

IN THE SUPREME COURT OF OHIO

NORFOLK SOUTHERN RAILWAY CO.)
)
 Appellant,)
)
 v.)
)
 HOMER R. BOGLE, ET AL.)
)
 Appellees.)
)

CASE NO. 06-1025
On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate District
Court of Appeals Case No. 86339

APPELLEES CHARLES ODELL WELDON AND ERIC A. WILES, INDIVIDUALLY AND
IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF LARRY ARNOLD WILES
MOTION FOR RECONSIDERATION

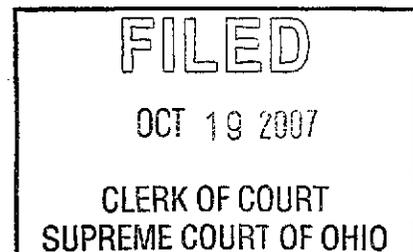
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PLAINTIFFS' MOTION FOR RECONSIDERATION

Appellees, Charles Odell Weldon and Eric Wiles, retired railroad workers who brought asbestos related disease claims under the Federal Employers Liability Act, respectfully request the Honorable Court to reconsider its decision in this matter.

The application of the state mandated evidentiary provisions of H.B. 292 (Ohio asbestos statute) to Federal Employers Liability Act claims, be they deemed procedural or substantive, contradicts the express intention of the Ohio Legislature and violates the Supremacy Clause.

Attached hereto and incorporated herein is Appellees' Memorandum in Support for Reconsideration. Plaintiffs' pray that this Court grant reconsideration in light of these additional concerns.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Appellee railroad workers, Charles Odell Weldon and Eric Wiles, brought compensation claims against their employer, Appellant Norfolk Southern Railway Co. (hereinafter "Railroad"), under the Federal Employers Liability Act (hereinafter "FELA") claiming injury from asbestos exposure during their employment. Subsequently, the State of Ohio passed H.B. 292, a bill addressed to deal with the large number of cases filed in Ohio against the manufacturers of asbestos products. Appellant Railroad sought to have H.B. 292 applied (retroactively) to Appellees FELA claims. The trial court and the 8th Circuit Court of Appeals ruled that applying H.B. 292 to FELA cases violated the Supremacy Clause. This Court reversed the decision of the appellate court and held that H.B. 292 can be applied to claims brought under the FELA.

Appellees respectfully request this Court to reconsider its decision in this case because it is contrary to the intent of the state legislature, is in conflict with decades of FELA jurisprudence, and violates the Supremacy Clause.

Appellees request the Court to reconsider its findings for the following reasons:

1. The decision of the Court conflicts with the legislature's intent. The Ohio Legislature specifically stated that it did not intend H.B. 292 to affect claims based on asbestos related occupational disease by employees against their employers. This is true whether the bill is found to be procedural or substantive. Although the legislature acted in an effort to deal with tens of thousands of asbestos cases filed in Ohio, the number of asbestos related FELA claims constitutes a minute fraction of these cases and fall under the exclusive control of FELA.

2. The Court's imposition of H.B. 292 on FELA claims directly violates the supremacy clause by disallowing "fear of cancer" claims.

3. The Court's application of H.B. 292 to Ohio FELA plaintiffs imposes a series of evidentiary hurdles which no other FELA plaintiff in the country is forced to meet. This flies directly in the face of the FELA and numerous U.S. Supreme Court rulings.

4. The Court's decision is in direct conflict with decisions of other state courts faced with this exact issue.

5. The Court's interpretation that H.B. 292 adopts procedures that are already in place in federal courts or other jurisdictions is inaccurate.

1. **LEGISLATURE SPECIFICALLY EXCLUDED EMPLOYEE CLAIMS FROM H.B. 292**

Section 2307.95(B) states that Sections 2307.91 to 2307.95 of the Ohio Revised Code "shall not affect the scope or operation of any workers' compensation law..."

Railroad employees can only bring claims against their employers under FELA which is in essence a workers' compensation system for railroad workers. Clearly the legislature did not want H.B. 292 to affect such employee claims whether the Act is considered procedural or substantive in nature. The fact that claims brought under FELA are not mentioned in H.B. 292 adds weight that such claims brought by railroad employees were not intended by the legislature to be affected by the bill. Further, the legislators intent was to deal with the tens of thousands of claims brought against asbestos manufacturers, not the miniscule amount of cases brought under FELA.

2. **H.B. 292 EXPRESSLY FORBIDS "FEAR OF CANCER" CLAIMS IN DIRECT CONFLICT WITH FELA AND IS CLEARLY PREEMPTED BY FEDERAL LAW**

FELA has conferred upon railroad employees, a substantive right to any damages suffered as a result of occupational injuries incurred through the negligence of the railroad.¹ This

¹*Urie v. Thompson* (1949), 337 U.S. 163, 189, 69 S. Ct. 1018, 93 L. Ed. 1282.

may include even the fear of cancer after exposure to asbestos.² The United States Supreme Court in *Norfolk and Western Railways Co. v Ayers et al.*³ upheld a FELA claimant's cause of action for "fear of cancer" and further confirmed the supremacy of federal law, in regards to asbestos based FELA claims. If H.B. 292 is deemed applicable to FELA cases, any available remedies for these "fear of cancer" claims will be forever denied since the Act precludes this claim in its entirety. Asbestosis is a cognizable injury under the FELA and it is from this injury that the cause of action for "fear of cancer" arises.⁴

3. THIS COURT'S APPLICATION OF H.B. 292 TO OHIO FELA CASES IMPOSES A SERIES OF EVIDENTIARY HURDLES WHICH NO OTHER FELA PLAINTIFF IN THE COUNTRY IS FORCED TO MEET

A. The Effect of Applying H.B. 292 to FELA Asbestos Claims

The mechanism of "administrative dismissal" now applied to FELA asbestos claims, places a federal railroad worker who does not meet the criteria set by the State of Ohio at the end of the line in an inactive court docket UNTIL and ONLY UNTIL he can meet the criteria set forth in H.B. 292. The medical criteria of H.B. 292 may never be met by that railroad worker, forever precluding him from bringing a FELA claim forward which previously or in any other state he would be entitled to pursue in a timely manner. The railroad worker who never meets the state medical criteria NEVER gets the chance to reactivate his claim. This is not a prioritization, it is a permanent dismissal.

The result of this Court's current decision now determines when and if a railroad worker with an asbestosis claim obtains a federal remedy under FELA. No injured railroad worker outside Ohio is forced to meet these prima facie standards before proceeding in a Court of law.

²*Norfolk & W. Ry. Co. v. Ayers* (2003), 528 U.S. 135, 123 S. Ct. 1210, 155 L. Ed.2d 261.

³ *Id.*

⁴ *Id.* at 148, 1218, 276

This Court justified its decision on the basis that the purpose of H.B. 292 criteria was to assist the Court in prioritizing asbestos claims. This purpose of “priorization” conflicts with the intent of FELA. As the U.S. Supreme Court in *Norfolk and Western Railways Co. v Ayers*⁵ recognized that “the general congressional intent to promote liberal recovery for injured railroad workers is well established.”⁶ Placing state law roadblocks to the ultimate resolution of a claim in a Court of law flies in the face of a “liberal recovery” for injured railroad workers.

The medical criteria requirements and the administrative dismissal process contained in H.B. 292 cannot be applied to asbestos claims brought by railroad workers without infringing on the FELA.

B. The Result of this Court’s Decision on FELA Plaintiffs Suffering from Lung Cancer

H.B. 292 requires that workers exposed to asbestos who have terminal lung cancer submit (1) a medical report stating that asbestos is a "substantial contributing factor" in the development of the lung cancer, (2) have at least a **ten year** latency period between the first exposure to asbestos and the date of diagnosis and (3) show proof of "substantial occupational " exposure to asbestos or proof of exposure equal or greater to 25 fiber per cc years by a certified industrial hygienist or safety professional. None of these requirements are contained in the FELA.

Further as outlined above, lung cancer FELA plaintiffs, like asbestotics, face "administrative" dismissal of their claim if they fail to meet these state law requirements. R.C. 2307.93(2)(c) states: "If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief

⁵ *Id.*

⁶ *Id.*

under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice."⁷ A dying FELA plaintiff suffering from lung cancer who has less than ten years latency period between first exposure and the date of diagnosis is permanently barred from pursuing a claim. This individual can not change the latency period of his disease. His administrative dismissal is not a prioritization of a claim, it is a dismissal outright. FELA does not require a plaintiff suffering from lung cancer derived by occupational exposure to asbestos while employed by a railroad to establish a latency period in order to bring a claim.

C. This Court's Decision to Apply H.B.292 to FELA Claims Violates the Equal Protection Clause in its Unequal Treatment of FELA Plaintiffs with Asbestos Related Occupational Diseases, and FELA Plaintiffs Suffering from Non-Asbestos Related Diseases.

