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

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

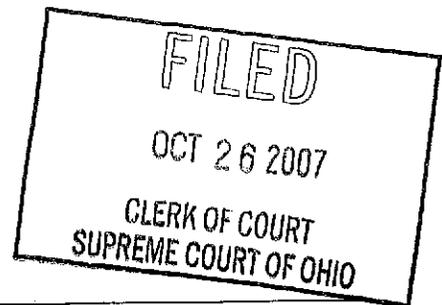
NORFOLK SOUTHERN RAILWAY COMPANY

Plaintiff-Appellant

vs.

HOMER R. BOGLE, et al.

Defendants-Appellees



**PLAINTIFF-APPELLANT, NORFOLK SOUTHERN RAILWAY COMPANY'S
MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION**

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ARGUMENT IN OPPOSITION TO RECONSIDERATION

Appellant, Norfolk Southern Railway Company, hereby opposes the motion for reconsideration filed by Appellees, Charles Odell Weldon, and Eric A. Wiles, individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, and the memorandum of Amicus Curiae, National Association of Retired & Veteran Railway Employees, Inc., in support of Appellees' motion for reconsideration. The law in Ohio should remain as set forth in this Court's well-reasoned opinion in *Norfolk S. RR. Co. v. Bogle*, ___ Ohio St.3d ___, 2007-Ohio-5248, announced on October 10, 2007.

I. LAW AND ARGUMENT

A. The Motion for Reconsideration Should Be Denied Because the Arguments Raised in Support of Reconsideration Were Adequately Addressed by the Court, and Appellees Have Not Called an Obvious Error to this Court's Attention.

Motions for reconsideration of this Court's decisions are governed by S.Ct.Prac.R. XI(2). That rule expressly provides that motions for reconsideration, "shall not constitute a reargument of the case. * * *" S.Ct.Prac.R. XI(2)(A). This aspect of the rule was recognized and applied in *State ex rel. Shemo v. City of Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905. In *Shemo*, this Court refused to hear arguments on reconsideration that merely restated arguments that had already been considered by the Court:

[R]espondents' attempted reargument of this contention is not authorized by our Rules of Practice. 'A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration [and] shall not constitute a reargument of the case ***.' S.Ct.Prac.R. XI(2)(A).

Id. at ¶ 9.

Appellees failed to timely file their merit brief in this case. Their motion for reconsideration appears to be a substitute for their merit brief and presents nothing more than a general reargument of the merits of the Court's decision, which is prohibited under S.Ct.Prac.R. XI(2)(A). Appellees have also failed to call to this Court's attention an obvious error in its analysis. Therefore, the motion for reconsideration should be denied.

1. Appellees' Failure to File a Timely Merit Brief is not a Basis for Seeking Reconsideration.

In their memorandum, the Amicus Curiae revisits and criticizes this Court's decision to strike Appellees' untimely merit brief and preclude Appellees from participating in oral argument. The Amicus Curiae appears to suggest that this Court blankly accepted Norfolk's position without carefully considering the issues presented in this case. In two separate entries, this Court properly denied Appellees' request to participate in oral argument.¹ See S.Ct.Prac.R. VI, Section 3(A); S.Ct.Prac.R. IX, Section 3(B); S.Ct.Prac.R. XIV, Section 1(C). The Supreme Court Rules of Practice are clear. Since Appellees failed to timely file their merit brief, Appellees were deemed "to have waived oral argument." S.Ct.Prac.R. IX, Section 3(B). As this Court observed in *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39: "There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court."

Appellees have briefed their position at length before the Eighth District Court of Appeals. Thus, their position on the issues involved in this appeal are contained in the record. This Court also had the benefit of the decision from the Eighth District Court of Appeals which accepted Appellees'

¹ The Court denied Appellees' request to participate in oral argument on January 18, 2007 and April 27, 2007. Further, on February 8, 2007, a correspondence from the Clerk's office was sent to Appellees regarding their inability to participate in oral argument.

position. While the Amicus Curiae may disagree with the Court's decision to strike Appellees' untimely merit brief and preclude Appellees' participation in oral argument, this is not a basis for seeking reconsideration of this Court's merit decision.

