

ORIGINAL

09-1070

Case No. 2009-
In the Supreme Court of Ohio

Jack E. Riedel, Danny R. Six, & Josephine Weldy, et al.,

Plaintiffs-Appellees,

v.

Consolidated Rail Corporation, et al.,

Defendants-Appellants.

**On Discretionary Appeal From the
Court of Appeals, Eighth Appellate District
Cuyahoga County, Ohio
Case Nos. 91237, 91238 & 91239**

**MEMORANDUM OF AMICUS CURIAE GRAND TRUNK WESTERN RAILROAD
INCORPORATED, IN SUPPORT OF JURISDICTION**

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RECEIVED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE PRESENTS ISSUES OF PUBLIC OR
GREAT GENERAL INTEREST**

This Court should accept jurisdiction in this matter because the issue presented is of first impression and involves public and great general interest. When Am. Sub. H.B. No. 292 (“H.B. 292”) was enacted by Ohio’s General Assembly, its purpose was to ease the burdens placed on the dockets of Ohio’s common pleas courts by prioritizing asbestos-related actions by requiring minimal criteria that asbestos-related cases must meet to avoid administrative dismissal. The Eighth Appellate District’s decision in *Riedel v. Consol. Rail Corp.*, 8th Dist. Nos. 91237, 91238 & 91239, 2009-Ohio-1242 erodes the very purpose of H.B. 292.

The impact of the appellate court’s decision cannot be overstated. It will have a sweeping impact on asbestos-related litigation across Ohio. If allowed to stand, the Eighth Appellate District’s decision provides a mechanism for claimants to avoid the requirements of H.B. 292, resulting in duplicative litigation which will further inundate an already overburdened trial docket specifically created to handle asbestos-related transactions. This should not be the law in Ohio, and Grand Trunk Western Railroad Incorporated urges this Court to review the decision of the Eighth Appellate District.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

Grand Trunk Western Railroad Incorporated is a railroad carrier that has been involved in asbestos litigation in Cuyahoga County for the past several years. Grand Trunk is appearing as amicus curiae in this case and filing this brief to preserve the important public policies which the Ohio General Assembly sought to protect in enacting H.B. 292. Grand Trunk urges this Court to administratively dismiss entire asbestos-related cases when the prima facie requirements set forth in H.B. 292 are unmet and when a single, indivisible pulmonary injury is at issue, regardless of the alternative exposures asserted as the basis giving rise to relief. Such an application of H.B.

292 serves to make efficient use of judicial resources and upholds the purpose of the statutes at issue.

Grand Trunk's appearance as amicus is premised upon the recognition that there is a glaring need for this Court to rectify the Eighth Appellate District's decision which unnecessarily restricts the scope of R.C. 2307.93(C), to the point of undermining the effect of the provisions enacted by H.B. 292. The Eighth Appellate District's decision further unnecessarily expands *Wagner v. Anchor Packing Co.*, 4th Dist. No. 05CA47, 2006-Ohio-7097; *Nichols v. A.W. Chesterson Co.*, 172 Ohio App.3d 735, 2007-Ohio-3828; and *Penn v. A-Best Products Co.*, 10th Dist. Nos. 07AP-404, 07AP-405, 07AP-406, 07AP-407, 2007-Ohio-7145.

In *Wagner* and *Nichols*, the issue decided was whether the claimant must set forth a prima facie case for colon cancer claims. Finding that there was no provision for colon cancer in R.C. 2307.92(B), (C) or (D), the appellate courts answered this question in the negative. *Wagner* at ¶32; *Nichols* at ¶26. Likewise, in *Penn*, the appellate court determined that R.C. 2307.92 imposes no burden upon a nonsmoker with lung cancer to present a prima facie case. *Penn* at ¶34.

Wagner, *Nichols* and *Penn* also determined that the definition of "competent medical authority" set forth in R.C. 2307.91(Z) was inapplicable to colon cancer claims (and non-smoking lung cancer and laryngeal cancer claims in *Penn*). R.C. 2307.91(Z) is only applicable in the context of a doctor providing a diagnosis for purposes of constituting prima facie evidence of an exposed person's physical impairment pursuant to the requirements of R.C. 2307.92. *Penn* at ¶17; *Wagner* at ¶36; *Nichols* at ¶28. Thus, a diagnosis by a "competent medical authority" as defined therein is not the only way for an asbestos-related claim to accrue.