1. Competent Medical Authority Defined by State Law in Violation of FELA

The decision of this Court ignores the fact that under H.B. 292, a railroad worker with an asbestos related disease, including lung cancer, must show an opinion from a 'competent medical authority', finding asbestos exposure as the primary cause of the asbestos disease. "Competent medical authority" under the Act is defined and interpreted as "treating physicians only".

The State of Ohio and its Medical Associations certify physicians to practice medicine in the State of Ohio. Persons passing the State's exam are assumed to be competent to practice medicine. H.B. 292, R.C. 2307.92(C)(1) requires that:

"No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

⁷ Ohio Revised Code § 2307.93(2)(c)

“(a) A diagnosis by a competent medical authority that the exposed person has a primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;” (emphasis added)

R.C. 2307.91(Z) defines "competent medical authority" as

" a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in Section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.”

R.C. 2307.91 and 2307.92 of H.B. 292 violates the Equal Protection Clause in its unequal

treatment of FELA plaintiffs with diseases caused by asbestos exposure, and other FELA plaintiffs suffering from medical maladies not caused by asbestos exposure. Those suffering from diseases caused by asbestos, must submit a report from a "competent medical authority" *as defined by state law* before they can proceed to trial. The very definition of "competent medical authority" excludes the vast majority of physicians who are certified to practice medicine in Ohio, including primary care physicians who are the plaintiffs' diagnosing physician. Most obvious, this list excludes general practitioners/family physicians. In addition to the limitation of specialists qualified under the Code, these select physicians cannot also be recognized experts by the legal community. No other FELA plaintiff involved in personal injury claims in the State of Ohio or the entire United States of America is restricted in presenting evidence of their disease or injury by defining the type of physician opinion they must submit and the percentage their physician has testified in a court of law.

Just as disturbing is the requirement under H.B. 292 that the physician rendering an opinion must be a "treating doctor." But by definition, treating doctors are not necessarily qualified to give a diagnosis of asbestos injury or to take the next step of attributing causation to railroad asbestos exposure. Their emphasis is on the diagnosis and treatment of disease. Many "treating physicians" are also uncomfortable with rendering medical opinions for use at trial or are prohibited by their employer from participating in legal matters. The FELA plaintiff suffering from lung cancer derived from asbestos exposure is therefore prevented from proceeding further because of the lack of cooperation from their "treating physician". In reality, a dying FELA patient must doctor-shop for treating physicians in order to advance his case and yet is precluded from using the expert physicians who will testify at trial on his behalf.

Clearly the unequal treatment of FELA plaintiffs with diseases caused by asbestos

exposure and those FELA plaintiffs suffering from other medical conditions are a violation of the United States and Ohio Equal Protection Clauses.

2. This Court's Decision to Apply H.B. 292 Imposes the Definition of "Competent Medical Authority" as used in R.C. 2305.10, Upon a FELA Plaintiff.

In the case at bar, applying R.C. Chapter 2307 of H.B. 292 to appellant's cause of action would remove their potentially viable FELA cause of action by imposing a new, more difficult statutory standard upon their ability to maintain their asbestosis claims. The statute also requires a plaintiff filing certain asbestos-related claims to present "competent medical authority" to establish a prima facie case. The statute specifically defines "competent medical authority" and places limits on who qualifies as "competent medical authority." Previously, no Ohio court had placed such restrictions on what constituted competent medical authority. Instead, courts generally accepted medical authority that complied with the Ohio Rules of Evidence. This represents a change in the law, not simply a change in procedure or in the remedy provided.

To the extent the legislation attempts to change the definition of "competent medical authority" in R.C. 2305.10, it is unconstitutional legislation when applied to FELA cases. FELA does not limit medical evidence. The FELA does not have the same stringent requirements that the Ohio legislation imposes in H.B. 292.

D. Imposing H.B. 292's "Substantial Occupational Exposure" Requirement Violates FELA

H. B. 292 also impairs the rights of FELA plaintiffs in its imposition of a requirement of "substantial occupational exposure" as the threshold of asbestos exposure. Thus, FELA plaintiffs must additionally meet these new state law burdens pertaining to exposure before being permitted to maintain a suit for asbestos-related injuries. According to Am. Sub. H. B. 292, "substantial occupational exposure to asbestos" is defined to mean:

Employment for a cumulative period of at least *five years* in an industry and an occupation in which, for a *substantial portion* of a normal work year for that occupation, the exposed person did any of the following:

- (1) handled raw asbestos fibers;
- (2) fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;
- (3) altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;
- (4) worked in close proximity to other workers engaged in any of the activities described in [(1), (2), or (3), *supra*] in a manner that exposed the person on a regular basis to asbestos fibers.

(emphasis added)

This threshold standard essentially mandates a frequency, proximity and regularity test of exposure that has no foundation in FELA law. Such burden clearly restricts the ability of a FELA plaintiff to maintain a case and heightens the eligibility to even file a case. This is the very type of restriction imposed by a state that has been found to be an impermissible encroachment of federal law. The United States Supreme Court has recognized "the overriding general principle under the FELA is that a substantive right or defense arising under FELA cannot be lessened or destroyed by a local rule or practice."⁸ These evidentiary burdens are not contained in the FELA. Imposing these state mandated burdens on Ohio railway workers violates their rights under the FELA.

4. ASBESTOS STATUTES IN OTHER STATES HELD TO BE PREEMPTED BY FELA

Appellant further points out that other jurisdictions have enacted similar asbestos bills in an attempt to regulate the so-called "elephantine mass" of legislation, including Texas and Georgia. However, Appellant fails to point out that the courts in these other jurisdictions have not applied these state tort laws to FELA cases.

⁸*Norfolk Southern Railroad v. Ferebee* (1915), 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303.

Texas and Georgia enacted asbestos statutes very similar to H.B. 292. Neither state has applied their asbestos statutes to FELA cases. While the Georgia Supreme Court did not explicitly address cases brought under FELA, it declared the asbestos statute unconstitutional in its entirety. (In *DaimlerChrysler Corp. v. Ferrante* 2006 Ga. (S06A0902).).

A Texas Appellate Court in the case *In Re: Global Santa Fe Corp.*⁹ held that the application of the state's asbestos/silica statute to a Jones Act was preempted by federal law. In its decisions the court notes that:

In passing the Jones Act, Congress granted the same rights to seamen as it granted to railway employees by the Federal Employers' Liability Act ("FELA"). Cox v. Roth, 348 U.S. 207, 208 (1955). Therefore interpretation of FELA are instructive in deciding issues under the Jones Act. See Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 178 (5th Cir. 2005)("Jones Act cases follow cases under the FELA."). The Jones Act adopts the "uniformity requirement" of FELA, and state courts are required to apply a uniform federal law. Am. Dredging, 510 U.S. at 456; see Yamaha Motor Corp., U.S.A. v Calhoun, 516 U.S. 199. 211 (1996).

(emphasis added)

The Court, after reviewing several cases, including the Ohio appellate court's decision in the very case at bar, held that:

Because we conclude that application of chapter 90's provisions to Lopez's Jones Act claims interferes with or restricts his remedies under the federal statute, whether substantive or procedural, the state law is preempted. Accordingly, we deny GSF's petition for writ of mandamus.

(emphasis added)

It is interesting to note that the defendant railroad in the *In Re Global Santa Fe Corp.* case argued that the appellate court's decision in *Bogle* should not carry weight because: "H.B.

⁹ *In re Global Santa Fe Corporation*, No. 14-06-00625-CV (Tex. App. 12/19/2006) (Tex. App., 2006)

292 is more harsh than chapter 90 [Texas' asbestos statute], because the Plaintiff's claim under H.B. 292 is dismissed without prejudice."

5. THIS COURTS INTERPRETATION THAT H.B. 292 ADOPTS PROCEDURES THAT ARE ALREADY IN PLACE IN FEDERAL COURTS OR OTHER JURISDICTIONS IS INACCURATE.

The premise that the procedural requirements set forth in H. B. 292, represent codification of the procedures already in place in Federal District Courts and in other jurisdictions is incorrect. The procedures previously utilized in the Federal Multi-District Litigation, relative to asbestos cases that remain pending in Federal District Court, are not analogous to the provisions of H.B. 292.¹⁰

By the very language of Administrative Order No. 8, it is apparent that the Court is merely establishing a prioritization of the order in which cases will be heard, rather than any imposition of specific medical criteria or restriction on the definition of asbestos exposure. Moreover, the only dismissals that are entered, pursuant to the Case Management Order, stem from the voluntary decision of counsel not to prosecute or to proceed with certain cases. Such prioritization and dismissals are dramatically different from the eligibility criteria of and complete dismissal of the FELA plaintiff, if such criteria are not met. As clearly set forth in the provisions of paragraph 3 of Administrative Order No. 8, the only evidentiary burden that a plaintiff must have to accomplish reinstatement, is to show exposure to asbestos and the existence of some asbestos-related disease. This burden is similar to the basic evidentiary requirements for filing an initial case and certainly less restrictive than the necessity of the plaintiff's development of a new disease or level of impairment, before eligibility to the trial docket.

