the Appellees' Merit Brief was filed within the

⁴72 Ohio St.3d 202; 648 N.E.2d 821

thirty days of the last filing, i.e., the Amicus Curiae Brief filed in support of Appellant's position on November 20, 2006. Further, given the previous extension of additional time afforded to Appellant, absent a showing of actual prejudice, the striking of Appellees' Brief and its disallowance from the proceedings is a disproportionate sanction. Accordingly, Appellees urge the Court to grant this request.

C. Appellees' Failure to Timely File their Brief does not entitle Appellant to Automatic Reversal of the Decision of the Lower Court

Appellees are requesting the opportunity to participate in the upcoming Oral Argument and all future proceedings. However, assuming that the Court deny this request, Counsel asserts that such decision does not entitle Appellant to an automatic reversal of the lower court's decision. In *State ex rel. Willacy v. Smith*⁵, the Court held that "we do not condone appellees' failure to file a merit brief because 'briefs serve the important function of narrowing and sharpening the parties' arguments' to the Court. Nevertheless, for the reasons herein, Willacy is not entitled to reversal of the court of appeals' judgment."⁶ Applying this same rationale to the facts herein, Appellees assert that their brief and the arguments contained therein will only serve to aid the Court in its review and narrow the issues before it. Therefore, Appellees' participation should be allowed by the Court to serve in this important function.

CONCLUSION

Appellees acknowledge that their Merit Brief was rejected as untimely upon receipt with the Court on December 19, 2006. As outlined above, Appellees respect the Rules of this Court and do not condone the mistake but merely offer an explanation as to the reasons that resulted in

⁵ 78 Ohio St.3d 47; 676 N.E.2d 109.

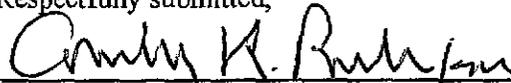
⁶ Id. at p. 49.

the late filing. Appellees further recognize that the Court has implemented its rules for meaningful purposes and understands the Court may, in accordance with its rules, deny this motion and decline to hear from the Appellees on this appeal.

However, Appellees urge the Court to use its inherent discretion to grant this motion requesting the opportunity to participate in all court proceedings, including the upcoming Oral Argument of this matter. Finally, while every single case before this Court is of great importance, Appellees assert that this case is one of first impression since it involves a question of law as to the application of Am.H.B. 292 that became effective on September 1, 2004 and may well affect all litigants whose rights stem from federal law. Accordingly, while Appellees understand that the Court is well equipped to evaluate and decide the issues without their input, Appellees believe that they can still assist the Court in its task due to the adversarial nature of appellate review.

Accordingly, Appellees ask this Court to exercise its inherent discretion and grant this request in the interest of fairness and for the reasons outlined herein.

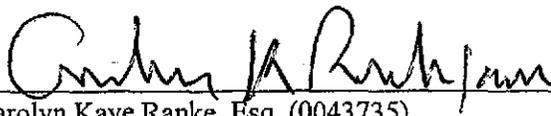
Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion to Participate in Oral Argument, has been forwarded to Kevin C. Alexandersen, Esq., Colleen A. Mountcastle, Esq. and Holly M. Olarczuk-Smith, Esq., attorneys for Appellant, Norfolk Southern Railway Co., at Gallagher Sharp, 1501 Euclid Avenue, Sixth Floor, Bulkley Building, Cleveland, Ohio 44115; and Charles F. Clarke, Esq., attorney for the Association of American Railroads, at Squire, Sanders & Dempsey, L.L.P., 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114, this 22nd day of December 2006, via regular U.S. Mail.



Carolyn Kaye Ranke, Esq. (0043735)
Counsel for Defendants-Appellees, Charles Odell Weldon and
Eric A. Wiles, Individually and in His Capacity as Executor
of the Estate of Larry Arnold Wiles

EXHIBIT

A



The Supreme Court of Ohio
 Clerk's Office
 65 South Front Street, 8th Floor
 Columbus, Ohio 43215-3431
 614.387.9000
 614.387.9530

Marcia J. Mengel
 Clerk of Court

Search Results: Case Number 2001-1957

The Supreme Court of Ohio CASE INFORMATION

GENERAL INFORMATION

Case: 2001-1957 Discretionary Appeal (Non-felony); Claimed Appeal of Right

Filed: 11/02/01

Status: Case Is Disposed

Richard C. Robson v. Allstate Insurance Company

PARTIES and ATTORNEYS

Ohio Academy of Trial Lawyers (Amicus Curiae on behalf of Appellant) Represented by: Crossmock, Steven (41947)
Robson, Richard C. (Appellant) Represented by: Roubanes, Barbara (88210) , Counsel of Record Ray, Frank (7762)
Allstate Insurance Company (Appellee) Represented by: Marsh, Rick (2110) , Counsel of Record Hubbard, Edward (67784)

PRIOR JURISDICTION

Jurisdiction Information	Prior Decision Date	Case Number(s)
Delaware County, 5th District	09/18/2001	01CAE03007

DOCKET ITEMS

 - denotes scanned document. Generally, scanned documents will be available within one business day from the date of filing.