Although the appellate courts' general statements that H.B. 292 was inapplicable to the other cancer claims could be construed as finding R.C. 2307.93 to also be inapplicable to those claims, this was *never* expressly stated by the appellate courts. The issue of whether the entire case should be administratively dismissed was not determined in *Wagner, Nichols* or *Penn*. These cases should not be broadly construed to support this position because to do so flies in the face of the public policy reasons for the enactment of H.B. 292.

Significantly, in *Wagner, Nichols* and *Penn*, the other cancer claims are asbestos-related. Thus, having these asbestos-related claims remain on the specialized Asbestos Docket does not raise the same public policy issues that exist as a result of the Eighth Appellate District's decision at issue. Asbestos-related claims are the types of claims for which this docket was created. In contrast, non-asbestos claims, like those asserted by Appellees, do not belong on the Asbestos Docket.

By erroneously expanding *Wagner, Nichols* and *Penn*, the Eighth Appellate District concluded, in contravention of the language of the statute, that "the administrative dismissal provision is limited to the asbestos-related claims that are specified in R.C. 2307.92. The legislature could have allowed the court to administratively dismiss the entire tort action, but chose to limit R.C. 2307.93(C) to asbestos-related nonmalignancy claims, lung cancer in a smoker and wrongful death claims." *Riedel*, at ¶13. The Eighth Appellate District's decision has resulted in and will continue to result in allowing claimants to thwart the very purpose of H.B. 292, thereby rendering the statutory case management efforts of H.B. 292 entirely ineffective.

For the reasons stated and developed more fully herein, Grand Trunk submits that the issue should be resolved with the Court holding that when a case is filed seeking redress for pulmonary injuries based on asbestos exposure, the entire case must be administratively

dismissed pursuant to R.C. 2307.93(C) when the prima facie requirements of R.C. 2307.92(B), (C) or (D) are unmet, regardless of whether claims premised on non-asbestos exposures are asserted in the action. Adoption of Appellants' Proposition of Law will prevent litigants from circumventing the requirements of H.B. 292. Grand Trunk thus supports reversal of the Eighth Appellate District's decision.

STATEMENT OF THE CASE AND FACTS

Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company (collectively, "the Railroads"), appeal from the decision of the Eighth Appellate District which affirms the Cuyahoga County Court of Common Pleas decision that administratively dismissed the asbestos-exposure claims of Plaintiffs-Appellees, Jack E. Riedel, Danny Six, and Josephine Weldy as representative of the estate of Jack Weldy (collectively "Appellees"), but severed the remaining non-asbestos exposure claims, thereby allowing the claims premised on exposures to non-asbestos substances and dust to be adjudicated on the special docket dedicated to asbestos-related transactions in Cuyahoga County ("Asbestos Docket").

Appellees filed occupational disease claims on the Asbestos Docket under the Federal Employers' Liability Act ("FELA") and the Locomotive Inspection Act ("LIA") against the Railroads alleging various pulmonary injuries (pneumonconiosis, asbestosis, pleural disease, restrictive lung disease, obstructive lung disease, emphysema, asthma, reactive airway disease¹, fear of cancer, and lost wages), which allegedly were caused by occupational exposure to various toxic substances. Separate claims were asserted for exposure to asbestos, diesel exhaust, sand and silica, solvents and other toxic substances.

¹ Josephine Weldy made a wrongful death claim for her husband, Jack Weldy, based on his chronic obstructive pulmonary disease and his occupational exposure to diesel exhaust.

Appellees could not make a prima facie showing in accordance with R.C. 2307.92(B) as to their asbestos exposure claims for asbestosis. The trial court granted the Railroads' motion for administrative dismissal as to the asbestos-related claims, but severed the claims pertaining to substances other than asbestos. The Eighth Appellate District upheld the trial court's decision, stating:

The administrative dismissal provision is limited to the asbestos-related claims that are specified in R.C. 2307.92. The legislature could have allowed the court to administratively dismiss the entire tort action, but chose to limit R.C. 2307.93(C) to asbestos-related nonmalignancy claims, lung cancer in a smoker and wrongful death claims.