¹⁰*In Re: Asbestos Products Liability Litigation* (No. VI), United States District Court Eastern District of Pennsylvania Civil Action No. MDL. 875. Administrative Order No. 8 (01/15/02).

In the cases presently before the Court, there is ample medical documentation for the injury they have suffered, as well as evidence of their exposure to asbestos in the course and scope of their employment with the Railroad. Accordingly, the procedure established by in Federal MDL and the impact on those plaintiffs, are in no way analogous to the impact of H. B. 292 on the claims of these litigants whose cases arise under rights universally recognized by federal law.

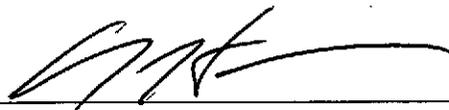
CONCLUSION

Appellees respectfully request this court to reconsider their ruling that H.B. 292 is not preempted by FELA and thus does not violate the Supremacy Clause.

It is clear that the legislature did not intend for H.B. 292 to include claims brought by employees against their employers. Application of H.B. 292 to FELA cases does nothing to further the intent of the legislature to deal with the tens of thousands of asbestos cases that have been brought against asbestos manufactures.

It is clear that the State of Ohio cannot impose the numerous evidentiary burdens contained in H.B. 292 on railroad workers bringing claims under FELA without violating the Supremacy Clause and the Equal Protection Clause.

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NOTICE

This opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

NORFOLK SOUTHERN RAILWAY CO., APPELLANT v. BOGLE, ET AL., APPELLEES.

[Cite as *Norfolk S. Ry. Co. v. Bogle*, ___ Ohio St.3d ___, 2007-Ohio-5248.]

Supremacy Clause — Federal preemption — The prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the Federal Employees' Liability Act and the Locomotive Boiler Inspection Act does not unnecessarily burden a federally created right.

(No. 2006-1025 – Submitted May 1, 2007 – Decided October 10, 2007.)

APPEAL from the Court of Appeals for Cuyahoga County,

No. 86339, 166 Ohio App.3d 449, 2006-Ohio-1540.

SYLLABUS OF THE COURT

The prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the FELA and the LBIA does not violate the Supremacy Clause because the provisions do not impose an unnecessary burden on a federally created right.

O'DONNELL, J.

{¶ 1} The central issue presented for our consideration concerns whether the application of the prima facie filing requirements of 2003 Am.Sub.H.B. 292 (“H.B. 292”), as codified in R.C. 2307.92, to asbestos claims arising out of the Federal Employees’ Liability Act (“FELA”) or the Locomotive Boiler Inspection Act (“LBIA”) infringes upon the Supremacy Clause of the United States Constitution and therefore is preempted by federal law. For the reasons that follow, we have concluded that the appellate court erred in finding preemption, and therefore, we reverse the judgment of the court of appeals.

H.B. 292

{¶ 2} Based on its belief that “[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike,” the General Assembly enacted H.B. 292. H.B. 292, Section 3(A)(2), 150 Ohio Laws, Part III, 3970, 3988. By the end of 2000, “over six hundred thousand people [had] filed asbestos claims” nationwide, and Ohio had “become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.” *Id.* at Section 3(A)(3)(a) and (b), 150 Ohio Laws Part III, at 3989. The General Assembly further noted that in Cuyahoga County alone, the asbestos docket increased from approximately 12,800 cases in 1999 to over 39,000 cases by October 2003. *Id.* at Section 3(A)(3)(e), 150 Ohio Laws, Part III, 3989. Eighty-nine percent of claimants do not allege that they suffer from cancer, and “[s]ixty-six to ninety per cent of these non-cancer claimants are not sick.” *Id.* at Section 5, 150 Ohio Laws, Part III, at 3990.

{¶ 3} Upon these considerations, the General Assembly enacted R.C. 2307.91 through 2307.98 to serve four primary purposes: (1) to give priority to those claimants who can demonstrate actual physical harm caused by asbestos; (2) to preserve the rights of those who were exposed for future action; (3) to enhance the state’s system of supervision and control over asbestos-related litigation; and (4) to conserve the scarce resources of the defendants so as to allow compensation

for cancer victims while also securing a right to similar compensation for those who suffer harm in the future. *Id.* at Section 3(B), 150 Ohio Laws, Part III, 3991.

{¶ 4} At issue here are R.C. 2307.92 and 2307.93. R.C. 2307.92(B) provides, “No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing” of physical injury caused by asbestos exposure. The prima facie showing requires the claimant to submit a report containing medical findings and to include a demonstration “that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person’s exposure to asbestos is a substantial contributing factor to the medical condition.” *Id.* The statute also contains prima facie filing requirements for asbestos claimants who bring a wrongful death action, and for claimants who are smokers suffering from lung cancer. R.C. 2307.92(C) and (D).

{¶ 5} In cases filed after the effective date of the legislation, a claimant has 30 days after initiating the action to comply with these prima facie requirements. R.C. 2307.93(A)(1). In cases pending at the time of the bill’s passing – such as those in the instant matter – claimants have 120 days from the effective date to comply. R.C. 2307.93(A)(2). Failure to file the report results in administrative dismissal, a procedure by which the case is essentially rendered inactive, but the court retains jurisdiction over the matter. R.C. 2307.93(C). A claimant may move to reinstate the case to the active docket if the claimant “makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) section 2307.92 of the Revised Code.” *Id.*

The Supremacy Clause and Preemption

{¶ 6} The Supremacy Clause of the United States Constitution provides that “the Laws of the United States * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Clause 2, Article VI, United States Constitution. The clause

grants Congress the power to preempt state laws. See *Jenkins v. James B. Day & Co.* (1994), 69 Ohio St.3d 541, 544, 634 N.E.2d 998, citing *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 259, 626 N.E.2d 85.

{¶ 7} The United States Supreme Court has identified three methods by which Congress may preempt state legislation. First, it may expressly state that an enactment preempts applicable state law. *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95-98, 103 S.Ct. 2890, 77 L.Ed.2d 490. Second, Congress may preempt an entire field of activity, without expressly stating its intention to do so, if an intent to preempt can be inferred “from a ‘scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ or where an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’ ” (Ellipses and brackets sic.) *English v. Gen. Elec. Co.* (1990), 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.E.2d 65, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447. Finally, Congress preempts state law when a state law actually conflicts with a federal law, i.e., “where it is impossible for a private party to comply with both state and federal requirements.” *English*, 496 U.S. at 78-79, 110 S.Ct. 2270, 110 L.E.2d 65.

{¶ 8} This case involves field preemption, as Congress “intended to occupy the field” when it passed the FELA, Section 51, Title 45, U.S.Code and LBIA, Section 20701, Title 49, U.S.Code. *Napier v. Atlantic Coast Line RR. Co.* (1926), 272 U.S. 605, 613, 47 S.Ct. 207, 71 L.Ed. 432. Despite the preemption of substantive state regulation, however, the court has instructed that “FELA cases adjudicated in state courts are subject to state procedural rules.” *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 84 L.Ed.2d 303. State procedural rules therefore govern FELA claims in state court.

{¶ 9} In this instance, the FELA creates a claim based upon, inter alia, a violation of the LBIA. The LBIA “does not purport to confer any right of action upon injured employees. It merely makes violation of its prohibitions ‘unlawful.’ Yet it has been held consistently that the Boiler Inspection Act supplements the Federal Employers’ Liability Act by imposing on interstate railroads ‘an absolute and continuing duty’ to provide safe equipment.” *Urie v. Thompson* (1949), 337 U.S. 163, 188, 69 S.Ct. 1018, 93 L.Ed. 1282, quoting *Lilly v. Grand Trunk Western RR. Co.* (1943), 317 U.S. 481, 485, 63 S.Ct. 347, 87 L.Ed. 411.

Procedural History

{¶ 10} This case began when four claimants, Homer Bogle, Charles Weldon, William Monroe, the administrator of the estate of Worth Oliver Bryant, deceased, and Eric Wiles, individually and in his capacity as executor of the estate of Larry Wiles, filed separate suits against Norfolk Southern Railway Company alleging asbestos-related injuries under the LBIA and seeking relief pursuant to the FELA. After the claimants filed suit, the General Assembly enacted H.B. 292, which required claimants with cases pending at the time of enactment to comply with its provisions requiring a medical report as described in the statute. The claimants, however, failed to comply with these requirements within the prescribed 120-day time period.

{¶ 11} In response to their failure, Norfolk filed this action seeking a declaration that R.C. 2307.92 applies to these claimants and that its requirements do not violate the Supremacy Clause of the United States Constitution. The trial court concluded that the requirements violated the Supremacy Clause because substantive rights created by federal statute – in this case the FELA and LBIA – “cannot be lessened or destroyed by a rule of practice.” *Norfolk S. RR. Co. v. Ferebee* (1915), 238 U.S. 269, 273, 35 S.Ct. 781, 59 L.Ed. 1303. In the trial court’s view, “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.”

