

ORIGINAL

Case No. 2009-1070

In the Supreme Court of Ohio

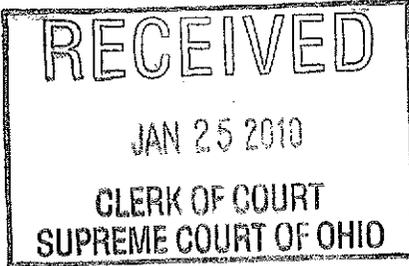
Jack E. Riedel, Danny R. Six, & Josephine Weldy, et al.,

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 APPELLANTS CONSOLIDATED RAIL
CORPORATION, AMERICAN PREMIER UNDERWRITERS, INC., AND
NORFOLK SOUTHERN RAILWAY COMPANY**

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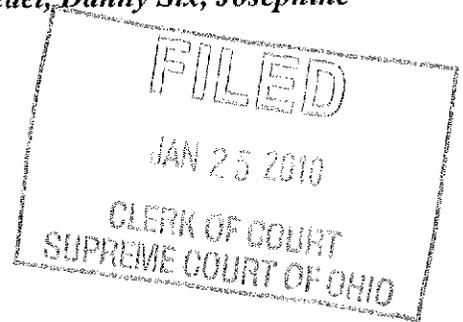


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INTRODUCTION

Rather than forming a responsive argument to the issues raised in Appellants' brief, Appellees attempt to distract this Court by focusing on issues that range from tangential to completely irrelevant. In fact, the first contention raised in their brief, though cluttered with extraneous information, amounts to nothing more than a disagreement with this Court's ruling in *Norfolk Southern Railway Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5284, 875 N.E.2d 919. Appellees' attempt to relitigate *Bogle* by arguing that Am. Sub. H.B. No. 292 ("H.B. 292") is federally preempted is inappropriate. Appellees ignore the fact that *Bogle* is binding precedent, and despite Appellees' disagreement with the ruling, it cannot just be cast aside. Therefore Appellees' lengthy arguments about the purposes behind the Federal Employers' Liability Act ("FELA") are not germane to the issues before this Court because it has been conclusively determined by this Court that H.B. 292 does not offend the FELA.

Appellees also argue that they have filed "six separate and distinct causes of action" (Appellees' Merit Brief, pg 4) and that H.B. 292 does not apply to the causes of action unrelated to asbestos. To support this contention, Appellees have distorted the plain meaning and plain language of H.B. 292 in a contrived effort to convolute what is an otherwise clear construction of the law.

Furthermore, Appellees are glossing over the fact that the causes of action in their suit are far from separate and divisible. Appellees' claims do allege exposures to multiple different substances. However, they also allege that each one of these substances, including asbestos, contributed to every one of the alleged injuries. Appellees cannot now claim that their alleged injuries are obviously unrelated to asbestos, when their own pleadings explicitly claimed that asbestos was a direct cause of each and every one.

Appellees' claimed injuries from substances other than asbestos clearly fall within the definitions of "tort action," "asbestos claims," and "civil action." As such, Appellees' non-asbestos exposure claims are subject to the *prima facie* requirements of H.B. 292 and must all be administratively dismissed.

LAW AND ARGUMENT

I. Appellees' argument that applying H.B. 292 would violate substantive rights under the FELA is contrary to controlling precedent.

Appellees spend a significant portion of their brief outlining what they believe to be the purpose of the FELA. Their analysis seems to contend that because the FELA was a federal statute enacted to provide railroad workers with a mechanism to recover for their occupational injuries, any claims for injuries related to diesel exhaust, asbestos or other substances cannot be regulated by H.B. 292. This Court, however, in *Bogle*, has already conclusively established that H.B. 292 can absolutely be applied to occupational disease cases brought pursuant to the FELA. This Court is bound to follow its previous ruling and leave binding precedent undisturbed. *Scott v. News Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). Furthermore, when the United States Supreme Court was given the opportunity to review this Court's opinion in *Bogle*, it chose not to do so and denied *certiorari*. *Bogle* is the binding law of Ohio and unequivocally held that H.B. 292 can be applied to FELA cases.

