

ORIGINAL

Case No. 2009-1070

**In the Supreme Court of Ohio**

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

**Plaintiffs-Appellees,**

v.

*Consolidated Rail Corporation, et al.,*

**Defendants-Appellants.**

ON DISCRETIONARY APPEAL FROM THE  
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO, CASE NOS. 91237, 91238 & 91239

**REPLY BRIEF OF AMICUS CURIAE GRAND TRUNK WESTERN  
RAILROAD INCORPORATED, IN SUPPORT OF APPELLANTS**

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**AMICUS CURIAE GRAND TRUNK WESTERN RAILROAD INCORPORATED'S  
REPLY BRIEF IN SUPPORT OF APPELLANTS' PROPOSITION OF LAW:**

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

**A. Non-Asbestos-Related Claims Do Not Belong on a Docket Specifically Created to Handle Asbestos Actions**

Despite alleging in the complaints at issue that each injury alleged was caused by asbestos exposure, Appellees now maintain throughout their brief that the claims that they seek to litigate before Judge Harry Hanna, on the Cuyahoga County Asbestos Docket, are “completely unrelated to asbestos.” See, Appellees’ Merit Brief at p. 2, generally. Citing to the case management order for the Cuyahoga County Asbestos Docket, Appellees acknowledge that this docket was created to “secure the just, efficient and economical resolution of each *asbestos* personal injury.” (Emphasis added.) (Appellee’s Second Supplement at 199.)

When Am. Sub. H.B. No. 292 (sometimes referred to as "H.B. 292") was enacted by Ohio's General Assembly, its purpose was to ease the burdens placed on the dockets of Ohio's common pleas courts by prioritizing asbestos-related actions. The Eighth Appellate District's decision in *Riedel v. Consol. Rail Corp.*, 8th Dist. Nos. 91237, 91238 & 91239, 2009-Ohio-1242, finding in favor of severing non-asbestos exposure claims from asbestos-claims, and thereby allowing the non-asbestos claims to be adjudicated on the special docket dedicated to asbestos-related transactions in Cuyahoga County, erodes the very purpose of H.B. 292.

Appellees entirely ignore these public policy considerations, and instead insist that these non-asbestos claims are properly on the Cuyahoga County Asbestos Docket by assignment pursuant to the Asbestos Docket Case Management Order (“CMO”). However, the Asbestos Docket CMO was only applied to these cases because Appellees labeled their complaint as

asbestos civil actions. This was done in accordance with Local Cuyahoga County Rule 16, entitled "Asbestos Litigation Special Provision." Appellees' complaints also assert that asbestos exposure was the cause of their injuries. Appellees chose to file their lawsuits on the Asbestos Docket by designating their complaints as asbestos actions, therefore, they must be bound by the rules applicable to all claimants on this specialized docket. Otherwise, their actions would amount to nothing but judge shopping.

Where these non-asbestos-related claims are adjudicated is important to this Court's determination of this case. The overwhelming amount of asbestos cases lodged on the Asbestos Docket "defies customary judicial administration" and poses "systemic difficulties." *Norfolk & W Ry. Co. v. Ayers* (2003), 538 U.S. 135, 166. The statutes enacted through H.B. 292 were implemented in reaction to the elephantine mass of asbestos cases clogging the dockets of Ohio's courts. If legislative measures have been taken to weed out non-malignant asbestos cases from the already strained Asbestos Docket, then certainly claims premised on exposure to substances other than asbestos should not be allowed to stand on the Asbestos Docket.

Appellees' asbestos-claims can not meet the minimal prima facie requirements of H.B. 292. Appellees were aware of the lack of evidence supporting the asbestos-claims prior to filing these actions. It defies logic that Appellees (and future plaintiffs) can join meritless asbestos claims, which they know will inevitably be administratively dismissed, with non-asbestos claims in order to keep the non-asbestos claims on a docket specifically created for asbestos actions. This is the illogical result created by the *Riedel* decision.

The non-asbestos claims asserted on the Asbestos Docket should not be severed from the asbestos-related claims. Appellees have asserted that asbestos was a direct cause of each of the injuries claimed, thus, the entire case should be administratively dismissed. In the interests of

judicial economy, this Court should reverse the Eighth Appellate District's decision in order to give full effect to the public policy behind the enactment of H.B. 292.

**B. Appellee Weldy's Arguments Relating to the Application of Am. Sub. H.B. 292 to FELA Wrongful Death Actions Have Been Waived and Are Not Properly Before this Court**

Appellee asks this Court to find that R.C. 2307.92(D) does not apply to Appellee Weldy's claim for wrongful death. However, this issue was not raised in the courts below, nor in Appellees' memorandum opposing jurisdiction, and has thus been waived. See, *Sorrell v. Ohio Dep't of Natural Resources, Div. of Parks & Recreation* (1988), 40 Ohio St. 3d 141; *State v. Awan* (1986), 22 Ohio St. 3d 120.

In accordance with S.Ct. Prac. R. 3.6 (B)(b), on September 16, 2009, this Court granted jurisdiction to hear the case on its merits and limited the issues on appeal to the proposition of law sought in the jurisdictional memorandum. Thus, the issue before this Court is not whether R.C. 2307.92(D) is applicable to FELA wrongful death actions, instead, the sole issue is whether an asbestos claim subject to HB 292 may be severed from a non-asbestos claim involving the same lawsuit and involving the same indivisible injury.

However, should this Court consider Appellee Weldy's late-blooming argument, it is without merit. Appellee Weldy claims that her FELA wrongful death claim falls outside the purview of H.B. 292. This argument fails to take into account that one of the FELA claims at issue in *Norfolk S. RR. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, was a wrongful death claim brought on behalf of the Estate of Larry Arnold Wiles. In *Bogle*, as Appellees concede, this Court determined that R.C. 2307.92 and R.C. 2307.93 can be applied to FELA cases filed in state court. *Bogle* at syllabus. The reason for this finding that R.C. 2307.92 and R.C. 2307.93 apply regardless of the theory or statutory basis giving rise to relief, is because these statutes

serve to make efficient use of judicial resources. *Bogle* at ¶31 (emphasis added). In contrast, the proper use of judicial resources is undermined by Appellee Weldy's position.

Pursuant to this Court's decision in *Bogle*, the requirements of R.C. 2307.92(D) apply to FELA claims based upon wrongful death. Therefore, Appellee Weldy's argument that R.C. 2307.92(D) does not apply to Josephine Weldy's claim for wrongful death fails.

### **C. Conclusion**

Grand Trunk Western Railroad Incorporated, as Amicus Curiae, supports the position of Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company. The decision of the Eighth Appellate District establishes an unwise rule of law for asbestos-related cases. Grand Trunk urges the Court to administratively dismiss entire asbestos-related cases when the prima facie requirements set forth in R.C. 2307.92(B), (C) or (D) are unmet and when a single, indivisible pulmonary injury is at issue, regardless of the alternative exposures asserted as the basis giving rise to relief. Such an application of H.B. 292 serves to make efficient use of judicial resources and upholds the purpose of the statutes at issue. Public policy favors the reversal of the decision by the Eighth Appellate District.

Respectfully submitted,



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