{¶ 12} Norfolk appealed that determination to the Cuyahoga County Court of Appeals. The appellate court affirmed the trial court’s judgment, reasoning that the requirements of R.C. 2307.92 “would ‘gnaw’ at the FELA/LBIA claimants’ substantive rights to assert a cause of action under federal law in a state court” and that the claimants “would essentially be indefinitely precluded from asserting their federal rights.” *Norfolk S. Ry. v. Bogle*, 166 Ohio App.3d 449, 2006-Ohio-1540, 850 N.E.2d 1281, ¶ 26. The appellate court held that the application of the statute to asbestos claims arising under the FELA and/or the LBIA infringes on the Supremacy Clause of the U.S. Constitution and thus is preempted by federal law. *Id.* at ¶ 30.

{¶ 13} The case is now before this court upon our acceptance of Norfolk’s discretionary appeal.

{¶ 14} Norfolk has asserted one proposition of law: “The medical criteria and the administrative dismissal process set forth in R.C. 2307.92 and R.C. 2307.93 are procedural and not substantive and are thus applicable to asbestos-related FELA/LBIA claims filed in state court without offending the Supremacy Clause of the United States Constitution or the doctrine of federal preemption.”

{¶ 15} Norfolk urges that these statutes establish procedural rules that do not affect substantive federal rights and that the prima facie filing requirements mirror those established in the federal courts themselves. Thus, in Norfolk’s view, these procedural statutory requirements do not infringe on the field of locomotive safety that Congress has preempted. The claimants have not filed a merit brief in this case and, therefore, did not argue before this court.

The Burden On FELA Claimants

{¶ 16} We initially consider whether the prima facie filing requirements are substantive or procedural in nature, as the FELA/LBIA preempts all

substantive state law in the field. In *Jones v. Erie RR. Co.* (1922), 106 Ohio St. 408, 412, 140 N.E. 366, we stated that substantive laws or rules are those that “relate[] to rights and duties which give rise to a cause of action.” By contrast, procedural rules concern “the machinery for carrying on the suit.” *Id.* A review of the statutes reveals that they do not grant a right or impose a duty that “give[s] rise to a cause of action.” *Id.* Instead, the impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court’s docket. Nothing more. Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. No new substantive burdens are placed on claimants, because Civ.R. 11 requires a party to certify, by signing a complaint, that there are “good ground[s] to support it.”

{¶ 17} In this context, we observe generally that the FELA applies to all railroad common carriers and their employees. To recover for an injury, an employee must prove that the injury occurred in the course of employment, that the railroad was engaged in interstate commerce at the time of the injury, and that the injury resulted in whole or in part from the railroad’s negligence. See *Norfolk & W. Ry. v. Ayers* (2003), 538 U.S. 135, 160, 123 S.Ct. 1210, 155 L.Ed.2d 261. That burden remains unchanged following enactment of R.C. 2307.92 and 2307.93. Thus, the provisions of the statutes do not relate to the rights and duties that give rise to this cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Rather, they pertain to the machinery for carrying on a suit. They are therefore procedural in nature, not substantive.

{¶ 18} This conclusion, however, does not end our analysis, because procedural rules apply to federal claims only so long as they do not operate to impair a claimant’s ability to enforce a federal right or cause of action. *Davis v. Wechsler* (1923), 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143. Accordingly, “[s]trict local rules of pleading cannot be used to impose unnecessary burdens

upon rights of recovery authorized by federal laws.” *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 298, 70 S.Ct. 105, 94 L.Ed. 100. The prime consideration, therefore, is whether the procedural provisions impose an unnecessary burden on FELA claimants.

{¶ 19} Several decisions of the United States Supreme Court support the position that the application of the prima facie filing requirements does not impose an unnecessary burden on a federal right and therefore does not violate the Supremacy Clause. In *Minneapolis & St. Louis RR. Co. v. Bombolis* (1916), 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961, the court upheld a Minnesota provision relaxing the requirement of a unanimous verdict in an FELA case. Bombolis had filed a wrongful death suit in a Minnesota state court alleging a violation of the FELA. *Id.* at 215. A Minnesota law provided that when a civil case had been submitted to a jury for at least 12 hours with no unanimous verdict, “five sixths of the jury are authorized to reach a verdict, which is entitled to the legal effect of a unanimous verdict at common law.” *Id.* at 216. The railroad objected to this procedure, urging that the federal nature of the FELA claim required application of the Seventh Amendment, which the court noted “exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict.” *Id.*, citing *Am. Publishing Co. v. Fisher* (1897), 166 U.S. 464, 17 S.Ct. 618, 41 L.Ed. 1079.

{¶ 20} Despite the federal claim at issue, the court rejected the application of the Seventh Amendment to a state court proceeding, reasoning that Congress “clearly contemplate[ed] the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts.” *Bombolis*, 241 U.S. at 218, 36 S.Ct. 595, 60 L.Ed. 961. Although the decision focused on the Seventh Amendment, the court also considered the broader effects of the “dual constitutional system of government,” of which the Supremacy Clause is a

crucial component. *Id.* at 221. Requiring a state court to use a federal procedural standard would, in the court's view, undermine the independent nature of the sovereign: "whether [courts] should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering." *Id.*

{¶ 21} The United States Supreme Court has also held that whether the doctrine of forum non conveniens applies to FELA cases in state court is a matter for the forum state. *Missouri ex rel. S. Ry. Co. v. Mayfield* (1950), 340 U.S. 1, 4, 71 S.Ct. 1, 95 L.Ed. 3. There, the court determined that states could employ the doctrine of forum non conveniens so long as the application did not work to discriminate against federal claims, reasoning that nothing in the FELA "purported 'to force a duty' upon the State courts to entertain or retain Federal Employers' Liability litigation 'against an otherwise valid excuse.'" *Id.* at 5, 71 S.Ct. 1, 95 L.Ed. 3, quoting *Douglas v. New York, New Haven & Hartford RR. Co.* (1929), 279 U.S. 377, 388, 49 S.Ct. 355, 73 L.Ed. 747.

{¶ 22} In more recent decisions, the United States Supreme Court has upheld other state court procedural rules that differ from those in place in the federal courts. In *Johnson v. Fankell* (1997), 520 U.S. 911, 915, 117 S.Ct. 1800, 138 L.Ed.2d 108, the court held that a defendant in an action brought in state court pursuant to Section 1983, Title 42, U.S.Code had no federal right to an interlocutory appeal from the denial of qualified immunity, even though denial constituted a final order for actions in federal court under Section 1291, Title 28, U.S.Code and *Mitchell v. Forsyth* (1985), 472 U.S. 511, 524-530, 105 S.Ct. 2806, 86 L.Ed.2d 411. The court has reasoned, "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them * * *. Some differences in remedy *and procedure* are inescapable if the different governments are to retain a measure of

independence in deciding how justice should be administered.” (Emphasis added and ellipses sic.) *Southland Corp. v. Keating* (1984), 465 U.S. 1, 33, 104 S.Ct. 852, 79 L.Ed.2d 1, quoting Hart, *The Relations Between State & Federal Law* (1954), 54 Col.L.Rev. 489, 508. Furthermore, the court has declared that “[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts,” it will act “ ‘with utmost caution before deciding that [the state court] is obligated to entertain the claim’ ” *Johnson*, 520 U.S. at 918, 117 S.Ct. 1800, 138 L.Ed.2d 108, quoting *Howlett v. Rose* (1990), 496 U.S. 356, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332. “States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law.” *Howlett*, 496 U.S. at 372, 110 S.Ct. 2430, 110 L.Ed.2d 332.

{¶ 23} And in *Am. Dredging Co. v. Miller* (1994), 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285, the court extended the reasoning of *Mayfield* to maritime actions brought pursuant to the federal Jones Act. In reaching its holding, the court emphasized that the doctrine of forum non conveniens “does not bear upon the substantive right to recover, and is not a rule upon which * * * actors rely in making decisions about primary conduct – how to manage their business and what precautions to take.” *Id.* at 454.

{¶ 24} In the instant case, R.C. 2307.92 and 2307.93 are “neutral state Rule[s] regarding the administration of the state courts,” *Johnson*, 520 U.S. at 918, 117 S.Ct. 1800, 138 L.Ed.2d 108, that do “not bear upon the substantive right to recover.” *Miller*, 510 U.S. at 454, 114 S.Ct. 981, 127 L.Ed.2d 285. The burden imposed is no greater than the Civ.R. 11 pleading standard established and followed throughout this state. The statute simply permits the court to prioritize claims for trial purposes.