In rendering its decision in *Bogle*, this Court observed that the requirements of H.B. 292 are procedural in nature and therefore do not impede any substantive rights in FELA cases. *Bogle* at 463. In light of *Bogle*, there is no reasonable constitutional interpretation that can be applied to support an argument that asbestos suits are not preempted by the FELA, but suits that involve other substances are. Such an application would lead to absurd results where the procedural/substantive nature of the statute itself turns on which substance allegedly caused the

pulmonary injury. Because this Court held that it was constitutionally permissible to apply H.B. 292 to FELA cases, if it is determined that the statute applies to cases of Appellees' nature, it must still be held to be procedural and thus constitutional.

II. Appellees base their argument that their cases should be permitted to proceed on the fact they have so little factual support.

Inexplicably, after first trying to rehash the issues decided in *Bogle*, Appellees admit that *Bogle* does apply to FELA cases. Appellees' brief states:

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 statute 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.

(Appellees' Merit Brief, pg 19).

However, Appellees seemingly attempt to distinguish their cases by arguing that applying the statute to these cases would affect a substantive right because Appellees will never have sufficient evidence to meet the *prima facie* requirements. Appellees admit this point:

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.

...

As to Appellees Six and Ridel, both are sixty-five years old and their asbestos-related disease is at its lowest detectable level. 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.

(Appellees' Merit Brief, pg 19-20).

Appellees admit that they are not able to even meet the minimum requirements necessary to proceed with their asbestos claims. Yet, they argue that because they do not have sufficient evidence to proceed with these cases, it necessitates the advancement of their claims related to substances other than asbestos. Quite simply, this argument is non-sensical.

Appellees' arguments omit a few crucial points. The first is that they do not have separate and distinct claims where they have alleged a specific disease caused by asbestos, another separate disease caused by diesel exhaust, and an additional disease caused by silica. What they have alleged is a general claim for pulmonary injury, every component of which was caused at least partially by asbestos. If the asbestos claim is severed, it would not serve to separate different causes of action; it would be splitting the same cause of action.

Secondly, Appellees could have avoided this whole debate by simply agreeing to dismiss any claims for asbestos with prejudice. In that case, the asbestos claims would be conclusively dealt with and they would move forward only with what they believe are the meritorious claims. If Appellees believe claims related to asbestos have no merit, they should dismiss them and move forward. But as *Bogle* makes clear, administrative dismissal is not the same as outright dismissal with prejudice. See *Bogle*; Civ.R. 41. Thus, if they are only administratively dismissed, they are still pending and still part of the action.

The reasons they have refused to dismiss these claims are quite simple: 1) they do not want to give up the one claim (ie. asbestos) that the mere mention of which would most likely inflame a jury; and 2) they are hoping to get two bites at the apple. They are attempting to bring suit for these other substances and then hope that down the road they can sue for the exact same disease process based on asbestos exposure. This is precisely the type of scheme that stands contrary to the purposes of H.B. 292.

III. Appellees' brief ignores the plain and clear language of the statute.

As discussed in Appellants' merit brief, the statutory language is clear on its face regarding how cases of this nature are to be adjudicated. By looking to the context in which the statute uses the phrase "asbestos claim," it is undeniable that the phrase is meant as a component of the larger "tort action." In reviewing R.C. 2307.92(B), it is difficult to find any ambiguity whatsoever. R.C. 2307.92(B) states:

No person shall bring or maintain a **tort action alleging an asbestos claim** based on a nonmalignant condition in the absence of a prima-facie showing . . . 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)(emphasis added).

The asbestos claim is but one part of what is being alleged in any given tort action. If the *prima facie* showing cannot be made, then the tort action itself must be administratively dismissed.

Though Appellees and Appellants are clearly arguing for different interpretations of the statutory language, a review of Appellees' pleadings in this matter renders their semantic position moot. Appellees' complaints all claim the same exact damages from alleged exposure to each substance that they have included. A look at the pleadings aptly illustrates this fact.

In Jack Riedel's Complaint the first "Cause of Action" claims exposure to asbestos.

Paragraph 22 contains the claimed damages from this exposure:

22. As a direct and proximate result of the aforementioned negligence and recklessness of the Defendants, Plaintiffs sustained severe and permanent injuries to their chest, lungs, respiratory system, nerves and nervous system and the various component parts thereof with pendent pain, suffering, anguish and debilitation. Plaintiffs' injuries may include, but are not limited to, pneumoconiosis, asbestosis, pleural disease, restrictive lung disease, obstructive lung disease, emphysema, asthma, reactive airway disease, shortness of breath, dyspnea, dementia, torment, fear of cancer, decreased lung function and breathing capacity, decreased life expectancy, loss of enjoyment of life, change of lifestyle, diminished mental capacity, diminished earning capacity, lost wages and benefits and medical expenses all to their damage.

