ORIGINAL

Case No. 2009-1070

In the Supreme Court of Ohio

JACK RIEDEL, DANNY SIX, & JOSEPHINE WELDY, et al.,

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Plaintiffs-Appellees,

vs.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendants-Appellants.

Appeal from the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, Case Nos. 91237, 91238 & 91239

MERIT BRIEF OF APPELLEES JACK E. RIEDEL, DANNY SIX, AND JOSEPHINE WELDY

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INTRODUCTION

This appeal presents the common-sense question of whether or not non-asbestos claims brought under federal law can be administratively dismissed under the Ohio Asbestos Bill.[1] Despite Appellants' mis-characterizations, Appellees herein are not claiming that exposure to asbestos and non-asbestos have caused the same pulmonary injury. To the contrary, these three former railroad workers have, or had, at least two separate and distinct injuries - asbestosis and Chronic Obstructive Pulmonary Disease (COPD). All three Appellees submitted prima-facie evidence to the trial court with respect to the diagnosis of asbestosis which they alleged was caused by occupational exposure to asbestos while working for the railroad. (2nd Supp. 1-164)[2] The trial court found that evidence to be insufficient and administratively dismissed the asbestosis claims of these three individuals. (2A.,3A.,4A.)

In reviewing the evidence, the trial court also found that all three men suffered from a second disease, COPD[3], alleged to have been caused by their railroad exposures to other toxic substances, including diesel locomotive exhaust. Finding these claims unrelated to asbestos, and outside the scope of the Ohio Asbestos Bill, the court allowed these claims to continue. *Id.* The trial court's findings were supported by evidence from the treating physicians of all three

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[1]The Ohio Asbestos Bill, referenced by the Appellants as "Am. Sub. H.B. 292," is codified at R.C. 2307.91–98 and attached to Appellants' Brief at 21A - 32A..

[2]Citations herein are to the Appellants' Supplement to the Briefs, cited as Supp. at __; Appellees' 2nd Supplement to the Briefs, cited as 2nd Supp. at __; Appellants' Appendix, cited as __A., or to Appellees' Appendix, cited as __AA.

[3]COPD encompasses a number of related obstructive lung diseases "including, chronic bronchitis, emphysema, and asthma." See Hart, Laden, Schenker and Garshick, *"Chronic Obstructive Pulmonary Disease Mortality in Diesel-Exposed Railroad Workers"* Environmental Health Perspectives. 114:1013-1017 (2006) at p. 1013. (2nd Supp 216-220)

individuals. (2nd Supp. 32-35, 70, 164). The Appellants' unavailing assertions that "unsubstantiated accusations" have been "tacked on" to the instant asbestos claims are without merit. The Eighth District recognized as much. Jack Weldy has died, Jack Riedel and Danny Six have suffered serious and debilitating harm, as a result of their occupational exposure to toxins, other than asbestos, while employed by Appellants. Sensibly, the trial court allowed these claims, unrelated to asbestos, outside the scope of the Ohio Asbestos Bill and supported by evidence from the Appellees' own treating physicians, to continue. *Id.* The Eighth District agreed holding that the Appellees' injuries, except asbestosis, "may be caused by other substances * * * [t]herefore, those claims remain * * *" *Riedel, et al. v. Consolidated Rail Corporation, et al.*, 8th Dist. Nos. 91237, 91238, 91239, 2009-Ohio-1242, at ¶14 (citations omitted); (12 A.). This Court has accepted jurisdiction and must now decide whether or not these substantive claims, created by federal law and completely unrelated to asbestos, should be dismissed by the Ohio Asbestos Bill.

STATEMENT OF FACTS

Jack E. Riedel, Danny Six, and Josephine Weldy, as Representative of the Estate of Jack Weldy[4], brought occupational disease actions under the protective wing of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 et seq., and the Locomotive Inspection Act ("LIA"),49 U.S.C. §20701 et seq., against Appellants, Consolidated Rail Corporation, et al. and Norfolk Southern Railway Company. (Supp. 1-83, 1AA-12AA). Appellees alleged that during their careers employed by the railroad, continuous occupational exposures to asbestos, diesel

[4] Following the trial court's decision, Josephine Weldy, personal representative and widow of Jack Weldy, also died and a new representative has been appointed.

exhaust and other toxic substances caused and/or aggravated the development of severe lung diseases, including asbestosis and COPD. *Id.*

COPD refers to a broad class of obstructive lung diseases, including chronic bronchitis, emphysema and asthma, that can be caused by exposure to various toxins including cigarette smoke, diesel exhaust and other dusts and fumes. See Hart, et al., supra. (2nd Supp. 216), see, also, *American Thoracic Society Statement: Occupational Contribution to the Burden of Airways Disease,* 167 Am J Respir Crit Care, 787 (2003) (2nd Supp 243). Specifically, COPD is a disease of the airways or bronchi, it "is characterized by the presence of airflow limitation * * * " *Id.* This "airflow limitation is usually progressive and associated with an abnormal response of the lungs to noxious particles or gases." *Id.*

Asbestosis, however, is a disease not of the airways, but of the lungs. See, Levin, Kahn and Lax, *"Medical Examination for Asbestos-Related Disease"* American Journal of Industrial Medicine. 37:6-22 (2000) at p. 9. (2nd Supp. 221). It is well-established that "[p]ulmonary asbestosis is a the diffuse, interstitial fibrosis in the lung parenchyma caused by the deposit of asbestos fibers (of all types) in the lung." *Id.* Asbestosis is a restrictive lung disease, caused only by exposure to asbestos. *Id.* Asbestos does not cause COPD. It does not cause chronic bronchitis or asthma. These are two separate and distinct disease processes effecting different parts of the respiratory system.

Appellees' Complaints where assigned to the Asbestos Docket by the Cuyahoga County Chief Administrative Judge in accord with the Case Management Order of that docket which requires that any FELA case which includes a cause of action for asbestos exposure be so assigned. Despite the assertions of *Amicus*, the instant Appellees did not "choose" to litigate

their claims on the asbestos docket. The trial court's CMO provides that its purpose is to "secure the just, efficient and economical resolution of each Asbestos personal injury, Silica, and FELA case now pending or hereafter filed in the Court of Common Pleas for Cuyahoga County, Ohio * * * " (2nd Supp. 199).

In their Complaints, Riedel, Six, and Weldy asserted six separate and distinct causes of action against the Appellants, alleging various pulmonary injuries occurring as a result of their occupational exposures to various substances. (Supp.1-83). The first cause of action related to exposure to asbestos, the second, exposure to diesel locomotive exhaust, the third, exposure to sand and silica, the fourth, exposure to solvents and other toxic substances, the fifth, for aggravation of pre-existing conditions, and the sixth, for negligent assignment. *Id.* In addition, Josephine Weldy made a claim for the wrongful death of her husband, under the FELA, based on his COPD . (Supp. 52-66). The injuries alleged by all three included, among other things "pneumoconiosis, asbestosis, pleural disease, restrictive lung disease, obstructive lung disease, emphysema, asthma, reactive airway disease," fear of cancer, and lost wages. (Supp.10, 24, 41).

Appellees' claims are brought under the FELA, a federal law designed solely for the protection of our nation's rail workers, which requires that rail carriers provide a reasonably safe working environment and imposes liability for negligence, even in the slightest, when employees are injured. *Consolidated Rail Corp. v. Gottshall* (1994), 512 U.S. 532, 543, 114 S. Ct. 2396, 129 L. Ed.2d 427; see, also, *Rogers v. Missouri Pacific R.R. Co.* (1957), 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed 2d 492. As a remedial statute, the FELA establishes a non-delegable duty and embodies a diminished standard of proof which has consistently been held to be substantially less than that of ordinary negligence actions. *Gallick v. Baltimore & Ohio R.R. Co.* (1963), 372 U.S. 108, 116,

83 S.Ct. 173, 9 L.Ed.2d 618, see, also, *Sentilles v. Inter-Carribean Shipping Corp.* (1959), 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142. Where there is any evidence of "employer negligence * * * [to] justify a jury's determination that employer negligence had played any role in producing the harm," the liability of the railroad is established. *Gallick,* 372 U.S. at 116.