Riedel at ¶13.

The Railroads have filed an appeal concurrently herewith because the appellate court should have administratively dismissed the entire case pursuant to R.C. 2307.93(C). The erroneous decision of the Eighth Appellate District subverts the very purpose of H.B. 292.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law I: **An asbestos claim subject to H.B. 292 may not be severed from non-asbestos claims arising from the same lawsuit and involving the same indivisible injury.**

1. The Purpose of H.B. 292.

The Supreme Court of the United States has characterized asbestos litigation as an "elephantine mass' of cases that "defies customary judicial administration." *Norfolk & W Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003); see, also, *CSX Transp., Inc. v. Hensley* (2009), 556 U.S. ____, (commenting on the "systemic difficulties posed by the 'elephantine mass of asbestos cases.'"). Ohio in particular has been inundated with an overwhelming number of asbestos filings, and is "one of the top five state court venues for asbestos filings." H.B. 292, Section 3(A)(3)(b).

In 2003, at least 35,000 asbestos personal injury cases were pending in Ohio's state courts and there appeared to be no end in sight because approximately 200 new asbestos cases were being filed every month. See, H.B. 292, Section 3(A)(3)(d) and (e). Faced with overburdened dockets and an unending number of newly filed asbestos actions, Ohio's courts needed a mechanism to manage a large volume of asbestos cases on their dockets. Finding that "[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike," Ohio's General Assembly enacted H.B. 292. *Norfolk S. RR. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, at ¶2.

H.B. 292 went into effect on September 2, 2004. See H.B. 292, 150 Ohio Laws, Part III, 3995. It enacted Ohio Revised Code Sections 2307.91 through 2307.98 to serve four primary purposes: (1) to give priority to 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 scarce resources to allow compensation for cancer victims while also securing a right to similar compensation for those who suffer harm in the future. See, H.B. 292, Section 3(B).

The General Assembly enacted H.B. 292 as a procedural mechanism to enhance the ability of courts to manage and organize their dockets by prioritizing asbestos-related actions in which the claimant can demonstrate impairment. See, *id.* At the same time, H.B. 292 fully preserves the rights of the unimpaired claimants to pursue their asbestos-related claims. See, *id.*

2. The Procedural Requirements of R.C. 2307.91 - R.C. 2307.93.

R.C. 2307.92 (B), enacted by H.B. 292, sets forth certain minimal medical criteria for non-malignant asbestos cases. It requires evidence that a competent medical authority took detailed occupational, asbestos-exposure, medical and smoking histories of the plaintiff, and

diagnosed an asbestos-related, non-malignant condition based on those histories, as well as a medical examination and a pulmonary function test. See, R.C. 2307.92(B)(1)-(3). 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).

At issue in this case is R.C. 2307.93(C), which provides:

The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any *case* that is administratively dismissed under this division. Any plaintiff whose *case* has been administratively dismissed under this division may move to reinstate the plaintiff's *case* if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

(Emphasis added.)

Thus, if a plaintiff cannot meet the medical criteria, which none of the Appellees could do herein, the *case* is administratively dismissed without prejudice. See *id.* Under this procedure, the trial court retains jurisdiction over the case. The administratively dismissed claims are preserved for purposes of the statute of limitations, and the dismissal does not count against the plaintiff. The case can be reinstated when the plaintiff complies with R.C. 2307.92 (B), (C) or (D).

3. The Eighth Appellate District's Decision Allows Claimants to Circumvent the Administrative Dismissal Procedure Set Forth in R.C. 2307.93.

All asbestos claimants, including FELA and LBIA claimants, must meet the aforementioned procedural medical requirements at the early stage of litigation in order to prioritize the cases on the trial court docket. See, *Bogle* at syllabus. This Court acknowledged that R.C. 2307.92 and 2307.93 "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." *Bogle* at ¶31 (emphasis added).

