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

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

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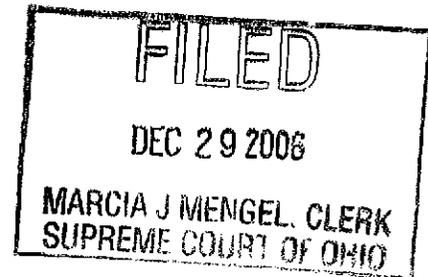
NORFOLK SOUTHERN RAILWAY COMPANY

Plaintiff-Appellant

vs.

HOMER R. BOGLE, et al.

Defendants-Appellees



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**PLAINTIFF-APPELLANT, NORFOLK SOUTHERN RAILWAY COMPANY'S  
MEMORANDUM OPPOSING DEFENDANTS-APPELLEES' MOTION  
TO ACCEPT LATE FILING OF MERIT BRIEF AND REQUEST TO  
PARTICIPATE IN ORAL ARGUMENT**

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**Charles Odell Weldon, and Eric A. Wiles,**  
**Individually and in his capacity as**  
**Executor of the Estate of Larry Arnold**  
**Wiles**

## MEMORANDUM IN OPPOSITION

### **I. STATEMENT OF THE CASE**

Pursuant to a stipulation reached between the parties, Plaintiff-Appellant, Norfolk Southern Railway Company's ("Norfolk") merit brief was due by November 20, 2006. On November 17, 2006, Norfolk timely filed its merit brief and supplement. Pursuant to S.Ct.Prac.R. VI, Section 6(A), the Association of American Railroads timely filed an Amicus Curiae brief in support of Norfolk on November 20, 2006.

Pursuant to S.Ct.Prac.R. VI, Section 3(A), Defendants-Appellees, Charles Odell Weldon, and Eric A. Wiles, individually and in his capacity as executor of the Estate of Larry Arnold Wiles' ("Appellees") merit brief was due "within 30 days after the filing of appellant's brief." Since the thirtieth day fell on Sunday, December 17, 2006, Appellees had until Monday, December 18, 2006 to file their merit brief. See S.Ct.Prac.R. XII, Section 3(A). Appellees, however, failed to timely file their merit brief within the prescribed time period.

Claiming that a miscalculation of the due date occurred, Appellees have now asked this Court to accept their late brief and further seek to participate in oral argument. This Court should deny Appellees' request to accept their untimely brief and participate in oral argument.

### **II. LAW AND ARGUMENT**

S.Ct.Prac.R. XIV, Section 1(C) prohibits the filing of untimely briefs and prohibits the filing of motions to waive this rule: "The Clerk shall refuse to file a \*\*\* brief \*\*\* that is not timely tendered for filing. Motions to waive this rule are *prohibited* and shall not be filed." (Emphasis added). Therefore, this Court should deny Appellees' motion to accept the late filing of their merit

brief as such motions are prohibited under S.Ct.Prac.R. XIV, Section 1(C).

Further, pursuant to S.Ct.Prac.R. VI, Section 3(A), “the appellee shall file a merit brief within 30 days after the filing of appellant’s brief.” Norfolk filed its merit brief on November 17, 2006. Thus, Appellees’ merit brief was due on December 18, 2006. Counsel for Appellees believed that “the Amicus Curiae Brief was to be considered as an appellant’s brief.” (Appellees’ motion to participate in oral argument at p. 3). While the Association of American Railroads filed an Amicus Curiae brief in support of Norfolk on November 20, 2006, this did *not* extend Appellees’ time to file their merit brief. The plain language of S.Ct.Prac.R. VI, Section 3(A) is simple and unambiguous. It states that “the appellee shall file a merit brief within 30 days after the filing of appellant’s brief[.]” not the amicus curiae brief. The Supreme Court Practice Rules clearly make a distinction between an appellant’s brief and an amicus curiae brief. See S.Ct.Prac.R. VI, Section 2 and Section 6.

There is no room for the purported confusion which counsel for Appellees claims had occurred. Counsel for Appellees have appeared and practiced before this Court on numerous occasions, including three separate appeals involving Norfolk. *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 2005-Ohio-5408, *Seaford v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 430, 2005-Ohio-5407, and *In re: Special Docket No. 73958*, Supreme Court Case No. 2006-1279. (See Exhibit A, list of Supreme Court cases involving Appellees’ counsel). Thus, Appellees should be well aware of the requirements for filing a timely merit brief and the distinction between an Amicus Curiae brief and an Appellant’s brief.

Appellees claim that the issues raised in this appeal are of such importance that this Court should overlook the Supreme Court Practice Rules and permit Appellees to participate in oral argument. The cases relied upon by Appellees are inapposite as they involve situations where the

appellant has failed to timely file a merit brief and was faced with the possibility of having the case dismissed under S.Ct.Prac.R. VI, Section 7. In contrast, here, the appeal will not be dismissed due to Appellees' failure to timely file its merit brief. It is true that this appeal, like all appeals before this Court, involve important constitutional and great public interest issues. However, this should not be used as a crutch to permit Appellees to participate in oral argument even though they failed to file their brief in a timely manner.

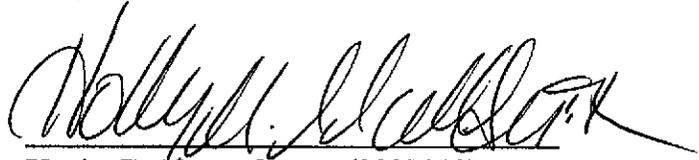
Since Appellees failed to timely file their merit brief, Appellees should be precluded from participating in oral argument. S.Ct.Prac.R. IX, Section 3(B) makes clear that "[a]ny party who fails to file a merit brief pursuant to S.Ct.Prac.R. VI, Section 2 or Section 3, shall be deemed to have waived oral argument." Appellees have briefed their position at length before the Eighth District Court of Appeals. Thus, their position on the issues involved in this appeal are already contained in the record. Counsel for Appellees are seasoned appellate attorneys who have practiced before this Court many times. (See Exhibit A). Counsel for Appellees should have been well aware of the requirements contained in the Supreme Court Practice Rules for filing a timely merit brief and should have been well aware of the consequences for the failure to do so.

As this Court observed in *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39: "There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court." The sentiments expressed in *Drake* apply here. It is inexcusable for counsel to fail to comply with the Supreme Court Practice Rules, and Appellees are not entitled to the relief requested.

### III. CONCLUSION

Based on the foregoing reasons, Plaintiff-Appellant, Norfolk Southern Railway Company, respectfully requests that this Court deny Defendants-Appellees, Charles Odell Weldon, and Eric A. Wiles, individually and in his capacity as executor of the Estate of Larry Arnold Wiles' motion to accept their late brief as such motion is prohibited under S.Ct.Prac.R. XIV, Section 1(C). Furthermore, pursuant to S.Ct.Prac.R. IX, Section 3(B), this Court should deny Appellees' request to participate in oral argument due to their failure to file a timely merit brief.

Respectfully submitted,



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**PROOF OF SERVICE**

A true copy of the foregoing was served via regular U.S. mail, postage prepaid, this 29th

day of December 2006, upon the following parties of record:

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<a href="#">View Case</a>	2003-1175	Ranke, Carolyn	0043735	Mayfield, Iran
<a href="#">View Case</a>	2004-0442	Ranke, Carolyn	0043735	Nash, John
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