The congressional purpose of the FELA is to provide a national law of uniform operation throughout the states and to "withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws." *New York Central Railroad Company v. Winfield,* (1917) 244 U.S. 147,150, 37 S. Ct. 546, 61 L. Ed. 1045. The United States Supreme Court, determining that occupational pulmonary diseases lied within the coverage of the FELA, reiterated the role of the judiciary in determining questions of law arising under the federal statute: "What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with different conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulated at applying the concept governs." *Urie v. Thompson,* (1949) 337 U.S. 163, 175, 69 S. Ct. 1018, 93 L. Ed. 1282.

The LIA, in substance an amendment to the FELA, imposes absolute liability on rail carriers which "use or permit to be used * * * any locomotive * * * [whose] parts and appurtenances [are not] in proper condition and safe to operate * * * [resulting in] unnecessary peril to life or limb* * *" *Southern Ry. Co. v. Lunsford* (1936), 297 U.S. 398, 400–01, 56 S. Ct. 504, 80 L. Ed. 740. The duty imposed by the LIA is absolute, continuing, and non-delegable and it has universally been deemed and interpreted to facilitate recovery for the injured rail employee. *Sinkler v. Missouri Pacific R.R. Co.* (1958), 356 U.S. 326, 328, 78 S. Ct. 758, 2 L. Ed.2d 799. No defenses, including contributory negligence, are available to the a railroad defendant found in

violation of the LIA. *Lilly v. Grand Trunk Western R.R. Co.* (1943), 317 U.S. 481, 491, 63 S. Ct. 347, 87 L. Ed. 411.

On September 2, 2004, after the Appellees' right to bring these causes of action had already accrued, vested, and in the case of Riedel and Weldy, been exercised, R.C. 2307.91 et seq., commonly known as the Ohio Asbestos Bill, became effective. The statute requires a plaintiff, making a claim based on exposure to asbestos, to make a prima-facie showing in order to have that claim adjudicated in Ohio state court. R.C. 2307.93(A). Failure to make a prima-facie showing as set forth by the statute results in administrative dismissal of the asbestos claim without prejudice. R.C. 2307.93(C). A plaintiff may move for reinstatement only if the asbestos-related condition deteriorates to the point where a prima-facie showing can be made. *Id.*

On October 24, 2007, in the case of *Norfolk Southern Railway Co. v. Bogle,* 115 Ohio St.3d 455, 2007 Ohio 5248, 875 N.E.2d 919, this Court held that the prima-facie filing requirements of the statute were procedural only and made no substantive change in the law. *Id.* at ¶¶ 16-17. This Court held, accordingly, that the prima-facie filing requirements of the statute could be applied to railroad workers injured in this state without offending the Supremacy Clause of the United States Constitution, and therefore, were not pre-empted by the FELA. *Id.* at ¶ 29.

On December 6, 2007, the trial court required the instant Appellees to make a prima-facie showing in accordance with R.C. 2307.92(B) as to their asbestos-related claims or stand to have those asbestos claims administratively dismissed. Appellees offered evidence to make their prima-facie case as required, which was challenged by the Appellants. (2nd Supp. 1-164). Appellees' evidence included medical opinions that they suffered from asbestosis as well as the

opinions of their own treating physicians that railroad exposures to substances other than asbestos had caused them to suffer from the severe and debilitating effects of COPD. *Id.*

The court reviewed the records of Dr. Michael Kelly, formerly Jack Riedel's personal physician. Dr. Kelly opined that Riedel suffered from asbestosis and further: "I also believe that there is an asthmatic bronchiectatic component to his pulmonary disease * * * a result of exposures to other materials besides asbestos. The diesel exhaust and other irritants have likely caused the reversible and asthmatic portion of this disease as well." (2nd Supp. 35). The court also reviewed records from Danny Six's treating pulmonologist, Dr. Vishnu Patel, who described his patient's condition as "severe respiratory impairment which is most probably from COPD which is again most probably from smoking but working on the railroad with exposure to diesel fumes and chemicals may be a contributing factor also." (2nd Supp. 70.)[5] Finally, the court reviewed records and reports of Dr. Brian Zurcher, the treating doctor of Jack Weldy prior to his death, who opined that "[e]xposure to smoke and fumes during his years working on the railroad most certainly contributed to [Mr. Weldy's] COPD * * * and, therefore, eventually led to his death." (2nd Supp. 164). This opinion was also confirmed by Weldy's expert pulmonologist who opined that Weldy suffered from asbestosis and COPD. (2nd Supp. 157-158).

On February 22, 2008, the trial court granted Appellants' Motion for Administrative Dismissal as to Appellees' asbestos-related claims and severed the remaining claims, unrelated to asbestos, reasoning that administrative dismissal, as outlined by R.C. 2307.93(C), could not

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[5]The trial court also reviewed the report of Six's expert pulmonologist who opined that Six suffered from asbestosis and also from COPD which was "probably due to a combination of smoking and his exposure to diesel fumes, sand dust and chemical weed sprays during his period of occupation with the railroad." (2nd Supp 75).

apply to non-asbestos claims. (2A.,3A.,4A.) . The trial court ordered that the asbestos-related claims be administratively dismissed and "that the remaining claims, contained within the remaining causes of action and pertaining to substances other than asbestos, should be scheduled for trial at the earliest convenience of the Court and of the parties." *Id.*

An appeal was initiated in the Eighth District and the trial court ordered an indefinite stay of all of the claims of these individuals pending appellate resolution of all issues. (2nd Supp. 165-172). The Eighth District, reviewing the decision of the trial court de novo, found the language of the statute "plain and unambiguous," conveying "clear and definite meaning." *Riedel*, at ¶¶ 5-7, (8 A). That court held: " 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 non-malignancy claims, lung cancer claims in a smoker and wrongful death claims." *Id.* at ¶13; (11A.-12A.) Accordingly, the Eighth District held that the trial court did not err in severing Appellees' non-asbestos claims which have been properly joined pursuant to Civ. R. 18. *Id.* at ¶¶ 15-16.

This Court has accepted jurisdiction to determine whether or not these three railroad workers, having brought suit under the FELA for their occupational exposures suffered in the course of their employment and the lung diseases which resulted, may have their substantive claims, other than those related to asbestos, determined by a jury.

A. Jack E. Riedel

Jack Riedel hired on with the Penn Central Railroad in 1969 as a fireman. (2nd Supp. 6-23). During a thirty-five year career, Mr. Riedel held several different positions with the railroad,

which he alleged caused him to be exposed to various harmful substances. *Id.* Jack Riedel worked as a fireman, engineer, gofer, and hostler. (2nd Supp. 173, 175-77). Mr. Riedel has personally testified to his exposure to asbestos, diesel fumes, silica sand, and other harmful substances while employed by the railroad.[6] *Id.*

Riedel has testified that while working as a fireman, one of his responsibilities was to fill his engines with sand by use of a sand hose. (2nd Supp. 179). As he filled the engines with sand, clouds of sand dust would emanate and Mr. Riedel would be forced to breathe the dust. *Id.* In the diesel house, where he worked as a fireman, Riedel testified that he was exposed to asbestos that was wrapped around pipes. (2nd Supp. 178). He also testified that he was exposed to asbestos when he worked as an engineer inside of the locomotives. *Id.* Insulation wrapped around pipes located in the engine itself, taped to heaters, and throughout the cab was made of asbestos. (2nd Supp.180).

Mr. Riedel testified that he was exposed to diesel fumes "everywhere on the railroad." (2nd Supp.181). Especially while working as an engineer, Riedel would be forced to breathe in diesel smoke that would seep into the cab through the ventilation system and cracks and crevices while waiting to make a run. *Id.* Riedel testified that he was exposed to diesel fumes for several hours each day during the course of his railroad career. (2nd Supp. 182).

Riedel alleged that at least in part as a result of these occupational exposures, he has developed at least two permanent and debilitating lung diseases. Riedel's treating physician, a specialist in internal medicine, Dr. Michael Kelly, has concluded that Mr. Riedel suffers from at

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[6]Although all three Appellees claimed exposure to silica potential application of R.C. 2307.86, the Ohio Silica Bill, was not briefed in, or decided by the trial court. Therefore, it has not been raised in this appeal.

least two separate lung diseases, asbestosis, related to his occupational exposure to asbestos and COPD, in the form of asthmatic bronchitis, relating to his exposures to diesel exhaust and sand dust while working for the railroad. (2nd Supp. 27-29, 32-35).