In an attempt to circumvent the administrative dismissal procedure set forth in R.C. 2307.93, Appellees assert a laundry list of baseless non-asbestos exposures in their complaints as potential causes of the pulmonary diseases from which they or their decedent allegedly suffer or suffered. By not applying the administrative dismissal process to the entire case, the Eighth Appellate District has allowed the mechanism by which claimants can avoid the prima facie requirements of R.C. 2307.92 and the administrative dismissal procedure of R.C. 2307.93. To keep a meritless asbestos-related action active, the claimant need only assert numerous types of exposure in addition to the asbestos-exposure. Clearly, this is not the intent of the statutes enacted by the General Assembly through H.B. 292.

The Eighth Appellate District's decision which permits litigants to engage in tactics, such as arbitrarily adding claims premised on exposures to non-asbestos substances and mixed dust to avoid administrative dismissal, should not be tolerated by this Court. The non-asbestos claims should not remain on the already over-saturated Asbestos Docket. Litigants should not be permitted to force Ohio's courts to unnecessarily expend time and judicial resources to adjudicate non-asbestos claims on a docket specifically created to handle the "elephantine mass" of asbestos claims that are currently pending.

Public policy concerns regarding the adjudication of non-asbestos claims on the Asbestos Docket undeniably exist. The overwhelming amount of asbestos cases lodged on the Asbestos Docket "defies customary judicial administration" and poses "systemic difficulties." *Hensley*, supra; *Ayers* at 166. The statutes enacted through H.B. 292 were implemented in reaction to the elephantine mass of asbestos cases clogging the dockets of Ohio's courts. If legislative measures

have been taken to weed out non-malignant asbestos cases from the already strained Asbestos Docket, then certainly non-asbestos claims should not be allowed to stand on the Asbestos Docket. Accordingly, the non-asbestos claims asserted on the Asbestos Docket should not be severed from the asbestos-related claims. Instead, the entire case should be administratively dismissed.

4. Severing Claims Undermines Judicial Economy and Promotes Double Recovery by Claimants.

The evidence necessary to prove each element of Appellees' FELA claim for pulmonary disease is the same whether the pulmonary disease is premised on asbestos exposure or exposure to non-asbestos-containing substances. There is only one indivisible injury alleged in each of these cases, to-wit: pulmonary disease. The same pulmonary conditions are at issue, just different alleged causes. Therefore, the pulmonary injury claims premised on alleged exposures to non-asbestos-containing toxic substances and mixed dust cannot be severed from the claim premised on asbestos exposure.

Judicial economy will not be served by separating these claims. The medical evidence for the alleged pulmonary disease is wholly related to medical evidence for the other non-asbestos exposures. The same treating doctors, as well as the same medical experts, will most likely be called to testify in support of the claimants' pulmonary diseases. Likewise, the time frame of exposure relevant to the asbestos and non-asbestos claims is the same. Both the asbestos-related claim and the claims premised on non-asbestos-containing toxic substances and dust concern the entire span of the claimants' work histories. Considering that the same medical testimony and the same time lines and work environments are at issue, the claims brought by Appellees are essentially dependent on one another. Thus, severing these claims from one

another is unwarranted and will result in duplicative litigation should the asbestos claim be revived by a claimant satisfying the prima facie criteria set forth in R.C. 2307.92(B), (C), or (D).

Against this backdrop, if the Eighth Appellate District's decision is allowed to stand, then two separate trials would be had involving virtually the same exact evidence. As the trial court's order stands now, Appellees would proceed to trial on their non-asbestos claims (ironically before an Asbestos Trial Judge) which would necessarily require a discussion of the involvement of asbestos since it also may have contributed to their injuries. Then, later on, if Appellees can make a prima facie showing under H.B. 292, a second trial would be had on the *same injuries with the same evidence* regarding asbestos. Not only does this defeat judicial economy, it permits Appellees to receive double recovery. Rather than streamline the asbestos litigation process as H.B. 292 intends, the approach adopted by the trial court and the Court of Appeals would double the amount of cases requiring adjudication on the Asbestos Docket and undermine the purpose of H.B. 292.