2. *The Federal Employers' Liability Act ("FELA") Is Not a Workers' Compensation Statute.*

Appellees claim that the express exclusion of workers' compensation cases contained in R.C. 2307.95(B) precludes the application of the prima facie filing requirements to FELA cases. According to Appellees, "[r]ailroad employees can only bring claims against their employers under FELA which is in essence a workers' compensation system for railroad workers." (See Appellee's motion at p.4). The idea that the FELA is a workers' compensation statute has been rejected by this Court and the Supreme Court of the United States. Relying on *Consol. Rail Corp. v. Gottshall* (1994), 512 U.S. 532, 543, this Court held that "the FELA is not a workers' compensation statute[.]" *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 2005-Ohio-5408, at ¶17. Thus, Appellees' argument lacks any tenable support.

Appellees also make the general claim that since the FELA is not expressly mentioned in H.B. 292 that such claims were not intended to be affected by the Act. Norfolk has already explained how the statutory language of H.B. 292 reveals that the General Assembly intended the Act to govern all asbestos cases filed in the state courts of Ohio, including those claims filed under the FELA/LBIA. This issue has already been considered by the Court and is not a basis for seeking reconsideration. *Bogle* at ¶31.

Next, Appellees appear to minimize number of asbestos-related FELA claims filed in Ohio, claiming that the legislature's intent was "to deal with the tens of thousands of claims brought

against asbestos manufacturers, not the minuscule amount of cases brought under FELA.” (See, Appellees’ motion at p. 4). The filing of asbestos-related FELA claims in Ohio, especially Cuyahoga County, is not minuscule. In fact, the Amicus Curiae takes a position contrary to Appellees and states that there are “thousands of claimants within this state[.]” (See, Amicus Curiae’s memorandum at p.1). Regardless, this Court has thoroughly analyzed the language of H.B. 292 and reviewed the General Assembly’s intent and legislative findings. In doing so, this Court properly determined that the prima facie filing requirements and administrative dismissal requirements “apply to all asbestos claims filed in Ohio regardless of the theory or statutory basis giving rise to relief[.]” *Bogle* at ¶31. There is no reason to revisit this issue.

3. *The Fear of Cancer Provision Contained in R.C. 2307.94(B) Was Not Before This Court for Review.*

Appellees claim that R.C. 2307.94(B) denies their right to bring a claim for fear of cancer in FELA cases. This issue was never before the Court. Norfolk *never* claimed at the trial court level or on appeal that R.C. 2307.94(B) applies to Appellees. Instead, “[a]t issue here are R.C. 2307.92 and R.C. 2307.93” and whether the requirements contained in those provisions apply to FELA/LBIA claims filed in state court without violating the Supremacy Clause of the United States Constitution. *Bogle* at ¶1, 4, 14. Since the fear of cancer provision contained in R.C. 2307.94(B) was never before this Court for review, it cannot be a basis for seeking reconsideration.

4. *The Prima Facie Filing Requirements Contained in R.C. 2307.92 Are Not Evidentiary Requirements And Do Not Impose an Unnecessary Burden on FELA Claimants.*

Appellees erroneously refers to the prima facie filing requirements contained in R.C. 2307.92 as “evidentiary requirements.” As expressly noted in R.C. 2307.92(G), the decision on the prima facie showing of the medical criteria is not conclusive as to liability, is not a presumption of physical

impairment, is not admissible at trial and does not effect the evidentiary requirements at trial. Thus, Appellees' characterization of the prima facie filing requirements as evidentiary requirements is inaccurate and unsupported by the statutory language.

Appellees also reassert their position that the prima facie filing requirements impose new burdens on FELA claimants while the administrative dismissal process operates as a permanent dismissal of cases for those claimants who are unable to meet the filing requirements. These arguments are reflected in the Eighth District's decision and have already been considered by this Court. *Bogle* at ¶¶11-12, 16-29. In analyzing these issues, this Court held:

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.' *** 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.'

*** 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.

Bogle at ¶¶16-17 (citation omitted and emphasis added).

This Court then went on to consider whether "the procedural provisions impose an

unnecessary burden on FELA claimants” and cited to several United States Supreme Court cases to support its position that the application of the prima facie filing requirements does not impose an unnecessary burden on FELA claimants. *Bogle* at ¶18-29. This Court further explained:

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.

Bogle at ¶24.