B. Danny R. Six

In 1968, Norfolk Southern Railroad hired Danny Six as a brakeman. (2nd Supp. 184). Mr. Six worked at the railroad for thirty-one years, seven of them as a brakeman, and the remainder as an engineer. *Id.* Mr. Six was forced to retire in 1999 after suffering a heart attack. *Id.* Mr. Six has testified to his exposure to various harmful substances while working for the railroad including asbestos, diesel fumes, silica sand, weed spray, and other harmful toxins. (2nd Supp.185-190).

Six testified that while working in the Norfolk locomotives, he was exposed to asbestos that was wrapped around pipes, taped around heaters, and was used as insulation throughout the cab and bathrooms on the engine. (2nd Supp.185-87). He further testified that when he worked as a brakeman, he was exposed to brake dust containing asbestos. (2nd Supp. 189). He also testified regarding his exposure to sand dust. As an engineer, Six used automatic sanders, used to improve traction by dispersing sand onto the track. (2nd Supp. 187). These sanders regularly blew sand into the locomotive cab occupied by Mr. Six. *Id.* Six testified that the sand dust was particularly bad on trains with long hood leads, unfortunately Mr. Six worked on these types of trains for a significant portion of his career. *Id.*

Six also testified regarding his exposure to diesel fumes when he worked as an engineer. The diesel smoke would blow into the cab even when the windows were closed, causing Mr. Six to breathe in the fumes on a daily basis. (2nd Supp. 188). Danny Six was also exposed to

chemical weed sprays that were used to kill vegetation along the tracks when a train he was operating would pass through an area recently sprayed for weeds by the railroad. (2nd Supp. 190). At no time during Mr. Six's career with the railroad was he ever given a mask or respirator, even though he complained verbally numerous times as well as in written daily reports. (2nd Supp.188). Six alleged that at least in part as a result of these occupational exposures, he had developed two permanent and severe lung diseases, asbestosis and COPD, requiring his use of supplemental oxygen twenty-four hours a day. (2nd Supp. 51). This has been confirmed by his own treating pulmonologist. (2nd Supp. 70).

C. Jack Weldy

Jack Weldy hired on with the Pennsylvania Railroad in 1955 as a brakeman. (2nd Supp.192-93). Eventually, Mr. Weldy was promoted to conductor, a position that he held until 1988 when he lost sight in one eye and was forced to retire. (2nd Supp. 192). Weldy's co-workers have confirmed that throughout his time working for the railroad, he was exposed to asbestos, diesel fumes, silica sand, and other hazardous substances.

Mr. Weldy's death prevented him from testifying on his own behalf about his occupational exposures at the railroad, but his widow, Josephine Weldy and two co-workers, Wayne Sauers and Rival McBride, have testified regarding these exposures. Co-worker Wayne Sauers testified that he and Mr. Weldy were exposed to asbestos while working at the railroad. (2nd Supp. 195). As brakemen, both would be exposed to asbestos dust that was released into the air when the brakes made of asbestos would grind the train to a stop. (2nd Supp.194). Mr. Sauers and Mr. Weldy also worked inside the cab of locomotives together where they were regularly forced to breathe diesel fumes. (2nd Supp. 195). Sauers testified that diesel smoke

entered the cab through the doors behind their seats, the side doors, or the windows. (2nd Supp. 195-96). He testified that diesel fumes in the cab were inescapable and that no breathing protection or training regarding these hazards was provided. (2nd Supp. 195).

Another co-worker, Rival McBride, confirmed the testimony of Mr. Sauers. McBride testified that both he and Weldy were exposed to harmful substances while employed by the railroad. (2nd Supp. 197, 198). McBride explained that he and Weldy were forced to come into contact with asbestos when using the bathrooms on the trains because the bathrooms were very small, all the pipes were insulated with asbestos, and the train moved very fast, jostling him around, inevitably causing him to come in contact with the asbestos, resulting in dust. (2nd Supp. 197). Rival McBride also recalled Weldy's exposure to diesel fumes for up to sixteen hours during the work day and an additional seven to eight hours while riding back to the terminal in a second or third locomotive cab after they had worked their allotted hours and could not work anymore that particular day. (2nd Supp. 198). According to McBride, riding in the second and third locomotive units caused severe exposure as the diesel smoke from all of the preceding engines would blow backwards into the second or third cabs in which the men, including Weldy, were riding. *Id.*

Jack Weldy brought suit under the FELA for his lung diseases, however, he died of his COPD on October 27, 2001. (2nd Supp. 163). His widow was named as representative of her deceased husband's estate and amended the Complaint to include a cause of action for wrongful death under the FELA. (2nd Supp 134-148). Weldy's own doctor, Dr. Brian Zurcher, has opined that Mr. Weldy's history of "[e]xposure to smoke and fumes during his years working on the railroad most certainly contributed to his C.O.P.D. (chronic obstructive pulmonary disease), and

therefore, eventually led to his death." (2nd Supp. 164).

Appellants herein argue that all of these claims, even those in no way related to asbestos, are governed by R.C. 2307.91 et seq., and should be administratively dismissed. This Court has held that this statute is procedural only and effects no substantive rights of claimants. *Bogle*, at ¶¶ 15-16. Simply put, the substantive rights of the instant Appellees to maintain their causes of action for severe, disabling, and in the case of Jack Weldy, fatal, COPD, would be trampled by the application of the Ohio Asbestos Bill to their FELA claims that are unrelated to asbestos. This appeal is without merit and must be denied.

LAW AND ARGUMENT

A. Standard of Review

At issue is whether federally-created and properly joined non-asbestos claims brought under the FELA can be administratively dismissed where the Appellees have been unable to meet the prima-facie filing requirements of R.C. 2307.92(B) for a non-malignant asbestos claim. The trial court ruled in the negative and properly severed Appellees' asbestos-related claims from their non-asbestos-related claims. That decision has been affirmed by the Eighth District Court of Appeals. This appeal follows. As this case requires interpretation of statutory authority, a question of law, appellate review thereof is de novo. *State v. Consilio*,114 Ohio St. 3d 295, 2007 Ohio 4163; 871 N.E.2d 1167; 2007 Ohio LEXIS 1952 at ¶8.

B. Appellees' Substantive Right of Action Under the Federal Employers' Liability Act May Not Be Impaired by the Ohio Asbestos Bill

The instant claims have been federally-created by the FELA. For over sixty years, the Supreme Court of the United States has held that railroad workers' claims for occupationally

related lung diseases, caused over the course of time by negligent exposures to toxic substances, fall under the protections of the FELA. *Urie*, 337 U.S. at 186. The *Urie* Court held: In our view, when the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about harmful consequences, the injury to the employee is just as great as when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning." *Id.*

Specifically, FELA and LIA claims for exposure to diesel exhaust and the disease which results are well established here in Ohio and around the country. *Hager v. Norfolk & Western Ry. Co.*, 8th Dist. No. 87553, 2006-Ohio-6580 (recognizing that "courts have held that exposure to diesel fumes in locomotive cabs is a direct violation of 49 CFR 229.43 and thus a violation of the LIA"); *Day v. Union Pac. Ry. Co.* (D. Kan. 2004), No.03-2055, 2004 U.S. Dist. LEXIS 5902, at *8 (allowing plaintiff to maintain his LIA claim where the evidence demonstrated that exhaust fumes regularly leaked into his locomotive cab); *Norfolk Southern Ry. Co. v. Baker* (1999), 237 Ga. App. 292, 296, 237 S.E.2d 448 (holding that there was no evidence to refute a finding that the railroad "violated the LBIA's regulation against diesel exhaust in it's locomotive's cabins"); *Missouri Pac. R.R. Co. v. Brown* (Tex. App. 1993), 862 S.W.2d 636, 639 (affirming an LIA violation where "engine consists were not safe to operate in the service to which the same were put" because exhaust fumes where present in the cabs of locomotives").