{¶ 25} In holding that the LBIA preempted the application of these statutes, the court of appeals relied on *Brown v. W. Ry. of Alabama* (1949), 338 U.S. 294, 295, 70 S.Ct. 105, 94 L.Ed. 100. In *Brown*, the court invalidated a

Georgia rule of practice that required a trial court to construe the allegations in a complaint “ ‘most strongly against the pleader’ ” when considering a motion to dismiss. *Id.* at 295, quoting *Brown v. W. Ry. of Alabama* (1948), 77 Ga.App. 780, 49 S.E.2d 833, syllabus. The application of this rule of practice to Brown’s FELA claim resulted in a dismissal of the matter with prejudice, precluding future recovery. *Id.* Citing its desire for uniformity in adjudication of federal claims, the court emphasized its duty “to protect federally created rights from dismissal because of overexacting local requirements for meticulous pleadings.” *Id.* at 299.

{¶ 26} *Brown* is distinguishable in two respects.

{¶ 27} First, the Georgia rule of practice had no similar federal counterpart. The federal rule, later embodied in *Conley v. Gibson* (1957), 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80, had long required a trial court to deny motions to dismiss unless it “ ‘appear[ed] from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.’ ” *Leimer v. State Mut. Life Assur. Co.* (C.A.8, 1940), 108 F.2d 302, 305, quoting *Winget v. Rockwood* (C.A.8, 1934), 69 F.2d 326, 329. The Georgia standard, therefore, was antithetical to that used in the federal courts. More importantly, the Georgia standard precluded recovery in a state court despite the fact that Brown’s complaint would have easily withstood scrutiny in a federal forum.

{¶ 28} Second, the Georgia rule of practice functioned as a dismissal with prejudice, while in the instant case, failure to comply with the prima facie filing requirements carries no such penalty. A claimant who fails to comply with these requirements faces administrative dismissal *without* prejudice, and the case effectively becomes “inactive” for purposes of discovery and trial. R.C. 2307.93(C). Moreover, the statutes toll the limitations period and permit a claimant to reinstate the matter upon a showing of the requisite injury. *Id.* For these reasons, R.C. 2307.92 and 2307.93 do not impose the same degree of

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burden on a party asserting a federal claim in state court as the rule of practice at issue in *Brown* does, and the court of appeals erred in holding the statute unconstitutional on this basis.

{¶ 29} We therefore hold that the prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the FELA and the LBIA does not violate the Supremacy Clause because the provisions do not impose an unnecessary burden on a federally created right.

{¶ 30} Our conclusion that the procedural statute at issue does not impose an unnecessary burden on a federal right is fortified by the fact that the federal courts themselves have responded to the growth of asbestos litigation by initiating a similar method to prioritize asbestos-related cases. Beginning in 1991, the Judicial Panel for Multidistrict Litigation transferred 26,639 asbestos-related cases from federal district courts into one forum. *In re Asbestos Prods. Liability Litigation* (1991), 771 F.Supp. 415. To accommodate the ever-growing docket, the District Court for the Eastern District of Pennsylvania established a screening process regarding nonmalignant asbestos-related injuries through the use of a pretrial order. *In re Asbestos Prods. Liability Litigation* (Sept. 16, 1996), E.D.Pa. No. MDL 875, 1996 WL 539589, *1. For example, Administrative Order No. 8 applies to all asbestos claimants that file a complaint “without a doctor-patient medical report setting forth an asbestos related disease.” *In re Asbestos Prods. Liability Litigation* (Jan. 16, 2002), E.D.Pa. No. 875, CO2-0194PJH, 2002 WL 11282668, *1. Claims without this documentation “shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statutes of limitations.” *Id.* Furthermore, after administrative dismissal of a case, a claimant may move to reinstate the case by submitting “an affidavit setting forth the facts that qualify the case for active processing,” with the claimant bearing the

burden to show “some evidence of asbestos exposure and evidence of an asbestos-related disease.” *Id.* at * 2.

{¶ 31} While the provisions of the statutes at issue are more specific than those enunciated in Administrative Order 8, the effect and purpose are generally the same. The Supremacy Clause does not require states to employ procedures identical to those in the federal courts, as long the procedures in question involve neutral rules regarding the administration of the courts. The statutes are procedural in nature, apply to all asbestos claims filed in Ohio regardless of the theory or statutory basis giving rise to relief, and serve to make efficient use of judicial resources.

{¶ 32} We therefore reverse the decision of the court of appeals and remand this cause for further proceedings.

Judgment reversed.

LUNDBERG STRATTON, O’CONNOR, LANZINGER, and CUPP, JJ., concur.

MOYER, C.J., and PFEIFER, J., dissent.

PFEIFER, J., dissenting.

{¶ 33} I disagree with the majority opinion’s conclusion that R.C. 2307.92 does “not impose an unnecessary burden on a federally created right.” The majority opinion states that “the impact of [R.C. 2307.92] is to establish a procedural prioritization of the asbestos-related cases on the court’s dockets. Nothing more.” I believe, to the contrary, that “[t]he new Ohio requirement precludes the [Federal Employers’ Liability Act/Locomotive Boiler Inspection Act (“FELA/LBIA”)] claimants from proceeding on their claims until filing the report satisfying the requirements of R.C. 2307.92 et seq. * * * [T]his requirement would ‘gnaw’ at the FELA/LBIA claimants’ substantive rights to assert a cause of action under federal law in a state court.” *Norfolk S. Ry. Co. v.*

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Bogle, 166 Ohio App.3d 449, 2006-Ohio-1540, 850 N.E.2d 1281, ¶ 26. I believe that FELA and LBIA preempt R.C. 2307.92. I dissent.

MOYER, C.J., concurs in the foregoing opinion.

Gallagher Sharp, Kevin C. Alexandersen, Colleen A. Mountcastle, and Holly M. Olarczuk-Smith, for appellant.

Squire Sanders & Dempsey, L.L.P., and Charles F. Clarke, urging reversal for amicus curiae, Association of American Railroads.

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IN RE GLOBAL SANTA FE CORPORATION, Relator.
No. 14-06-00625-CV.
Court of Appeals of Texas, Fourteenth District, Houston.
Opinion filed December 19, 2006.

Original Proceeding Writ of Mandamus.

Petition for Writ of Mandamus Denied.

Panel consists of Chief Justice ADELE HEDGES, Justices YATES and SEYMORE.

OPINION

ADELE HEDGES, Chief Justice.

In this original proceeding, relator GlobalSantaFe Corporation ("GSF") challenges an order signed by respondent, the Honorable Tracy Christopher, presiding judge of the 295th Judicial District Court, the silica multidistrict litigation pretrial court ("MDL pretrial court"), in which real party's Jones Act claims were remanded to the 55th Judicial District Court of Harris County. GSF claims that the MDL pretrial court must retain the case pursuant to chapter 90 of Texas's Civil Practice and Remedies Code. For the reasons set forth below, we deny GSF's petition for a writ of mandamus.

BACKGROUND

On May 29, 2003, real party in interest John Lopez filed his Jones Act¹ claims in the 55th District Court against GSF, alleging that it had failed to provide a safe and seaworthy vessel, resulting in his exposure to silica.

On December 5, 2005, GSF filed a "Notice of Transfer under Section 90.010(b)," whereby Lopez's case was transferred to the MDL pretrial court.² See Tex. Civ. Prac. & Rem. Code Ann. § 90.010(b) (Vernon Supp. 2006); Tex. R. Jud. Admin. 13.11(c), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. F app. (Vernon Supp. 2006). Lopez filed a motion to remand and, in his pleadings, argued that the case should be remanded to the 55th District Court because section 90.010 was preempted by the Jones Act.

GSF argued that because the MDL rules applied to all silica related claims, they all were to be transferred to the MDL pretrial court.

A hearing was held on Lopez's motion in the MDL pretrial court. His counsel argued that by transferring the case to the MDL pretrial court, Lopez is required to provide an expert report complying with the provisions of chapter 90; the report requirement is a substantive one not found in the Jones Act; therefore, the provisions of chapter 90 are preempted by the federal law. GSF, in contrast, characterized the issue as one of venue. Arguing that the provisions by which Lopez's case was transferred to the MDL pretrial court are merely procedural provisions, GSF asserted that federal law did not preempt the state's procedural provision. After Judge Christopher signed an order on January 10, 2006, remanding the case to the 55th District Court, GSF filed its petition for writ of mandamus in this court.³

MANDAMUS STANDARD OF REVIEW

Under the MDL rules, an order or judgment of the pretrial court may be reviewed by the appellate court regularly reviewing orders of the court in which the case is pending at the time review is sought. See Tex. R. Jud. Admin. 13.9(b); see, e.g., *In re Fluor Enters., Inc.*, 186 S.W.3d 639, 642 (Tex. App.-Austin 2006, orig. proceeding [mand. denied]) (concluding that the intermediate appellate court had mandamus jurisdiction to review an order of the MDL pretrial court under rule 13.9(b)); *In re Union Carbide Corp.*, 145 S.W.3d 805, 806-07 (Tex. App.-Houston [14th Dist.] 2004, orig. proceeding) (reviewing order of MDL pretrial court in mandamus proceeding).