5. Adjudication of Non-Asbestos Claims on the Asbestos Docket Undermines Judicial Economy

The practice of having non-asbestos related claims adjudicated on the Asbestos Docket defeats judicial economy. The adjudication of the approximately 40,000 pending asbestos actions will undoubtedly already take many years to resolve. In fact, it has been estimated that if the 233 Ohio state court general jurisdictional judges started trying these asbestos cases today, each would have to try over 150 cases before retiring the current docket. See, H.B. 292, Section 3 (A) (3) (D). "That figure conservatively computes to at least 150 trial weeks or more than three (3) years per judge to retire the current Asbestos Docket." *Id.*

With the addition of countless non-asbestos cases, the already overburdened Asbestos Docket will be overwhelmed. Given that there is no indication that asbestos litigation is likely to

lessen in the near future, this Court should not allow Ohio's common pleas courts to bear the additional burden of litigating claims that do not belong on the Asbestos Docket. With approximately 200 new asbestos cases filed in Cuyahoga County every month, litigating non-asbestos claims on the already severely overburdened Asbestos Docket thwarts the purpose of H.B. 292 which is to expedite the final determination of asbestos-related disputes that meet the minimum prima facie requirements.

6. The Eighth Appellate District's Decision Allows for Judge Shopping.

Appellees cannot benefit from filing their lawsuits on the Asbestos Docket without being held to the consequences of that specialized docket. Appellees chose to file their lawsuits on the Asbestos Docket, therefore, they must be bound by the rules applicable to all claimants on this specialized docket. Otherwise, their actions would amount to nothing but judge shopping.

The Eighth District's decision contravenes public policy because it provides claimants with a vehicle to circumvent the random judicial assignment system of the General Division of the Cuyahoga County Court of Common Pleas. See, Local Rule 15(A) of the Rules of the General Divisions of the Cuyahoga County Court of Common Pleas. Claimants (including Appellees) are well aware that a single, specific judge handles all FELA asbestos actions on the Asbestos Docket in Cuyahoga County. Even if the asbestos claim cannot meet the H.B. 292 criteria, a claimant can hand-select the judge who will preside over the remaining non-asbestos claims without dealing with the consequences of meeting the criteria for pursuing an asbestos-related action, i.e., without administrative dismissal. This is precisely what occurred here. In short, the Eighth District's ruling allows claimants to engage in judge shopping, a practice which the rules of assignment were specifically designed to prevent. *Brickman & Sons, Inc. v. National City Bank*, 106 Ohio St.3d 30, 2005-Ohio-3559 at ¶21.

Rule 36(B)(1) of the Rules of Superintendence for the Courts of Ohio provides: "As used in these rules, 'individual assignment system' means the system in which, upon the filing in or transfer to the court or a division of the court, a case immediately is assigned by lot to a judge of the division, who becomes primarily responsible for the determination of every issue and proceeding in the case until its termination." Sup. R. 36(B)(1) continues, "[t]he individual assignment system ensures all of the following: (a) [j]udicial accountability for the processing of individual cases; (b) [t]imely processing of cases through prompt judicial control over cases and the pace of litigation; [and] (c) [r]andom assignment of cases to judges of the division through an objective and impartial system that ensures the equitable distribution of cases between or among the judges of the division."

Judicial assignments must be free from the appearance of impropriety. *Brickman* at ¶21. Allowing claimants to add specific claims to their complaints as a means of either circumventing a statute or selecting the judges who will oversee their cases, is a practice that should not be tolerated. Appellees should not be permitted to circumvent H.B. 292 or the judicial assignment rules, yet that is precisely what the Eighth Appellate District's decision allows.

CONCLUSION

Grand Trunk Western Railroad Incorporated, as Amicus Curiae, supports the position of Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company, and respectfully submits that the issues presented in this appeal are of first impression and involve public and great general interest. The decision of the Eighth Appellate District establishes an unwise rule of law for asbestos-related cases, and this case deserves this Court's attention. The devastating impact that the Eighth Appellate District's decision will have on the statutes enacted by Ohio's General Assembly and the public policies behind H.B. 292 further commend the case for review.

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