This FELA action is the only means of recovery available to railroad workers alleging work-related diseases. See *Hilton v. So. Carolina Pub. Ry. Comm.* (1991), 502 U.S. 197, 202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (holding that rail workers do not receive the benefit of state workers' compensation statutes and that the FELA is their only means of recovery for work-

related injuries); see, also, *New York Central Railroad Company v. Winfield,* 244 U.S. 147,150, 37 S.Ct. 546, 61 L.Ed. 1045. The FELA has been and remains the basis of a comprehensive statutory scheme designed to protect railroad workers and has been uniformly and deliberately construed in favor of those workers in order to effectuate the remedial and humanitarian goals of the statute. *Green v. River Terminal Railroad Company,* (C.A.6 1985) 763 F.2d 805, 1985 U.S. App. LEXIS 19764.

1. The Congressional Purpose of the FELA

In enacting the FELA, Congress sought "to shift part of the 'human overhead' of doing business from the employees to their employers." *Norfolk & W. Ry. Co. v. Ayers* (2003), 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261(quoting *Gottshall*, 512 U.S. at 542)(citations omitted)); see, also *Tiller v. Atlantic Coast Line R. Co.* (1943), 318 U.S. 54, 58, 87 L. Ed. 610, 63 S. Ct. 444. The undeniable legislative purpose behind the Act is to provide rail employees and dependent families with a remedy for the needless injuries and deaths suffered by railroad workers. *Gottshall,* 512 U.S. at 542. The general congressional intent to promote liberal recovery for injured workers is well-established. *Id.*, see, also, *Ayers*, 538 U.S. at 145.

Supreme Court Justice William O. Douglas has noted that: "the Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumes in its operations [and] * * * to lift from employees the 'prodigious burden' of personal injuries * * * and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'" *Wilkerson v. McCarthy* (1949), 336 U.S.

53, 68, 69 S. Ct. 413, 420-421, 93 L. Ed. 497 (Douglas, J. concurring)(citations omitted).

The FELA was "intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive." *Erie Railroad Company v. Winfield,* 244 U.S. 170, 172, 37 S. Ct. 556, 61 L. Ed. 1057. The congressional purpose of the Act was to provide a national law of uniform operation throughout the states and to "withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws." *New York Central Railroad Company v. Winfield,* 244 U.S. 147, 150, 37 S. Ct. 546, 61 L. Ed. 1045. This purpose is exemplified in the legislative history of the statute: "[The FELA] is intended in its scope to cover all commerce to which regulative power of Congress extends * * * by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carries to their employees * * * [a] Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states." *Id.* (citations omitted).

Accordingly, for almost one hundred years, it has been an overriding principle of FELA jurisprudence, established by Congress, emphasized repeatedly by the Supreme Court of he United States and well-recognized here in Ohio, that a "substantive right or defense arising under the act cannot be lessened or destroyed by a local rule * * * " *Norfolk Southern Railroad v. Ferebee* (1915), 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303; see, also *South Buffalo Rail Company v. Ahern* (1952), 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 395 ("Peculiarities of local law may not gnaw at rights rooted in federal legislation."); *Bogle,* at ¶ 18 ("* * * 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.")(citations omitted), *Vance v. Consolidated Rail Corporation* , 8th Dist, No. 63806,1993 Ohio App. LEXIS 5351,*11 ("The FELA supersedes both common law and any state law which relate to the liability of railroads for injury to their employees.").

The Supreme Court has held that "[w]hether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line." *New York Central Railroad Company v. Winfield,* 244 U.S. at 149. Moreover, the high Court has held "we may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. *Id.* at 152. (citations omitted).

2. The FELA Grants a Substantive Right of Action To Rail Workers

Thus, the FELA has conferred upon railroad employees a substantive right of action where occupational injuries have been incurred through the negligence of the railroad, which may not be impaired by the application of state procedure. *Urie,* 337 U.S. at 180. The FELA and its companion statute, the LIA, have "supplanted a patchwork of state legislation with a nationwide uniform system of liberal remedial rules and have displaced any state law trenching on the province of the Act." *Ahern,* 344 U.S. at 371. State courts are "duty bound to enforce the act as Congress has written it and as federal courts have interpreted it." *Dice v. Akron, Canton and Youngstown Railroad Co.* (1952), 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398. It has long been held and reaffirmed by the Supreme Court of the United States that the "FELA granted to

[railroad employees] a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be." *Id.* (citing *Chesapeake & Ohio R. Co. V. Kuhn* (1931), 284 U.S. 44, 52 S. Ct. 45, 76 L. Ed. 157; *Ricketts v. Pennsylvania R. Co.* (C.A.2, 1946), 153 F.2d 757, 759, 1946 U.S. App. LEXIS 2915, 2917, 164 A.L.R. 387, 389.

It has been long-established that occupational pulmonary diseases, including asbestosis, silicosis and chronic obstructive pulmonary disease, alleged by the Appellees herein, are well-recognized and compensable injuries under the FELA. *Urie,* 337 U.S. at 180 (silicosis); *Ayers,* 538 U.S. at 148 (asbestosis); *Kichline v. Consolidated Rail Corporation,* (C.A.3, 1986) 800 F.2d 356, 1986 U.S. App. LEXIS 30517(chronic obstructive pulmonary disease). The FELA, as interpreted by the Supreme Court of the United States since 1949, provides a substantive right of action where railroad workers have contracted occupational lung diseases as a result of their employment.

3. State Procedure May Not Impair the FELA's Substantive Right of Action

While it is well-established that FELA actions may be brought in state or federal court, "the substantive law governing the cases is federal." *Atchison, Topeka & Santa Fe Railway Co. v. Buell* (1987), 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed 2d 563; *Henry v. Norfolk and Western Railway Company*, 4th Dist. No. 2129, 1994 Ohio App. LEXIS 620; *Vance,* at * 11. Moreover, state "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." *Bogle*, at ¶ 18. (citing *Davis v. Wechsler* (1923) 263 U.S. 22, 24, 44, S. Ct. 13, 68 L. Ed. 143). State procedure may not "bear

upon [a railroad workers'] substantive right to recover." *Id.* at ¶ 24 (citing *Am. Dredging Co. v. Miller* (1994), 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed. 2d 285.

This Court has previously considered the prima-facie requirements of R.C. 2307.92 and 2307.93 in the context of FELA cases alleging *only* exposure to and disease related to asbestos. *Bogle,* at ¶ 1. In *Bogle*, this Court held that the statutory requirements are procedural only and that "no new substantive burdens are placed on claimants." *Id.* at ¶ 16. Consequently, this Court held that the comprehensive scheme of federal regulation of railroad personal injury actions embodied in the FELA did not preempt the requirements of the Ohio Asbestos Bill. *Id.* at ¶ 29. Likewise, in *Ackison v. Anchor Packing, et al.*, 120 Ohio St 3d 228, 2008 Ohio 5243, 897 N.E.2d 1118, this Court reiterated that the requirements of the statue are procedural only, that these requirements placed no new, substantive burdens on claimants and, therefore, could be applied retroactively without offending the Retroactivity Clause of the Ohio Constitution. *Id.* at ¶ 17.

This Court has twice held that the Ohio Asbestos Bill's prima-facie filing requirements are procedural only and place no substantive burdens on claimants. *Id.*; *Bogle,* at ¶ 16. In the case at bar, these requirements cannot be interpreted so as to impair the substantive rights of Weldy, Riedel and Six to proceed with their federally-created causes of action for their exposure to diesel locomotive exhaust and the COPD which, by the opinions of their own doctors, has resulted. Jack Weldy is dead, he will not be getting any sicker. He will have no new doctors, nor new test results which may comply with the prima-facie requirements of the statute as to his asbestos-related disease. Jack Weldy can never meet those requirements and his cause of action for asbestos-related disease can never be litigated in Ohio state court. Unless his cause of action for diesel exhaust exposure as it relates to his COPD is severed from his asbestos-related cause of

action, his substantive right to litigate that FELA claim too will be dead. As this Court has held in *Bogle*, this statute is procedural only and cannot be interpreted so as to abrogate the federally-created, substantive rights of FELA plaintiffs.

As to Appellees Six and Riedel, both are sixty-five years old and their asbestos-related disease is at its lowest detectable level.[7] It may, over the course of time, progress to the point that they may meet the prima-facie filing requirements of the statute - or it may not. Asbestosis is a very slowly progressing disease, taking fifteen to twenty years after exposure to manifest itself at all. See, Levin, et al , supra at p.9 (2nd Supp. 224). It is extremely improbable that a disease that has progressed only to its mildest form to this point, will progress far enough to meet the statutory requirements within the life expectancy of these individuals.