Mandamus is an extraordinary remedy that will issue to correct a clear abuse of discretion and, generally, only when the relator lacks an

adequate appellate remedy. See *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002). A clear failure to correctly analyze or apply the law constitutes an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Accordingly, we review the remand order under an abuse of discretion standard. See *In re Fluor*, 186 S.W.3d at 643.

To determine whether a party has an adequate remedy by appeal, we balance jurisprudential considerations implicating both public and private interests. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004). When the benefits of mandamus review outweigh its detriments, appellate courts must consider whether the appellate remedy is adequate. *Id.* GSF contends that it has no adequate remedy by appeal because "[o]nce the pretrial phase of the case is over, and trial has occurred, [GSF] will have lost the benefits of efficiency and fairness conveyed by Section 90."

DISCUSSION

In its mandamus petition, GSF argues that the remand order is an abuse of discretion because (1) it is contrary to the express language of section 90.010 and (2) the MDL pretrial court misinterpreted federal preemption law.

At issue here is Texas Civil Practice and Remedies Code section 90.010(b), which enables a defendant, in a suit for personal injury or death resulting from asbestos or silica exposure, to file a notice of transfer to the MDL pretrial court should the claimant fail to serve an expert report that complies with the statute. See *Tex. Civ. Prac. & Rem. Code Ann. § 90.010* (Vernon Supp. 2006). The Jones Act, in contrast, does not contain a report requirement.

GSF characterizes section 90.010(b) and the related MDL rules as venue provisions and argues that because federal law is not concerned with venue, section 90.010(b) is not preempted by the Jones Act. GSF contends that, even if section 90.010 provisions are substantive, Congress has not explicitly or implicitly occupied the field; therefore, we must give effect to the procedural portions of chapter 904

because they do not conflict with federal law. GSF also asserts that whether the report provisions in chapter 90 are preempted under the Jones Act is premature because section 90.010(b) is the only provision applied to Lopez's claims at this point. It states that many of the chapter's provisions will not apply to Lopez's suit because it was filed before September 1, 2003; GSF concedes, however, that "the Jones Act probably preempts the portion of Section 90.010 that imposes a 'minimum injury' requirement on silica plaintiffs." Further, GSF contends that some of the report requirements merely dictate the way in which a plaintiff must prove the reliability of his expert, similar to Rule of Evidence 702.

Lopez argues that chapter 90 is preempted by the Jones Act because the statute substantially impairs the substantive rights of Jones Act plaintiffs and precludes a uniform application of the federal maritime law. He asserts that Jones Act plaintiffs transferred to the MDL pre-trial court pursuant to chapter 90 are held there in "suspended animation" without a remedy until complying with the minimum injury, reporting, and causation requirements set out in chapter 90, requirements not found in the Jones Act. He also contends that the report requirements under chapter 90 directly conflict with the negligence standard for recovery under the Jones Act.

We must decide whether transfer to the MDL pretrial court, pursuant to the provisions of chapter 90, of Lopez's Jones Act claims is precluded by the preemption doctrine. This is an issue of first impression, chapter 90 having been only recently enacted.⁵ We begin with preemption analysis under maritime law.

GSF frames its preemption argument as follows: (1) courts must be reluctant to find preemption; (2) because Congress has not intended to "occupy the field" in this area, preemption should be found only if it is impossible to comply with both the state and federal laws, that is, if they "conflict"; and (3) the provisions here do not conflict with the

Jones Act. Therefore, GSF reasons chapter 90's procedural provisions must be enforced.

1. Preemption

Congressional intent determines whether a federal statute preempts state law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21, 23-24 (Tex. 2002). "The purpose of Congress is the ultimate touchstone" and is discerned by examining the statute's language, its structure, and its purpose. *Gade*, 505 U.S. at 96. We must determine whether the state law is "consistent with the structure and purpose of the [federal] statute as a whole. . . . and to its object and policy." *Id.* at 98.

Generally, absent express preemptive language, preemption may be implied if the statute's scope indicates congressional intent to "occupy the field" or when the state law actually conflicts with the federal statute. *Am. Cyanamid Co.* 79 S.W.3d at 24. GSF recites this preemption principle, asserting that federal law is not concerned with a state's procedural rules. However, whether procedural or substantive, a state's law will be preempted when it interferes or restricts remedies under a federal statute. See *Felder v. Casey*, 487 U.S. 131, 138 (1988). "[W]here state courts entertain a federally created cause of action, the federal right cannot be defeated by the forms of local practice." *Id.* (quoting *Brown v. Western Ry. Co. of Al.*, 338 U.S. 294, 296, (1949)). The Supreme Court stated in *Gade*:

We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law Any state legislation which

frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.

505 U.S. at 106-07 (quoting *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971)).

2. Jones Act

The Jones Act provides a cause of action for a seaman injured in the course of his employment by the negligence of his employer. See 46 U.S.C.A. § 688(a); see also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (describing the Jones Act as legislation that "establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seamen."). Its purpose is to provide for the benefit and protection of "seamen who are peculiarly the wards of admiralty." *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936); see also *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 429 (Tex. 1999) ("Providing a remedy to an injured seaman is a 'characteristic feature' of admiralty," quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917)). The Jones Act is liberally construed to enlarge the protection afforded to seamen under general maritime law. See *Arizona*, 298 U.S. at 123; see also *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958) ("[I]t is clear that the general congressional intent was to provide liberal recovery for injured workers" under the Jones Act).

In passing the Jones Act, Congress granted the same rights to seamen as it granted to railway employees by the Federal Employers' Liability Act ("FELA"). *Cox v. Roth*, 348 U.S. 207, 208 (1955). Therefore, interpretations of FELA are instructive in deciding issues under the Jones Act. See *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 178 (5th Cir. 2005) ("Jones Act cases follow cases under the FELA."). The Jones Act adopts the "uniformity requirement" of FELA, and state courts are required to apply a uniform federal law. *Am. Dredging*, 510 U.S. at 456; see *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 211 (1996).

Under the Jones Act, a state court may "adopt such remedies, and . . . attach to them such incidents, as it sees fit' so long as it does not attempt to make changes" in the substantive maritime law. *Am. Dredging Co.*, 510 U.S. at 447 (quoting *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 561 (1954)). Also, when considering preemption under the Jones Act, we consider whether the state law concerns "a 'characteristic feature' of admiralty or a doctrine whose uniform application is necessary to maintain the 'proper harmony' of maritime law." See *Stier*, 992 S.W.2d at 428-29.6 Uniformity in maritime law is important to the availability of unseaworthiness as a basis of liability. See *Yamaha*, 516 U.S. at 211.

Whether the Jones Act preempts provisions of chapter 90 depends on the impact of those provisions on the rights and remedies provided under the federal statute. If it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," chapter 90 will be preempted. See *Gade*, 505 U.S. at 98.7

3. Chapter 90

Effective September 1, 2003, the Texas Legislature established the multi-district litigation panel concept to coordinate pretrial handling of asbestos-related claims. See *In re Union Carbide*, 145 S.W.3d at 806 n.1; see also *Tex. Gov't Code Ann.* § 74.161-164 (*Vernon* 2005).⁸ In 2005, Senate Bill 15 was signed into law, which established the method for handling a pretrial docket for asbestos and silica related claims and set forth reporting requirements and medical criteria by which impaired and unimpaired plaintiffs are identified. See *Tex. Civ. Prac. & Rem. Code Ann.* § 90.001 cmt. (*Vernon Supp.* 2006) [Acts of 2005, 79th Leg., R.S., ch. 97, § 1, 2005 *Tex. Gen. Laws* 169, 170]. The 2005 legislation applies to any action pending on September 1, 2005, unless exempted by one of several exceptions—not at issue here—for cases filed prior to September 1, 2003. See *id.* § 90.010(a). Section 90.010(b) provides as follows:

If the claimant fails to serve a report complying with . . . 90.0049 on or before the 90th day after [September 1, 2005] under Subsection (a)(2), the defendant may file a notice of transfer to the MDL pretrial court. . . . If the MDL pretrial court determines that the report was not served on or before the 90th day after the date this chapter becomes law or that the report served does not comply with . . . 90.004, the MDL pretrial court shall retain jurisdiction over the action pursuant to the MDL rules.

Id. § 90.010(b). GSF relied on this provision to request transfer of Lopez's claims.