In essence, H.B. 292 serves a gatekeeping function by requiring that certain procedural requirements be met at the outset of the litigation in order for an asbestos case to proceed on the active trial docket. If claimants who cannot meet the necessary prima facie filing requirements are permitted to proceed to trial, then they would clog up the trial court’s already overburdened docket and limit access to those claimants who can make the requisite prima facie showing. These requirements are not “roadblocks” as Appellees suggest, but rather state procedural requirements imposed to enhance the ability of courts to manage and organize their docket by prioritizing cases. See, H.B. 292 Section 3(B); See, also, *Bogle* at ¶8; *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 393, 2005-Ohio-5408 at ¶18 (“FELA cases adjudicated in state courts are subject to state procedural rules”). Appellees, as non-residents of Ohio, purposely chose this jurisdiction (rather than the jurisdiction where they reside or worked for the railroad) to file their asbestos-related FELA/LBIA claim. They cannot now seek to avoid this state’s procedural rules.

Appellees next rely on *Daimler Chrysler Corp v. Ferrante* (Ga 2006), 637 S.E.2d 659, to

claim that this Court's decision is incorrect. Appellees' reliance on *Ferrante* is misplaced for two reasons. First, it did not involve federal preemption nor address cases brought under the FELA. Second, it struck down a law that contradicted a recent Georgia Supreme Court decision. Thus, *Ferrante* is distinguishable and does not support Appellees' position that this Court should reconsider its decision.

In this same regard, *In re Global Santa Fe Corp.* (Tex. App. Dec. 19, 2006), Case No. 14-06-00625-CV, 2006 Tex App. LEXIS 10753, offers no support for reconsideration. *In re Global Santa Fe* was decided by a Texas appellate court, not the court of last resort for the state of Texas, and is an unreported decision. Most importantly, the intermediate Texas appellate court acknowledged that the federal preemption issue before it was an issue of first impression and that the only other court that had directly addressed the issue was Ohio's Eighth District Court of Appeals. See, *In re Global Santa Fe* at 8, fn. 5, citing to *Norfolk S. Ry. Co. v. Bogle*, (2006), 166 Ohio App. 3d 449, 2006-Ohio-1540. *In re Global Santa Fe* relied on the underlying Eighth Appellate District's decision to find that Texas' silica reporting requirements were federally preempted by the Jones Act. *Id.* at 8. Incredibly, Appellees ask this Court to rely on *In re Global Santa Fe* as a basis of reconsidering its decision herein. The circular reasoning presented by Appellees is as follows: this Court should rely on *In re Global Santa Fe*, which relied on the Eighth Appellate District's decision, which is the very decision overturned by this Court herein. This argument is simply illogical.

This Court has reversed the Eighth District's decision. Thus, this Court has implicitly determined that the court in *In re Global Santa Fe* also incorrectly decided this issue. As such, *In re Global Santa Fe* does not support reconsideration of this Court's sound decision.

It should also be noted that contrary to Appellees' representation, *In re Global Santa Fe* did

not involve a railroad. Thus, Appellees wrongly attribute the comments made by the defendant in that case to “the railroad defendant.” (See, Appellees’ motion at p. 12.) Furthermore, the defendant, Global Santa Fe Corporation’s representation that H.B. 292 is harsher than the Texas statutes’ reporting requirements because cases “are dismissed without prejudice” is simply wrong. As recognized by this Court, “[the] failure to comply with the prima facie filing requirements carries *no such penalty.*” *Bogle* at ¶28 (emphasis added). Under the administrative dismissal process, the trial court retains jurisdiction over the case, the claim is preserved for purposes of statute of limitations, and the dismissal is *without prejudice* and *does not* count against the plaintiff. See R.C. 2307.93(C). *Bogle* at ¶28. This gives claimants greater protection than would be afforded upon an actual Civ.R. 41 dismissal.

For these reasons, the non-binding decision of *In re Global Santa Fe* does not support Appellees’ position that this Court’s sound decision should be reconsidered.