Right now, while Six and Riedel are still alive, they have substantive and viable federally-created rights of action for their occupationally-related COPD which their own doctors have opined resulted, at least in part, from their railroad exposure to diesel locomotive exhaust. The FELA was enacted so that rail carriers and not rail employees would bear the risk of injury. *Gottshall*, 512 U.S. at 542 ("Congress created a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers.")(citations omitted). Appellees' rights to proceed with their federally-created cause of action for COPD as it relates to their railroad exposure to diesel exhaust is a substantive right that may not be impeded by state procedural rules. As this Court has observed, state procedure may not "operate to impair a

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[7]The x-rays of Appellees Riedel and Six have been read as a 1/0 on the twelve point ILO scale (2nd Supp 40, 92). For an explanation of this scale, see, Levin, et al. supra, p. 14 (2nd Supp. 229).

claimants's ability to enforce a federal right or cause of action." *Bogle,* at ¶ 18. The decision of the lower court must be affirmed.

C. The Ohio Asbestos Bill is Applicable Only to Asbestos Claims and Accordingly a Prima-Facie Showing May Be Required Only for Asbestos-Related Claims

The Ohio Asbestos Bill became law to deal with a perceived crisis in asbestos legislation. The Twelfth District has noted that "on September 2, 2004, H.B. 292 went into effect. The basic purpose of the law is to resolve this state's asbestos-litigation crisis." *Nichols v. A.W. Chesterton Co.*, 12th Dist. No. 06CA-12-316, 06-12-319,172 Ohio App. 3d 735, 2007 Ohio 3828, 876 N.E.2d 1269 at ¶ 17 (citations omitted). This Court has recognized the stated purpose of the statute, that is, to curtail unfair and inefficient asbestos litigation. *Bogle*, at ¶ 3. This Court recited the goals of the legislature: "[T]he Ohio 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 compensation for cancer victims while also securing a right to similar compensation for those who suffer harm in the future." *Id.*

The General Assembly passed the bill so that *asbestos* claims, but not other distinct and unrelated claims, would have to comply with R.C. 2307.91 et seq. The non-malignant asbestos claims made by the Appellees in this case are governed by R.C. 2307.92 (B), which provides: "No person shall bring or maintain a tort action alleging an asbestos claim based on a non-

malignant condition 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." R.C. 2307.92 (B).

To make a prima-facie showing the claimant must submit "a written report and supporting test results" by a "competent medical authority" that demonstrates "that the exposed person has a physical impairment, that the physical impairment is the result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition." R.C. 2307.93 (A); R.C. 2307.92 (B). Failure to meet the prima facie requirements results in administrative dismissal of "the Plaintiff's ***claim*** without prejudice * * *" R.C. 2307.93 (C) (emphasis added).

In the case at bar, Appellees asserted six different and divisible claims or causes of action for various and divisible pulmonary injuries, each Appellee asserted only one claim related to asbestos exposure. (Supp 1-83). It is apparent that the legislature intended to restrict asbestos litigation, and under the law in Ohio as it now stands, Appellees' claims related to asbestos must comply with the R.C. 2307.92(B) or be administratively dismissed. Appellants, however, argue that even Appellees' substantive, federally-created, non-asbestos claims properly joined in the same action with their asbestos claims should also be administratively dismissed. This appeal is wholly without merit and must be denied.

1. Failure to Make a Prima-Facie Showing Pursuant to R.C. 2307.92 and 2307.93 Results in Administrative Dismissal of Only Asbestos-Related Claims

The prima facie filing requirements of R.C. 2307.93 can only apply to Appellees' asbestos claims and not to the entire action. The statute provides: " The Plaintiff in any ***tort action*** who alleges an ***asbestos claim*** shall file * * * a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified * * * [t]he court shall administratively dismiss the Plaintiff's ***claim*** without prejudice upon a finding of failure to make the prima-facie showing that meets the minimum requirements * * *" R.C. 2307.93 (emphasis added).

"Claim" and "action"are not synonymous and cannot be taken as such when used by the legislature in the same sentence. These are each statutorily defined terms: "(B) 'Asbestos claim' means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos * * * (II) 'Tort action' means a civil action for damages for injury, death, or loss to person." R.C. 2307.91(B); R.C. 2307.91(II)

It is evident that while "action" refers to the entire case, "claim" refers only to specific causes of action. The plain and generally accepted meaning of these terms further compels this conclusion. An "action" is "a civil or criminal judicial proceeding." *Black's Law Dictionary* 31 (8th ed. 2004); see, also, *Id.* at 228 (defining "case" as synonymous with "action"). A "claim," however, is defined as "an interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; ***cause of action (1)***." *Id.* at 264 (defining "Claim"); see, also, *Id.* at 235 (defining "Cause of Action"as synonymous with "Claim")(emphasis added).

The legislature's choice of language in R.C. 2307.93 must be noted in interpreting its meaning. The choice of words in the statutory language can not have been made arbitrarily. See, e.g., *Ohio v. Lowe*, 112 Ohio St. 3d 507, 2007-Ohio606, 861N.E. 2d 512 at ¶ 9; *State ex rel. Burrows v. Indus. Comm'n*, 78 Ohio St 3d 78, 80-81, 676 N.E.2d 519. This Court, in *Bogle,* held that the statute "appl[ies] to all **asbestos *claims*** filed in Ohio * * * " *Bogle,* at ¶ 31 (emphasis added). Nowhere in *Bogle* did this Court address the dismissal of a plaintiff's entire multi-claim complaint because the *Bogle* plaintiffs had only made asbestos claims. This statute cannot be extended to substantively affect a plaintiff's non-asbestos claims, simply because such claims have been properly pleaded with a plaintiff's asbestos claims in one tort action as neither the statute, nor *Bogle*, mandate, or even contemplate, administrative dismissal of non-asbestos claims.

2. The Trial Court Did Not Err in Allowing Non-Asbestos Claims to be Severed When Appellees Could Not Meet Prima-Facie Requirements of the Statute.

It is axiomatic that the dismissal of one claim or cause of action in a lawsuit does not dismiss the entire action. See, e.g., *Price v. Jillsky*, 4th Dist. No. 03AP-801, 2004 Ohio 1221("The trial court clearly determined only one of the three counts alleged in the complaint" therefore the remaining claims could still be adjudicated); *Walker v. Firelands Community Hospital* et al., 6th Dist. No. I-06-023, 2006 Ohio 2930, 2006 Ohio App. LEXIS 2805 ("The trial court granted summary judgment to defendants on Counts 1, 2, 3, and 4 and continued the case as to Counts 5 and 6.") Severance of claims is in the sound discretion of the trial court. *Id.*

This Court has previously held that the dismissal of one claim does not affect other distinct claims that a plaintiff may still have. See *Perry v. Eagle-Picher Industries, Inc.* (1990), 52 Ohio St. 3d 168, 170, 556 N.E. 2d 484, 1990 Ohio LEXIS 280. In *Perry*, this Court held that the trial court abused its discretion by not granting leave to bring claims other than the dismissed action in a supplemental pleading because the applicable Civil Rule, allowed only for dismissal of the single claim. *Id.* The Twelfth District has also held: "The philosophy of the Civil Rules is that matters are to be tried on the proof, rather than the pleadings. Any legal theory for recovery of any claim, legal or equitable, may be set forth in a proper manner in the Complaint. The court's dismissal of [one form of relief sought by a Plaintiff] will therefore not require dismissal of the other claims properly joined in the Complaint." *Peed v. Moore and Moore*, 12 Dist. No. 857, 1981 Ohio App. LEXIS 14531, at *8-*9.

In the case at bar, each Appellee has asserted multiple claims or causes of action, relative to their multiple pulmonary diseases and, in the case of Jack Weldy, death. Only one of these claims is related to asbestos. The remaining claims are wholly unrelated to Appellees' occupational exposure to asbestos, but rather, related by their own physicians, to their railroad exposures to diesel exhaust and other toxic substances. (2nd Supp. 34-35, 70, 164). As this Court held in *Perry*, the dismissal of a single claim in a multi-claim Complaint does not compel the dismissal of the properly joined remaining claims. *Perry,* 52 Ohio St. 3d at 170.