Examining the impact of section 90.010(b), the result is that a pre-September 1, 2003 Jones Act silica related claim is transferred to the MDL pretrial court if the claimant fails to file a report complying with chapter 90; however, once there, other provisions in section 90.010 dictate that the case remain there until a report complying with chapter 90 is served or, presumably, until the claimant is diagnosed with a malignant silica-related cancer. See *Tex. Civ. Prac. & Rem. Code Ann.* §§ 90.010(a)(3), (b), (d), (f). If section 90.010 is applied to a pre-September 1, 2003 Jones Act claimant, he or she is free to pursue federal remedies only by satisfying the report requirements contained in chapter 90. There is no such report requirement in the Jones Act. Consequently, because applying the provisions to the pre-2003 Jones Act claimant thwarts federal remedies, it is preempted. See, e.g., *Norfolk S. Ry. Co. v. Bogle*, 850 N.E.2d 1281 (Ohio Ct. App. 2006); see also *Gade*, 505 U.S. at 105-06 (noting that preemption is, in part, "defined by the state law's actual effect.").

GSF acknowledges that there is no report requirement under the Jones Act, and states the Jones Act "probably" preempts the portions of section 90.010 that impose a "minimum injury" requirement on those claimants.¹⁰ GSF reasons, however, that while some provisions in section 90.010 may be preempted, other provisions—such as section 90.010(b)—which do not "conflict" with the Jones Act, must be enforced.

We disagree. Parsing the statute in this manner results in the provisions within section 90.010 deemed "procedural" applying to permit transfer, while the substantive provisions, i.e., report requirements, will not apply and the claimant must therefore be transferred back to the court of origin. This resulting "transfer-retransfer" procedure is a waste of resources and is incompatible with the purposes of both the federal and state laws.

GSF also asserts that the "featherweight" causation burden applied in Jones Act cases is not offended by chapter 90's provisions. The "featherweight" causation burden is defined as "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Diamond Offshore Mgmt. Co. v. Horton*, 193 S.W.3d 76, 79 (Tex. App.-Houston [1st Dist.] 2006, pet. denied) (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957)) (emphasis added); see also *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988). GSF claims the report requirements affect only the manner in which the proof is presented. Again, we disagree.

A report under section 90.004 must contain a history of the claimant's past and present medical problems and "their most probable cause." Tex. Civ. Prac. & Rem. Code Ann. § 90.004(a)(1). If a claim for silicosis is made, the report must verify that "the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than silica exposure revealed by the exposed person's occupational, exposure, medical, and smoking history." Id. § 90.004(b)(3). If claiming silica-related lung cancer, the report must include that "inhalation of silica was a substantial contributing factor to that cancer." Id. § 90.004(c)(1). The remaining provisions of section 90.004 provide as follows:

(d) If the claimant is asserting a claim for any disease other than silicosis and lung cancer alleged to be related to exposure to silica, the

report required by Subsection (a) must also verify that the physician has diagnosed the exposed person with a disease other than silicosis or silica-related lung cancer and has concluded that the exposed person's disease is not more probably the result of causes other than silica exposure.

(e) The detailed occupational and exposure history required by Subsection (a)(1)(B) must describe:

(1) the exposed person's principal employments and state whether the exposed person was exposed to airborne contaminants, including silica and other dusts that can cause pulmonary impairment; and

(2) the nature, duration, and frequency of the exposed person's exposure to airborne contaminants, including silica and other dusts that can cause pulmonary impairment.

Id. § 90.004(d),(e). Thus, a report under section 90.004 for any silica-related injury requires a defined level of causation between the claimant's exposure and his illness; while perhaps not a direct causative relationship, it is at least one blurring the line between substance and procedure. Indeed, even GSF states "[t]he line between 'substance' and 'procedure' must be drawn more finely" in this case than others and, at one point, refers to the doctor's report under chapter 90 as a "causation report."

Likening chapter 90's report requirements to Texas's Rule of Evidence 702, GSF argues that Lopez will be required to establish the reliability of his medical experts and meet normal standards of proof even if the case proceeds in 55th District Court. GSF's argument suggests that transfer to an MDL pretrial court would not alter Lopez's obligation with regard to medical reports or reliability of experts.

4. Other Case Law

Both parties rely on *Norfolk S. Ry. Co. v. Bogle*, 850 N.E.2d 1281 (Ohio Ct. App. 2006), a case similar to the facts before us.¹¹ In *Norfolk*, the plaintiffs filed claims for injuries caused by

occupational exposure to asbestos. See *id.* at 1283. The trial court concluded that the state's law, House Bill 292, a statute similar to chapter 90, was preempted by the FELA and/or the Locomotive Boiler Inspection Act ("LBIA"). See *id.* at 1283, 1286. After setting out the principles of preemption and examining the report requirements of H.B. 292, the Ohio appellate court stated:

We hold 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's intent of creating 'uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees.'

Id. at 1289 (quoting *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980)). This is the reasoning expressed by Lopez.

GSF argues that Bogle is instructive because the features of Ohio's law are not an issue in this case. GSF claims that H.B. 292 is more harsh than chapter 90, because the plaintiff's claim under H.B. 292 is dismissed without prejudice, and "[t]hus, Ohio simply does not permit asbestos plaintiffs with minor injuries to maintain a lawsuit." However, under chapter 90, assuming the pre-September 1, 2003 plaintiff does not meet the report requirements, the result is that his suit languishes in the MDL pre-trial court, precluding—or, at least, delaying—pursuit of his federal remedies. See *Tex. Civ. Prac. & Rem. Code Ann.* § 90.010(d),(f)-(h).

GSF also cites *American Dredging Company v. Miller* as directly on point. See 510 U.S. at 445-46. In that case, the defendants had argued that the *forum non conveniens* defense available to them under federal law was not available under Louisiana's statute, and, therefore, Louisiana's law was preempted. *Id.* at 450-51. The Court examined whether the *forum non conveniens* doctrine "is either a 'characteristic feature' of admiralty or a doctrine

whose uniform application is necessary to maintain the 'proper harmony' of maritime law." *Id.* at 447. It concluded that the doctrine neither originated in admiralty law nor had exclusive application there; consequently, Louisiana's statute did not "work material prejudice to a characteristic feature of the general maritime law," and was not preempted. *Id.* at 450.12

American Dredging is inapposite to the subject case. "The Jones Act has the effect of bringing into the maritime law . . . all appropriate statutes relating to employers' liability for personal injury or death" for the benefit of seamen. *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932). Thus, the Jones Act claim here is not comparable to a procedural doctrine. Uniformity in the application of federal law plays a larger role in the preemption analysis when an unseaworthiness claim is involved. See *Yamaha*, 516 U.S. at 211.

In short, GSF's argument rests on the conclusion that section 90.010(b) is procedural and can be construed apart from chapter 90's remaining provisions—in fact, from other provisions in that section. We disagree with GSF that section 90.010(b) is merely procedural and susceptible to segregation from other chapter 90 provisions. Section 90.010(b) is an integral part of the larger MDL design and cannot be isolated from it. Even so, by applying only section 90.010(b), Lopez is precluded from pursuing his rights under the Jones Act. Whether procedural or substantive, chapter 90 is preempted by federal law. See *Gade*, 505 U.S. at 98; *Felder*, 487 U.S. at 138.

CONCLUSION

Because we conclude that application of chapter 90's provisions to Lopez's Jones Act claims interferes with or restricts his remedies under the federal statute, whether substantive or procedural, the state law is preempted. Accordingly, we deny GSF's petition for writ of mandamus.

Notes:

1. See 46 U.S.C.A. § 688 (2000).
2. In its Notice, GSF stated that as an "injurious exposure to silica" case, it was addressed by the November 10, 2004 MDL Panel decision as a "tag-along" case.
3. GSF filed a motion to reconsider with the MDL Panel. The panel concluded its jurisdiction to review remand orders was limited to those in which remand was based on deciding whether a case was a "tag along." See Tex. R. Jud. Admin. 13.5(e) (stating a remand order of the pretrial court based on the ground that the case remanded is not a tag-along case may be appealed to the MDL panel).
4. See Tex. Civ. Prac. & Rem. Code Ann. §§ 90.001-.012 (Vernon Supp. 2006) (setting out the pretrial handling of claims involving asbestos and silica).
5. To date, it appears that only one state has directly addressed the impact of its MDL statute on a Jones Act claim. E.g., Norfolk S. Ry. Co. v. Bogle, 850 N.E.2d 1281 (Oh. Ct. App. 2006), appeal allowed by, 852 N.E.2d 1213 (Oh. 2006) (unpublished table opinion No. 2006-1025).
6. In Stier, a case involving a nonresident seaman injured in the territorial waters of another nation, the court concluded that under either standard, the seaman's state law tort claims were impliedly preempted. 992 S.W.2d at 429.
7. Preemption analysis under maritime law is somewhat different than preemption in other areas of the law. See Stier, 992 S.W.2d at 428. For example, while preemption under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law, in Stier the court noted that decisions addressing preemption issues under admiralty law typically have not applied or even mentioned the Supremacy Clause. Id. Also, preemption under maritime law has historically recognized that state laws must yield to the needs of an area of law which requires "harmony

and uniformity." S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). Currently, there is no bright line rule to determine when a state law is preempted under federal maritime law. See Stier, 992 S.W.2d at 429 (noting that Jensen may be overruled); see also Am. Dredging Co., 510 U.S. at 452 ("It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.").