5. *Federal Courts Handle Asbestos Cases in a Similar Manner as Set Forth by H.B. 292. This Demonstrates That H.B. 292 Is Procedural in Nature.*

Appellees argues that the procedure adopted in federal court to handle asbestos cases is not analogous to the process contained in H.B. 292. Appellees forget that the FELA provides for a system of concurrent jurisdiction between the state and federal court. Any argument that Appellees’ rights under the FELA/ LBIA would be impaired by H.B. 292 is completely without merit because their cases would be treated in a similar manner if filed in federal court as demonstrated by Judge Weiner’s Administrative Order No. 8. This order has never been found to be in conflict with or frustrate the FELA.

Yet, Appellees claim that Administrative Order No. 8. is “dramatically different” from H.B.

292. However, this Court fully understood Appellees' position as adopted by the Eighth Appellate District and rejected it: "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." *Bogle* at ¶31.

This is not a basis for reconsideration.

B. Appellees Raise New Arguments That Were Never Presented in the Lower Courts and Therefore, Have Been Waived.

Appellees raise several arguments that were never presented below. First, Appellees argue that this Court's decision will adversely impact FELA claimants suffering from lung cancer. (See, Appellees' motion at p. 6). This argument was never raised by Appellees at the trial court or Eighth District Court of Appeals and cannot be raised for the first time in a motion for reconsideration. Consequently, this issue has been waived. *Baker v. West Carrollton*, 64 Ohio St.3d 446, 448, 1992-Ohio-124; *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43; *Moats v. Metropolitan Bank of Lima* (1974), 40 Ohio St.2d 47, 49-50. Nevertheless, this Court clearly understood the issues involved and the impact this case would have on FELA asbestos claimants in Ohio. There is no reason to revisit this Court's decision.

Second, Appellees argue that this Court's decision violates the Equal Protection Clauses of the Constitution of the United States and Ohio. (See, Appellees' motion at pp. 7-10). This argument was never raised by Appellees during the proceedings below and has been waived. *Baker* at 448; *Stores Realty Co.* at 43; *Moats* at 49-50. Even if this argument were preserved by Appellees, it is not a basis for seeking reconsideration.

As noted in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 689, a statute challenged on equal protection grounds must be upheld if there exists a conceivable set of facts under which the

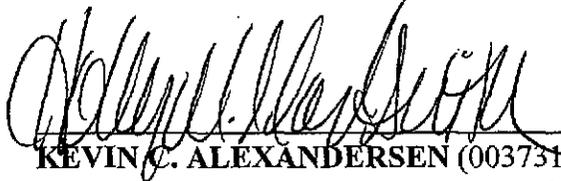
classification rationally furthers a legitimate legislative interest. H.B. 292 passes the rational basis test. The General Assembly enacted H.B. 292 in “response to the asbestos litigation crisis in this state.” See H.B. 292, Section 3(A)(5). The Act sets forth the procedural process by which Ohio courts can handle and organize the “elephant mass” of asbestos cases and manage their dockets to ensure that sick claimants receive priority in the resolution and compensation of their claims while at the same time fully preserving the rights of unimpaired claimants to pursue asbestos claims in state courts. See H.B. 292, Section 3(B). These are legitimate legislative objectives, and H.B. 292 does not violate the Equal Protection Clauses of the Constitution of the United States or Ohio.

II. CONCLUSION

As reflected in its opinion, this Court gave due consideration to the arguments presented by Norfolk and the position taken by Appellees which was adopted by the Eighth Appellate District. This Court understood the issues raised in this case, appreciated the impact its decision would have on FELA asbestos claimants in Ohio and rendered a well-reasoned opinion supported by precedent from the Supreme Court of the United States.

Accordingly, Appellant, Norfolk Southern Railway Company, respectfully requests that the Court deny the motion for reconsideration filed by Appellees, Charles Odell Weldon, and Eric A. Wiles, Individually and in his capacity as Executor of the Estate of Larry Arnold Wiles, and the memorandum in support of reconsideration filed by the National Association of Retired & Veteran Railway Employees, Inc. The rule of law in Ohio should remain as established in this Court’s decision that the prima facie requirements contained in R.C. 2307.92 and the administrative dismissal requirements contained in R.C. 2307.93 are procedural in nature and their application to FELA/LBIA claims filed in state court does not violate the Supremacy Clause.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kevin C. Alexandersen', written over a horizontal line.

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CERTIFICATE OF SERVICE

A true copy of the foregoing was served via regular U.S. mail, postage prepaid, this 25th day of October 2007, upon the following parties of record:

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