The instant Appellees have numerous claims against their former employers which each have properly joined in one lawsuit as permitted by Civ. R. 18 which provides: "Joinder of claims – A party asserting a claim to relief as an original claim, counterclaim, cross-claim or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable as

he has against an opposing party." Civ. R.18. (20AA). Where, as here, claims have been properly joined and only one of the claims has been dismissed, it is self-evident that the remaining claims must proceed. The trial court did not err when it severed the non-asbestos claims, allowing them to proceed, after the administrative dismissal of the Appellees' claims related to asbestos because the non-asbestos claims do not relate to any of the Appellees' exposures to asbestos, but rather to other substances not addressed by the Ohio Asbestos Bill. These causes of action were properly severed by the trial court.

Appellants argue, inexplicably, that allowing for severance of these claims could somehow create a potential "double recovery" for the Appellees. Appellants ignore that the instant asbestos claims have been administratively dismissed by the trial court, there can be no recovery for these asbestos claims unless new evidence is presented in satisfaction of the statute's criteria. Jack Weldy will not have any additional evidence to present. His claim for asbestos-related disease can never satisfy the criteria of R.C. 2307.92 and he will never have any recovery at all for his asbestos-related disease. As to Six and Riedel, if their asbestos-related disease does worsen over time, evidence may become available that meets the requirements of the statute - or it may not. At that time, their claims for asbestos-related disease could possibly be reactivated - or they may not. At that time, they could possibly recover for their asbestos-related disease - or they may not. They could not recover at that time for any disease unrelated to asbestos and the railroad would maintain the right to use the diesel-related disease as a defense. Right now, they have substantive claims for a completely separate disease, COPD, under the FELA resulting from their railroad exposures to diesel exhaust and other toxic substances. None of these substances are addressed in the Ohio Asbestos Bill. The trial court did not err in severing these claims. The instant appeal is without

merit and the decision of the lower court must stand.

3. R.C. 2307.92 Applies Only to the Categories Specified Therein.

Numerous Appellate Courts have held that R.C. 2307.91 et seq. has no application to a plaintiff's injuries where those injuries are absent from the statutory language. See *Penn v. A-Best Prods. Co.*, 10th Dist. Nos. 07AP-404, 07AP-405, 07AP-406, 07AP-407, 2007 Ohio 7145 at ¶ 32, *Nichols*, at ¶ 9, *Wagner v. Anchor Packing*, 4th Dist. No. 05CA47, 2006 Ohio 7097, ¶ 31. In *Penn*, the Tenth district has held that plaintiffs with injuries not included in the statute cannot be required to comply with the provisions of R.C.2307.91 et seq.: "[t]hus, the type of asbestos claim that must file evidence to support a prima-facie case is specifically limited to those types of claims fitting within R.C. 2307.92 (B) (non-malignant diseases), R.C. 2307.92(C) (lung cancer in a smoker)' and R.C. 2307.92 (D) (wrongful death claims) * * * A plain reading of R.C. 2307.92 indicates that only those types of cases explicitly specified must demonstrate a prima facie case." *Penn*, at ¶¶ 31, 32, see, also *Nichols*, at ¶ 26 (where appellees' claims "do not fit within any of the three categories listed in [the statute] * * * R.C. 2307.92(A), like R.C. 2307.92 (B), (C) and (D), has no application to this case.")

Just as in *Penn* and *Nichols*, the instant Appellants seek to apply the language of the statute to claims that are clearly not within the plain language of the statute, nor even contemplated by it. Here, Appellants seek to include Appellees' claims for COPD without textual warrant. While Appellees' claims for the asbestos-related disease, asbestosis, failed to comply with the requirements of R.C. 2307.92(B) their other claims, those for COPD as a result of their railroad exposures to diesel exhaust and other toxic substances, were properly severed by the trial court.

Just as in *Nichols*, Appellees' claims for COPD arising out of occupational exposure to diesel fumes and other toxic substances, are not a "physical impairment" as defined by the statute. COPD, including chronic bronchitis and asthma, are not and may not be caused by asbestos and therefore, is not a non-malignant condition related to asbestos as defined by R.C. 2307.91(T) and not subject to the requirements of R.C.2307.92 (B), (C) or (D) for asbestos-related disease. See Levin, et el., supra. (explaining the non-malignant diseases cased by asbestos) (2nd Supp. 221). Simply put, injuries not caused by asbestos are not subject to the requirements of the statue and, as the trial court ordered, may continue despite the administrative dismissal of a joined asbestos claim.

D. R.C. 2307.92(D) Does Not Apply to Josephine Weldy's Claim for Wrongful Death

Josephine Weldy has also brought a wrongful death claim under the FELA for the death of her husband from COPD. (Supp. 52-66). R.C. 2307.93 requires a prima facie showing in asbestos claims for wrongful death as specified in R.C. 2307.92(D). That section specifically requires a prima-facie showing for wrongful death claims brought under R.C. 2125.01, that is, the Ohio Wrongful Death Statute. (13AA.-19AA.) R.C. 2307.92(D) provides: "(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, ***as described in section 2125.01 of the Revised Code***, of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of 2307.93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition." R.C. 2307.92(D)(emphasis added).

R.C. 2307.92(D) is not applicable to the wrongful death claim of Josephine Weldy , as that claim is not an asbestos claim based on the wrongful death of her husband as described by the Ohio Wrongful Death Statute. It is not a claim contemplated by the statue at all because R.C. 2307.92 (D) requires that the claim be one "that is based upon wrongful death, ***as described in section 2125.01 of the revised Code*** of an exposed person* * *. R.C. 2307.92 (D) (emphasis added). Nowhere in her Complaint does she allege a violation of Ohio's Wrongful Death Statute. She has brought a wrongful death action under the provisions of the FELA. 45 U.S.C. 51. The FELA provides for Mr. Weldy's cause of action for the wrongful death of her husband: "* * * in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee." 45 U.S.C. 51. (1AA.)

The Supreme Court of the United States has long held that wrongful death actions brought under the FELA, such as the one at bar, are governed by federal and not state law. *St. Louis, Iron Mountain & Southern Railway Co. v. Craft*, (1915) 237 U.S. 648, 35 S. Ct. 704, 59 L. Ed. 1160. (holding that "here, the state [wrongful death] statue is not applicable because superseded, as respects the class of cases to which this one belongs, by the Federal Employers' Liability Act.")(citations omitted); *St. Louis, San Francisco & Texas Railway Co. v. Seale*, (1913) 229 U.S. 156, 158, 33 S. Ct. 651, 57 L.Ed. 1129 (holding that where "the federal statute [FELA] was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution.")(citations omitted); *Michigan Central Railroad Co. v. Vreeland*, (1913) 227 U.S. 59,67, 33 S. Ct. 192, 57 L. Ed. 417 (holding that "[i]t therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce this act [FELA] is paramount and exclusive * * *"); see, also,

Coray v. Southern Pacific Co. (1949), 335 U.S. 520, 524, 69 S. Ct. 275, 93 L.Ed. 208 (holding that "Congress has, thus, for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages.").

This long-standing distinction between wrongful death actions brought under Ohio state law and under the FELA has been recognized by the courts of this state. The Mahoning County Probate Court in the case of *In Re Estate of Roy J. Hale,* Case No. 2007-ES-55, April 7, 2008. (2nd Supp 238). In that case, Judge Belinky reviewed the federal statutory and decisional law and ordered that "the settlement and distribution of Decedent's claims are governed by federal statutes and not under the Ohio Wrongful Death Statute." *Id.,* see, also *In the Matter of Estate Raymond Goans*, Case No. 507973, October 9, 2008 (same)(2nd Supp 241). Likewise, Josephine Weldy's claim for wrongful death is governed by the federal jurisprudence interpreting the FELA and not by the Ohio Wrongful Death Statute. The Ohio Asbestos Bill, in R.C. 2307.92 (D), mandates compliance only in the case of the later.