Date Filed	Description
11/02/01	Notice of appeal of Richard C. Robson <i>Filed by:</i> Robson, Richard
11/02/01	Memorandum in support of jurisdiction <i>Filed by:</i> Robson, Richard
11/05/01	Copy of notice of appeal sent to clerk of court of appeals
11/30/01	Memorandum in response <i>Filed by:</i> Allstate Insurance Company
02/06/02	Upon consideration of jurisdictional question 02/06/02: Appeal allowed
02/06/02	Order to clerk of court/custodian to certify record
02/19/02	Record
02/19/02	Clerk's notice of filing of record
04/01/02	Brief of amicus curiae Ohio Academy of Trial Lawyers <i>Filed by:</i> Ohio Academy of Trial Lawyers
04/03/02	Motion not to dismiss appeal and proceed with consideration of merits <i>Filed by:</i> Robson, Richard
	04/08/02: Granted; appellee's merit brief due within 20 days; appellant's reply brief due within 15 days thereafter
04/29/02	Appellee's merit brief <i>Filed by:</i> Allstate Insurance Company
04/29/02	Second supplement to briefs <i>Filed by:</i> Allstate Insurance Company
05/13/02	Reply brief <i>Filed by:</i> Robson, Richard
05/13/02	Motion to participate in oral argument <i>Filed by:</i> Robson, Richard
	07/29/02: Granted
08/01/02	Notice of oral argument to be held 10/16/02
10/09/02	List of additional authorities <i>Filed by:</i> Allstate Insurance Company
10/10/02	Request to broadcast/record/photograph court proceedings by Susan DiMauro and Kevin Graft of The (Newark) Advocate 10/11/02: Granted
10/11/02	Request to broadcast/record/photograph court proceedings by MaryRob Clodfelter of Johnstown Independent 10/14/02: Granted

10/11/02	Request to broadcast/record/photograph court proceedings by Chris Parker of This Week Johnstown Independent Group
	10/14/02: Granted
10/14/02	Request to broadcast/record/photograph court proceedings by Chad Klimack of The Pataskala Standard
	10/15/02: Granted
10/15/02	Application for dismissal of case <i>Filed by: Robson, Richard</i>
	10/15/02: Granted
10/29/02	Certified copy of judgment entry sent to clerk
10/29/02	Issuance of mandate
11/20/02	Return of record to clerk of court/custodian
11/25/02	Return receipt; postage \$9.25

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EXHIBIT

B



The Supreme Court of Ohio
Clerk's Office
65 South Front Street, 8th Floor
Columbus, Ohio 43215-3431
614.387.9000
614.387.9530

Marcia J. Mengel
Clerk of Court

Search Results: Case Number 1999-2158

The Supreme Court of Ohio
CASE INFORMATION

GENERAL INFORMATION

Case: 1999-2158 Discretionary Appeal (Non-felony); Claimed Appeal of Right

Filed: 12/06/99

Status: Case Is Disposed

In the Matter of The Adoption of Justin Richard Asente [Richard & Cheryl Asente]

PARTIES and ATTORNEYS

American Academy of Adoption Attorneys (Amicus Curiae on behalf of Appellant) Represented by: Smith, Mary (30530)
Attorney General of Ohio (Amicus Curiae on behalf of Appellant) Represented by: Gormley, David (46943) , Counsel of Record Bowers, Andrew (71486)
Grassroots Citizens for Children (Amicus Curiae on behalf of Appellant) Represented by: Pomeroy, Rosemary (39635)
Hear My Voice and Other Organizations (Amicus Curiae on behalf of Appellant) Represented by: Scarnecchia, Suellen (0)
National Committee for Rights of the Child (Amicus Curiae on behalf of Appellant) Represented by: Pomeroy, Rosemary (39635)
National Task Force for Children's Constitutional Rights (Amicus Curiae on behalf of Appellant) Represented by: Pomeroy, Rosemary (39635)

The Justice For Children Project (Amicus Curiae on behalf of Appellant) Represented by: DiPasquale, Anita (39805) Federle, Katherine (69334)
Asente, Cheryl (Appellant) Represented by: Milless, Charles (7025) , Counsel of Record Eisenman, Susan (20121) Ryan, Corinne (66393)
Asente, Richard (Appellant) Represented by: Milless, Charles (7025) , Counsel of Record Eisenman, Susan (20121) Ryan, Corinne (66393)
Dorning, Jerry (Appellee) Represented by: Dietz, Stephanie (64664)
Moore, Regina Carol (Appellee) Represented by: Cullison, Richard (26527) , Counsel of Record Scala, Michael (1383)
Letson, Daniel B. (Other - Party Status) Represented by:

