

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. )	

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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 AS SPECIAL  
RELIEF PURSUANT TO SUPREME COURT RULE 14

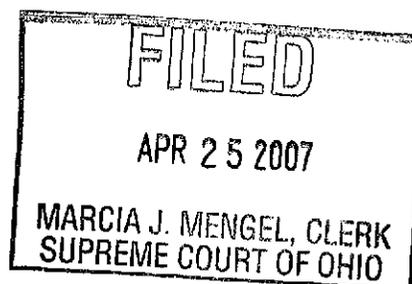
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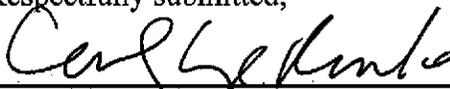
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**MOTION TO PARTICIPATE IN ORAL ARGUMENT**

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 on a renewed basis to participate in and/or be present at oral argument of the within matter despite the Court's previous denial of the request. At present, the oral argument is scheduled for May 1, 2007 and counsel renews its request to be heard on behalf of the Appellees. 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, previously moved this Court to allow their participation in the oral argument of the within matter and all other court proceedings despite the striking of their Merit Brief on December 19, 2006. Despite this request and its prior denial on January 18, 2007, Counsel urges the Court to allow their participation in the oral argument on May 1, 2007.

Although there is no specific statutory provision or rule a trial court's decision to reconsider a previous order or outlining the standard of review, Appellees' request is grounded in common law principles and the relevant case law on point. As the Court of Appeals for Franklin County, by then Judge Thomas J. Moyer, now Chief Justice of this Honorable Court declared in Matthews v. Matthews (1981), 5 Ohio App.3d 140, on reconsideration of an appellate decision:

"App. R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been."

See also, State v. Black (1991) 78 Ohio App.3d 130.

Although Appellees are not challenging a court ruling on the merits of a case or an appellate decision, relief from the previous denial is being sought. As previously asserted, the circumstances surrounding the untimely filing of the Appellees' Merit Brief occurred due to a good faith mistake on the part of counsel. Counsel does not condone the mistake and has attempted to offer an explanation as to the reasons that resulted in the late filing. However, Appellees further recognize that the Court has implemented its rules for meaningful purposes and understands the Court has, in accordance with its rules, previously denied this motion.

Nonetheless, due to the cases that are set for hearing by the Court on its May 1 docket and the multiple issues involving Ohio's Tort Reform, counsel again seeks permission to present the claimant perspective with regard to the asbestos cases pending throughout Ohio courts. Appellees assert that this is a reasonable request in the interest of fairness and will in no way lead to any prejudice on the part of the Appellant if granted.

## II. ARGUMENT

### A. **This Court is considering other challenges to Ohio's Tort Reform and Consumer Protection Legislation, similar to the Asbestos Reform that is pending in the *Bogle* case.**

Appellees have cited this Court to other case decisions as precedence for the granting of the motion to participate in the oral argument. In denying the request, counsel has interpreted the Court's refusal to be based on the distinction between an appellant and appellee with regard to the safeguarding an issue for review. However, due to the recent changes enacted by the Ohio Legislature, there are multiple issues before this Court that have impacted the rights of litigants. In fact on May 1, this Court will be entertaining argument in the matter styled *Arbino v. Johnson & Johnson*, which involves the constitutionality of limits on non-economic damages as set forth in Senate Bill 80, Ohio's Tort Reform Law. In addition, the Court will also be considering the issues surrounding the veto of Senate Bill 117 which attempts to restrict personal injury suits against lead paint manufacturers. Both of these cases involve constitutional challenges to the legislature's effort to limit the rights of a plaintiff or litigant and strike at the very heart of due process issues. Similarly, the *Bogle* case represents this Court's first review of Ohio's Asbestos Reform Act, House Bill 292 and will also decide the rights of thousands of plaintiffs who suffer

from asbestos disease in the State of Ohio. In addition, other interested parties have filed amicus curiae briefs which further emphasize the importance of this issue as in the cases outlined above. To consider such an issue of compelling public interest without the representation of one side of the argument leaves this Court without the assistance of an important voice in the debate.

Appellees therefore assert that in light of the complete slate of issues currently pending before the Court and the unique nature of considering the constitutional challenges to legislative reform and the broad impact of its ruling, there is 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**

Although the Appellant has opposed the previous request to participate in the oral argument, its granting will in no way result in prejudice. Certainly, Appellant would prefer to be allowed to argue its position without any input or argument on the part of Appellees, however, due to the nature of the case and its appellate history at the Eighth District Court of Appeals, there can be no harm in the event that both sides of the issue are preserved for oral argument. Further, given the previous extension of additional time afforded to Appellant for filing its merit brief, absent a showing of actual prejudice, the striking of Appellees' Brief for being one day late and the total bar of Appellees' counsel from the proceedings is a disproportionate sanction. Accordingly, Appellees urge the Court to grant this request.

## CONCLUSION

Appellees acknowledge that their Merit Brief was rejected as untimely upon receipt with the Court on December 19, 2006 and the previous refusal to allow participation in the oral argument as a sanction. Since the denial of the request, the Court has however identified a schedule of issues to be heard on May 1 which include two cases involving similar constitutional challenges to Ohio's Tort Reform as well as the Asbestos reform challenge represented by the *Bogle* case. Accordingly, Appellees again seek the ability to preserve the rights of the thousands of asbestos claimants whose rights will be dramatically affected by the decision herein.

Therefore, Appellees urge the Court to use its inherent discretion to grant this motion requesting the opportunity to participate in the Oral Argument of this matter set for May 1, 2007. 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. With all due respect, Appellees assert that their participation can still assist the Court in its task due to the adversarial nature of appellate review and will aid in the presentation of the issues in the event of inquiry from the panel.

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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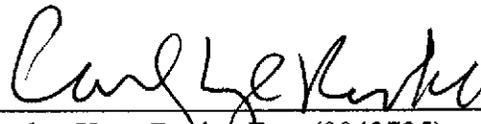
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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Reconsider the Request 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 23<sup>rd</sup> day of April 2007, via regular U.S. Mail.



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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