Additionally, as evidenced by his Death Certificate, the immediate causes of Jack Weldy's death was not related to asbestos at all, but instead his causes of death were COPD and respiratory failure. (2nd Supp. 163). The statute contemplates "physical impairment," defined as a non-malignant condition, meaning a condition that "is caused or may be caused by asbestos * * * " R.C. 2307.91(V); R.C. 2307.91(T). Again, COPD is not caused by exposure to asbestos. (2nd Supp. 221). Weldy's own physician has opined that his death was caused by COPD related at least in part to his exposure to diesel exhaust while working for the railroad. (2nd Supp. 163). Mrs. Weldy's claim for the wrongful death of her husband stems not from his exposure to asbestos, but

instead from other occupational exposures while working for the railroad. Because the wrongful death claim of Josephine Weldy is not related to asbestos and not contained within the plain language of the statute, it is severable and should proceed, with all other non-asbestos claims, to trial.

CONCLUSION

As set forth above, where a plaintiff cannot meet the prima facie requirements of an asbestos claim under R.C. 2307.92(B), (C), or (D), the only plausible result is administrative dismissal of the asbestos-related claim. Any other claims, particularly those which implicate federally-created and substantive rights, properly joined to the asbestos claim, are not subject to administrative dismissal and may be severed. This Court has previously reaffirmed that state procedural rules may not "bear upon [a railroad workers'] substantive right to recover," nor "operate to impair a claimants's ability to enforce a federal right or cause of action." *Bogle,* at ¶¶ 24,18 (citations omitted). To dismiss these substantive FELA claims that are unrelated to asbestos would change the nature of the statute's prima-facie filing requirements which this Court has repeatedly characterized as procedural. Appellees respectfully request that this Court affirm the rulings of the trial court and of the Eighth District Court of Appeals, deny the instant appeal and allow Appellees' remaining non-asbestos claims to proceed to trial.

DATED December 31, 2009

Respectfully Submitted,
By: DORAN & MURPHY, LLP

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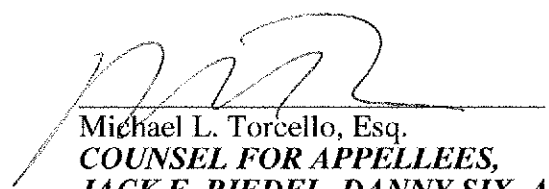

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APPENDIX

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45 USCS § 51

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

History:

(Apr. 22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404.)

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45 USCS § 52

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

History:

(Apr. 22, 1908, ch 149, § 2, 35 Stat. 65.)

Notes:

Research Guide:

Federal Procedure:
1 Fed Proc L Ed, Access to District Courts § 1:461.
32A Fed Proc L Ed, Transportation § 76:248.

Am Jur:

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45 USCS § 53

§ 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

History:

(Apr. 22, 1908, ch 149, § 3, 35 Stat. 66.)

Notes:

Related Statutes & Rules:

This section is referred to in 45 USCS § 437.

Research Guide:

Federal Procedure:
1 Fed Proc L Ed, Access to District Courts § 1:461.
11 Fed Proc L Ed, Employers' Liability Acts §§ 30:45, 46.
32A Fed Proc L Ed, Transportation § 76:248.

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45 USCS § 54

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this Act [45 USCS §§ 51 et seq.] to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

History:

(Apr. 22, 1908, ch 149, § 4, 35 Stat. 66; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404.)

History; Ancillary Laws and Directives:

Amendments

1939. Act Aug. 11, 1939, inserted "where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case".

Notes:

Related Statutes & Rules:

Assumption of risk when carrier violates 45 USCS §§ 1-6, 45 USCS § 7.
Liability of carrier for negligence of fellow servant, 45 USCS § 51.

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45 USCS § 54a

§ 54a. Regulation, standard, or requirement under chapter 201 of title 49, United States Code, deemed to be statute under sections 3 and 4

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49, United States Code [49 USCS §§ 20101 et seq.], or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 3 and 4 of this Act [45 USCS §§ 53, 54].

History:

(April 22, 1908, ch 149, § 4A, as added July 5, 1994, P.L. 103-272, § 4(l), 108 Stat. 1365.)

Notes:

Research Guide:

Federal Procedure:
1 Fed Proc L Ed, Access to District Courts § 1:461.
32A Fed Proc L Ed, Transportation § 76:248.

Am Jur:
48 Am Jur 2d, Labor and Labor Relations § 166.

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45 USCS § 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act [45 USCS §§ 51 et seq.], shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

History:

(Apr. 22, 1908, ch 149, § 5, 35 Stat. 66.)

Notes:

Research Guide:

Federal Procedure:
1 Fed Proc L Ed, Access to District Courts § 1:461.
1A Fed Proc L Ed, Access to District Courts § 1:696.
11 Fed Proc L Ed, Employers' Liability Acts §§ 30:9-11, 26.
32A Fed Proc L Ed, Transportation § 76:248.

Am Jur:

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45 USCS § 56

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this act [45 USCS §§ 51 et seq.] unless commenced within three years from the day the cause of action accrued.

Under this act [45 USCS §§ 51 et seq.] an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 et seq.] shall be concurrent with that of the courts of the several States.

History:

(Apr. 22, 1908, ch 149, § 6, 35 Stat. 66; Apr. 5, 1910, ch 143, § 1, 36 Stat. 291; Aug. 11, 1939, ch 685, § 2, 53 Stat. 1404; June 25, 1948, ch 646, § 18, 62 Stat. 989.)

History; Ancillary Laws and Directives:

1. Explanatory notes
2. Amendments

1. Explanatory notes:
The bracketed word, "district" is inserted on authority of Act Mar. 3, 1911, ch 231, §§ 289, 291, 36 Stat. 1167, which appears as 28 USCS §§ 430 and 430a which transferred the powers and duties of the circuit courts to the district courts.

2. Amendments:

1910. Act Apr. 5, 1910 added "Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of

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45 USCS § 57

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this act [45 USCS §§ 51 et seq.] shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

History:

(Apr. 22, 1908, ch 149, § 7, 35 Stat. 66.)

Notes:

Related Statutes & Rules:

Bankruptcy court cannot appoint receiver, 11 USCS § 105.

Research Guide:

Federal Procedure:
1 Fed Proc L Ed, Access to District Courts § 1:461.
32A Fed Proc L Ed, Transportation § 76:248.

Am Jur:
32A Am Jur 2d, Federal Courts § 1375.
32B Am Jur 2d, Federal Employers' Liability and Compensation Acts § 11.
48 Am Jur 2d, Labor and Labor Relations § 166.

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45 USCS § 58

§ 58. Duty or liability of common carriers and rights of employees under other Acts not impaired

Nothing in this act [45 USCS §§ 51 et seq.] shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

History:

(Apr. 22, 1908, ch 149, § 8 in part, 35 Stat. 66.)

History; Ancillary Laws and Directives:

Explanatory notes

The final clause of this section saving the prosecution of pending proceedings or right of action under the Employers' Liability Act of 1906 (34 Stat. 232) [unclassified] is omitted as it is no longer classified to this section.

Notes:

Research Guide:

Federal Procedure:
1 Fed Proc L Ed, Access to District Courts § 1:461.
32A Fed Proc L Ed, Transportation § 76:248.

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45 USCS § 59

§ 59. Survival of right of action of person injured

Any right of action given by this act [45 USCS §§ 51 et seq.] to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

History:

(Apr. 22, 1908, ch 149, § 9, as added Apr. 5, 1910, ch 143, § 2, 36 Stat. 291.)

Notes:

Related Statutes & Rules:

General provision as to liability of common carrier in case of death of employee to personal representative for benefit of certain named persons, 45 USCS § 51.

Research Guide:

Federal Procedure:
1 Fed Proc L Ed, Access to District Courts § 1:461.
11 Fed Proc L Ed, Employers' Liability Acts §§ 30:2, 4, 32.
32A Fed Proc L Ed, Transportation § 76:248.

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45 USCS § 60

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $ 1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this Act [45 USCS §§ 51 et seq.] is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act [45 USCS §§ 51 et seq.] and the applicability of such provision to other persons and circumstances shall not be affected thereby.

History:

(Apr. 22, 1908, ch 149, § 10, as added Aug. 11, 1939, ch 685, § 3, 53 Stat. 1404.)