PRIOR JURISDICTION

Jurisdiction Information	Prior Decision Date	Case Number(s)
Trumbull County, 11th District	11/01/1999	99T0055
Trumbull County, 11th District	11/01/1999	99T0056
Trumbull County, 11th District	11/01/1999	99T0057
Trumbull County, 11th District	11/01/1999	99T0058

DOCKET ITEMS

 - denotes scanned document. Generally, scanned documents will be available within one business day from the date of filing.

Date Filed	Description

12/06/99	Notice of appeal by Richard and Cheryl Asente
12/06/99	Motion for stay of court of appeals decision
	12/23/99: Denied
12/07/99	Copy of notice of appeal sent to clerk of court of appeals
12/13/99	Memorandum of amicus curiae Grassroots Citizens for Children et al. in support of jurisdiction
12/15/99	Memorandum of amicus curiae American Academy of Adoption Attorneys in support of jurisdiction
12/16/99	Memo opposing motion for stay of court of appeals decision
12/16/99	Memorandum in support of jurisdiction
12/22/99	Motion to expedite motion for stay and consideration of the jurisdictional question
12/30/99	Memo opposing motion to expedite consideration of the jurisdictional question
01/18/00	Memorandum in response by Regina Moore
01/18/00	Memorandum in response by Jerry Dorning
01/19/00	Entry: sua sponte, the Attorney General is invited to submit within 30 days an amicus curiae memorandum addressing whether the Court should allow the appeal and hear this case on the merits
02/18/00	Memorandum in support of jurisdiction of amicus curiae Attorney General of Ohio
04/19/00	Upon consideration of jurisdictional question
	04/19/00: Appeal allowed; sua sponte, case shall proceed under S. Ct. Prac. R. VI as amended
04/19/00	Entry: appellant's brief due 20 days from the date of the filing of the record; appellees' brief due 20 days; reply brief due 15 days
04/19/00	Order to clerk of court/custodian to certify record
05/09/00	Record
05/09/00	Clerk's notice of filing of record
05/26/00	Motion for admission pro hac vice of Suellyn Scarnecchia for Hear My Voice by Nicholas J. Rine
	07/12/00: Granted
05/26/00	Brief of amicus curiae Hear My Voice
05/30/00	Brief of amicus curiae American Academy of Adoption Attorneys
05/30/00	Brief of amicus curiae The Justice for Children Project
05/31/00	Motion not to dismiss appeal and proceed with consideration of merits
	06/02/00: Granted; sua sponte, appellees brief due within 20 days of entry; appellants reply brief due 15 days after aee brief
06/21/00	Appellee's merit brief
06/21/00	Second supplement to briefs
06/30/00	Reply brief
07/12/00	Notice of oral argument to be held 8/22/00; correspondence from Clerk regarding appellants' inability to argue
08/10/00	Request to broadcast/record/photograph court proceedings by Keith Bell of WYTV-33, Youngstown
	08/16/00: Granted
08/10/00	Request to broadcast/record/photograph court proceedings by Anthony Peoples of WYTV-33, Youngstown

	08/16/00: Granted
08/14/00	Motion to participate in oral argument
	08/16/00: Denied
08/17/00	Request to broadcast/record/photograph court proceedings by Joel Chow of WCMH-TV
	08/21/00: Granted
08/17/00	Request to broadcast/record/photograph court proceedings by James M. Gorey of ONN-Ohio News Network / WBNS-TV
	08/21/00: Granted
08/18/00	Motion to participate in oral argument by amicus curiae Grassroots Citizens For Children
	08/21/00: Granted
08/18/00	Request to broadcast/record/photograph court proceedings by Jerry DeMoss of WLWT TV5-Cincinnati
	08/21/00: Granted
08/21/00	Request to broadcast/record/photograph court proceedings by Andrew Welsh-Huggins for J. Kustron of The Associated Press
	08/22/00: Granted
08/23/00	Upon consideration of the merits
 View	08/23/00: Affirmed for the reasons stated in the Court of appeals' opinion, which is adopted as the opinion of this Court. See opinion at 2000-Ohio-32
09/05/00	Motion for reconsideration
	10/04/00: Denied
09/12/00	Memo opposing motion for reconsideration
10/04/00	Certified copy of judgment entry sent to clerk
10/04/00	Issuance of mandate
10/04/00	Copy of rehearing entry sent to clerk
10/10/00	Return of record to clerk of court/custodian (US Cargo)

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