8. The MDL panel designated Judge Mark Davidson of the 11th Judicial District Court of Harris County as the pretrial judge to whom the asbestos cases would be transferred. In re Union Carbide, 145 S.W.3d at 806 n.1.

9. Section 90.004 sets out the report requirements for silica-related injuries, and section 90.003 pertains to asbestos-related injuries. See Tex. Civ. Prac. & Rem. Code Ann. §§ 90.003, 90.004 (Vernon Supp. 2006). Because Lopez's claims are for silica-related injuries, our citation to report requirements is to section 90.004 only.

10. As noted in the subsequent discussion concerning the causation burden under the Jones Act, various report requirements in chapter 90 impose a certain level of impairment, caused by exposure to asbestos or silica, before a claimant may proceed with his claim.

11. The case was accepted for appeal by the Ohio Supreme Court, 852 N.E.2d 1213, on August 23, 2006.

12. The Court also noted the disparity within its decisions concerning state regulations and maritime law, but decided that where those boundaries may lie was not a question it had to decide in that case. Id. at 453. Instead, the Court concluded that the doctrine was procedural rather than substantive; as such, its application would not produce uniform results, and the doctrine under federal law was not applicable to the states. Id. at 457.

DAIMLERCHRYSLER CORP. v. FERRANTE
637 S.E.2d 659 (GA 2006)

DAIMLERCHRYSLER CORP. et al.

v.

FERRANTE et al.

Georgia Pacific Corp. et al.

v.

Mitchell et al.

Georgia Pacific Corp. et al.

v.

Hall et al.

Georgia Pacific Corp. et al.

v.

Odum et al.

Georgia Pacific Corp. et al.

v.

Etress et al.

Georgia Pacific Corp. et al.

v.

Hasberry et al.

Nos. S06A0902, S06A1219, S06A1221-S06A1223 and S06A1225.

Supreme Court of Georgia.

November 20, 2006

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Quentin Riegel, Nat. Ass'n of Manufacturers, Washington, DC; F. Kennedy Hall, Mark Edward Toth, Hall, Bloch, Garland & Meyer, Macon, Amici Appellants.

HUNSTEIN, Presiding Justice.

These appeals arise out of multiple asbestos actions currently pending in the Superior and State Courts of Cobb County. In each action, plaintiffs, appellees here, sought a judicial determination that it is unconstitutional to apply the newly enacted asbestos claims statute, OCGA § 51-14-1 et seq. (the Act), to their pending asbestos cases. After consolidated hearings were held, the trial courts issued virtually identical orders ruling that because the Act required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected appellees' substantive rights by establishing "a new element to [their] claim, one that did not exist when the original cause of action accrued." Appellants, defendants in the underlying actions, requested, and the trial courts issued, certificates of immediate review of the courts' rulings. We granted the subsequent applications for interlocutory appeal, see OCGA § 5-6-34(b), and consolidated the appeals to determine whether the courts erred in holding the Act unconstitutional as applied to appellees' claims. Finding no error, we affirm.

1. As found by the trial courts, the Act provides for the dismissal of any asbestos claim pending on April 12, 2005, unless within 180 days from that date the plaintiff in a pending asbestos claim establishes "prima facie evidence of physical impairment" with respect to the asbestos claim. OCGA § 51-14-5(a). To establish prima facie evidence of physical impairment, a plaintiff must provide proof in certain specified forms and from certain specified sources that exposure to asbestos was a *substantial* contributing factor to the exposed person's medical condition. See OCGA § 51-14-2(15); OCGA § 51-14-3(b). Under the express language of the Act, prima facie evidence of physical impairment is "an essential element of an asbestos claim." OCGA § 51-14-3(a).

Appellants contend the trial courts erred by ruling that the Act affects substantive rights and therefore cannot be applied retrospectively to claims which accrued prior to its April 12, 2005 effective date. "Although legislation which involves mere procedural or evidentiary changes may operate retrospectively, legislation which affects substantive rights may operate prospectively only. [Cit.] *Enger v. Erwin*, 245 Ga. 753, 754, 267 S.E.2d 25 (1980). See Ga. Const, Art. I, § I, Par. X (constitutional ban on retroactive laws). "Substantive law is that law which creates rights, duties, and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations. [Cits.]" *Polito v. Holland*, 258 Ga. 54, 55(3), 365 S.E.2d 273 (1988). The question before us, therefore, is whether enactment of the Act affected appellees' rights, duties or obligations with respect to their asbestos claims.

Prior to passage of the Act, in order to establish a claim for asbestos related injuries, a plaintiff was required to show only that exposure to asbestos was a *contributing* factor in his or her medical condition. *John Crane, Inc. v. Jones*, 278 Ga. 747, 604 S.E.2d 822 (2004). Thus, by introducing the requirement that asbestos plaintiffs present prima facie

evidence that asbestos was a *substantial* contributing factor to their medical condition, the Act imposes upon appellees a greater evidentiary burden than was required under the law in effect at the time their actions were filed. Contrary to appellants' argument, it makes no relevant difference that the Act does not alter appellees' burden of proof at trial because regardless of when it must be shown, the Act makes proof that asbestos exposure was a substantial contributing factor an essential element of an asbestos claim. OCGA § 51-14-3(a). See *id.* at (b) (no person shall bring or maintain asbestos claim in absence of evidence asbestos was "substantial contributing factor" to physical injury).(fn1) Accordingly, the provisions of the Act requiring appellees to produce evidence establishing that exposure to asbestos was a substantial contributing factor to their medical conditions affect appellees' substantive rights and cannot retroactively be applied to their claims.

2. Appellants contend that even if the "substantial contributing factor" language is unconstitutional as applied to appellees, the trial courts should have severed the offending language from the Act. "Where one portion of a statute is unconstitutional, this court has the power to sever that portion of the statute and preserve the remainder if the remaining portion of the Act accomplishes the purpose the legislature intended. [Cits.]" *Nixon v. State*, 256 Ga. 261, 264(3), 347 S.E.2d 592 (1986). If, however, "the objectionable part is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it." [Cits.]" *City Council of Augusta v. Mangelly*, 243 Ga. 358, 363(2), 254 S.E.2d 315 (1979).

Here, the Act as a whole establishes with considerable specificity the procedure by which plaintiffs must prove their asbestos claim and delineates the evidentiary burden placed upon plaintiffs in such cases. The legislature decided to include the requirement that asbestos plaintiffs produce evidence that exposure to asbestos was a substantial contributing factor in the exposed persons' medical conditions and to place further restrictions on the form of such evidence. This decision demonstrates a clear intent to limit actionable asbestos claims to those situations in which a greater level of causation can be shown. These requirements and limitations are the heart of the Act, and their severance from the Act would "result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose." *State of Georgia v. Jackson*, 269 Ga. 308, 312, 496 S.E.2d 912 (1998). Accordingly, we cannot effectively sever the unconstitutional provisions from the Act and it must fall in its entirety. See *Georgia Franchise Practices Comm. v. Massey-Ferguson, Inc.*, 244 Ga. 800(6), 262 S.E.2d 106 (1979); *Mangelly*, *supra*, 243 Ga. at 363(2), 254 S.E.2d 315.

The presence of a severability clause within the Act does not require a different result. As previously recognized by this Court:

[t]he presence of a severability clause reverses the usual presumption that the legislature intends the Act to be an entirety, and creates an opposite presumption of separability. However, the severability clause does not change the rule that in order for one part of a statute to be upheld as severable when another is stricken as unconstitutional, they must

not be mutually dependent on one another. *Carter v. Carter Coal Co.*, 298 U.S. 238, 313, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). [Cit.]

Id. at 363-364, 254 S.E.2d 315. See *Georgia Franchise Practices Comm.*, supra, 244 Ga. at 803(6), 262 S.E.2d 106; *Murphy v. State of Georgia*, 233 Ga. 681, 682, 212 S.E.2d 839 (1975).

3. In a number of the cases being appealed, the trial courts also found the Act violated the due process and special laws provisions of the Georgia Constitution. See Ga. Const., Art. I, § I, Par. I; Ga. Const., Art. III, § VI, Par. IV. Because we hold that the Act cannot constitutionally be applied to the cases before us, we need not address these alternative holdings in this appeal.

Judgment affirmed.

SEARS, C.J., BENHAM, CARLEY, THOMPSON and HINES, JJ., and Judge M. YVETTE MILLER concur.

MELTON, J., not participating.

[DOCNUM CHECK]

Footnotes:

FN1. For the same reason, the Act cannot accurately be described as merely establishing a procedural threshold for a preliminary determination of causation. Under the Act's plain language, a plaintiffs who cannot make the prima facie showing of substantial causation cannot pursue their claims, whereas before passage of the Act they could.

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