Notes:

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TITLE 49. TRANSPORTATION
SUBTITLE V. RAIL PROGRAMS
PART A. SAFETY
CHAPTER 207. LOCOMOTIVES

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49 USCS § 20701

§ 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances--

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter [49 USCS §§ 20701 et seq.] and regulations prescribed by the Secretary of Transportation under this chapter [49 USCS §§ 20701 et seq.]; and

(3) can withstand every test prescribed by the Secretary under this chapter [49 USCS §§ 20701 et seq.].

History:

(July 5, 1994, P.L. 103-272, § 1(e), 108 Stat. 885.)

History; Ancillary Laws and Directives:

Prior law and revision

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
20701.....	45:23.	Feb. 17, 1911, ch. 103, Sec. 2, 36 Stat. 913; Mar. 4, 1915, ch. 169, Sec. 1, 38 Stat. 1192; restated June 7, 1924, ch. 355, Sec. 2, 43 Stat. 659; June 22, 1988, Pub. L. 100-342, Sec.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH NOVEMBER 10, 2009 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 28, 2009 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2125. ACTION FOR WRONGFUL DEATH

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ORC Ann. 2125.01 (2009)

§ 2125.01. Action for wrongful death

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action.

History:

GC § 10509-166; 114 v 320(438); Bureau of Code Revision, 10-1-53; 139 v H 332 (Eff 2-5-82); 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01. Eff 7-6-2001.

Section Notes:

Section 2.02(B) of SB 108 (149 v --) repeals the HB 350 (146 v --) version and section 3(A)(3) revives and amends the former version.

Related Statutes & Rules:

Cross-Reference to Related Statutes:

Action against state university or college, RC § 3345.40.

Actions against Dalkon Shield claimants trust, RC § 2305.10.1.

Civil recovery for criminal act, RC § 2307.60.

Claimant defined as to product liability, RC § 2307.71.

Compensatory damages against political subdivision; limitation exception, RC § 2744.05.

Distribution to beneficiaries, RC § 2125.03.

Insurance payments, set off, RC § 4113.09.

Legal disability defined, RC § 2131.02.

New action after reversal or failure other than upon merits, RC § 2125.04.

Order in which debts to be paid, RC § 2117.25.

Payment of debts; report of insolvency, RC § 2117.15.

Rules and procedure of court of common pleas to govern, RC § 2101.32.

Ohio Constitution:

Damages not limited, OConst art I, § 19a.

Comparative Legislation:

WRONGFUL DEATH ACTIONS: CA--Cal Prob Code § 2504

FL--Fla. Stat. §§ 768.16-768.26

IL--740 ILCS § 180/1

IN--Burns Ind. Code Ann. § 29-1-10-17

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ORC Ann. 2125.02 (2009)

§ 2125.02. Persons entitled to recover; determination of damages; limitation of actions

(A) (1) Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.

(2) The jury, or the court if the civil action for wrongful death is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries described in division (A)(1) of this section by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3) (a) The date of the decedent's death fixes, subject to division (A)(3)(b)(iii) of this section, the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.

(b) (i) In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(ii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence of the cost of an annuity in connection with an issue of recoverable future damages. If that evidence is presented, then, in addition to the factors described in

division (A)(3)(b)(i) of this section and, if applicable, division (A)(3)(b)(iii) of this section, the jury or court may consider that evidence in determining the future damages suffered by reason of the wrongful death. If that evidence is presented, the present value in dollars of an annuity is its cost.

(iii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence that the surviving spouse of the decedent is remarried. If that evidence is presented, then, in addition to the factors described in divisions (A)(3)(b)(i) and (ii) of this section, the jury or court may consider that evidence in determining the damages suffered by the surviving spouse by reason of the wrongful death.

(B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

(4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;

(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

(C) A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of a civil action for wrongful death, may settle with the defendant the amount to be paid.

(D) (1) Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death.

(2) (a) Except as otherwise provided in divisions (D)(2)(b), (c), (d), (e), (f), and (g) of this section or in section 2125.04 of the Revised Code, no cause of action for wrongful death involving a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(b) Division (D)(2)(a) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(c) Division (D)(2)(a) of this section does not bar a civil action for wrongful death involving a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death, has not expired in accordance with the terms of that warranty.

(d) If the decedent's death occurs during the ten-year period described in division

(D)(2)(a) of this section but less than two years prior to the expiration of that period, a civil action for wrongful death involving a product liability claim may be commenced within two years after the decedent's death.

(e) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, a civil action for wrongful death involving a product liability claim may be commenced within two years after the disability is removed.

(f) (i) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(1), (2), (3), or (4) of section 2305.10 of the Revised Code and the decedent's death resulted from exposure to the product during the ten-year period described in division (D)(2)(a) of this section.

(ii) If division (D)(2)(f)(i) of this section applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(f)(i) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(g) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(5) of section 2315.10 of the Revised Code. If division (D)(2)(g) of this section applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(g) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(E) (1) If the personal representative of a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from a civil action for wrongful death or if any person listed in division (A)(1) of this section who is permitted to benefit from a civil action for wrongful death commenced in relation to a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from the action, the personal representative or the person may file a motion in the court in which the action is commenced requesting the court to issue an order finding that the parent abandoned the minor and is not entitled to recover damages in the action based on the death of the minor.

(2) The movant who files a motion described in division (E)(1) of this section shall name the parent who abandoned the deceased minor and, whether or not that parent is a resident of this state, the parent shall be served with a summons and a copy of the motion in accordance with the Rules of Civil Procedure. Upon the filing of the motion, the court shall conduct a hearing. In the hearing on the motion, the movant has the burden of proving, by a preponderance of the evidence, that the parent abandoned the minor. If, at the hearing, the

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ORC Ann. 2125.03 (2009)

§ 2125.03. Distribution to beneficiaries

(A) (1) The amount received by a personal representative in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code, whether by settlement or otherwise, shall be distributed to the beneficiaries or any one or more of them. The court that appointed the personal representative, except when all of the beneficiaries are on an equal degree of consanguinity to the deceased person, shall adjust the share of each beneficiary in a manner that is equitable, having due regard for the injury and loss to each beneficiary resulting from the death and for the age and condition of the beneficiaries. If all of the beneficiaries are on an equal degree of consanguinity to the deceased person, the beneficiaries may adjust the share of each beneficiary among themselves. If the beneficiaries do not adjust their shares among themselves, the court shall adjust the share of each beneficiary in the same manner as the court adjusts the shares of beneficiaries who are not on an equal degree of consanguinity to the deceased person.

(2) The court may create a trust for any beneficiary who is under twenty-five years of age by ordering that the portion of the amount received by the personal representative for that beneficiary be deposited in trust for the benefit of that beneficiary, until the beneficiary reaches twenty-five years of age, and order the distribution of the amount in accordance with the provisions of the trust. Prior to appointment as a trustee of a trust created pursuant to this section, the person to be appointed shall be approved by each adult beneficiary and by the guardian of each minor beneficiary of the trust.

(3) The personal representative shall not distribute any amount received in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code to any person in relation to whom the court has entered an order pursuant to division (E)(2) of section 2125.02 of the Revised Code.

(B) The court shall distribute the amount of funeral and burial expenses awarded, or received by settlement, by reason of the death to the personal representative of the decedent, to be expended by the personal representative for the payment, or as

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ORC Ann. 2125.04 (2009)

Legislative Alert:

LEXSEE 2009 Ohio SB 106 -- See sections 1 and 2.

§ 2125.04. New action

In every civil action for wrongful death commenced or attempted to be commenced within the time specified by division (D)(1) or (D)(2)(c), (d), (e), (f), or (g) of section 2125.02 of the Revised Code, if a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits and if the time limited by any of those divisions for the commencement of the action has expired at the date of the reversal or failure, the plaintiff or, if the plaintiff dies and the cause of action survives, the personal representative of the plaintiff may commence a new civil action for wrongful death within one year after that date.

History:

GC § 10509-169; 114 v 320(439); Bureau of Code Revision, 10-1-53; 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01. Eff 7-6-2001; 150 v S 80, § 1, eff. 4-7-05.

Section Notes:

EFFECT OF AMENDMENTS

150 v S 80, effective April 7, 2005, inserted "division (D)(1) or (D)(2)(c), (d), (e), (f), or (g) of", and made minor stylistic changes.

RULE 18. Joinder of Claims and Remedies

(A) Joinder of claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(B) Joinder of remedies; fraudulent conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

[Effective: July 1, 1970.]