(Complaint of Jack Riedel, ¶22).

Jack Riedel's so-called second "Cause of Action" claims exposure to diesel exhaust.

Paragraph 29 contains the claimed damages from this exposure:

29. As a direct and proximate result of the aforementioned negligence and recklessness of the Defendants, Plaintiffs sustained severe and permanent injuries to their chest, lungs, respiratory system, nerves and nervous system and the various component parts thereof with pendent pain, suffering, anguish and debilitation. Plaintiffs' injuries may include, but are not limited to, pneumoconiosis, asbestosis, pleural disease, restrictive lung disease, obstructive lung disease, emphysema, asthma, reactive airway disease, shortness of breath, dyspnea, dementia, torment, fear of cancer, decreased lung function and breathing capacity, decreased life expectancy, loss of enjoyment of life, change of lifestyle, diminished mental capacity, diminished earning capacity, lost wages and benefits and medical expenses all to their damage.

(Complaint of Jack Riedel, ¶29).

Jack Riedel's named third "Cause of Action" claims exposure to silica. Paragraph 36 contains the claimed damages from this exposure:

36. As a direct and proximate result of the aforementioned negligence and recklessness of the Defendants, Plaintiffs sustained severe and permanent injuries to their chest, lungs, respiratory system, nerves and nervous system and the various component parts thereof with pendent

pain, suffering, anguish and debilitation. Plaintiffs' injuries may include, but are not limited to, pneumoconiosis, asbestosis, pleural disease, restrictive lung disease, obstructive lung disease, emphysema, asthma, reactive airway disease, shortness of breath, dyspnea, dementia, torment, fear of cancer, decreased lung function and breathing capacity, decreased life expectancy, loss of enjoyment of life, change of lifestyle, diminished mental capacity, diminished earning capacity, lost wages and benefits and medical expenses all to their damage.¹

(Complaint of Jack Riedel, ¶36).

It is self-evident that for each substance that Appellees are claiming exposure to, they are alleging that they contributed to the same harm. Even using Appellees' own definition of a claim: "A 'claim' however is defined as 'an interest or remedy recognized at law'" (Appellees' Merit Brief, pg 23), their allegations must be considered to fall within the statute as they are clearly claiming the same interest and remedy for alleged exposures to each substance. Therefore, Appellees' own argument requires that the entire suit be administratively dismissed.

IV. Appellees' brief fails to acknowledge the difference between dismissal and administrative dismissal.

Appellees' brief also attempts to argue that the "dismissal of one claim or cause of action in a lawsuit does not dismiss the entire action." (Appellees' Merit Brief, pg 24). Appellants acknowledge that this is generally true. However, what Appellees continually fail to grasp is that a dismissal is not the same as an administrative dismissal. If a claim is dismissed with prejudice, the right to recover for that claim is forever extinguished, and the remainder of the case can move forward with jurisdiction unencumbered with the fear that the dismissed claim will reach back from the grave. With an administrative dismissal, the ability to recover still exists.² If the

¹ The Complaints of Jack Weldy and Danny Six also reflect the same identical pleading for each claimed exposure.

² Administratively dismissed cases are placed on a separate inactive docket and the statute of limitations for those claims is tolled.

remainder of the case is allowed to proceed, it will be affected by, and may affect, the administratively dismissed claim.

This is why the legislature drafted the statute in the manner that they did. The goal was to reduce the amount of litigation, not to multiply it. It is for this reason that the statute was drafted in a manner that, as long as an asbestos claim was still in existence, other related exposures will fall under the umbrella of the statute. This is the only way to avoid the judicial redundancy that would result from applying Appellees' arguments.

V. Appellees have waived any argument related to Josephine Weldy's wrongful death claims.

Appellees have also argued that H.B. 292 does not apply to Josephine Weldy's wrongful death claim because such a claim is not covered by the statute. However, Appellees' brief is the first time this argument has ever been raised by Appellees. This was not contained in their arguments to the lower Courts and was not discussed in Appellees' jurisdictional memorandum. Appellees cannot raise this argument for the first time in their Brief and therefore this argument should be deemed waived. However, even if this Court determines that such an argument can be considered, Appellees have no substantive basis for making it.

Appellees contend that the portion of H.B. 292 that addresses wrongful death cannot apply to FELA wrongful death actions because the statute states "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..." R.C. 2307.92(D). Appellees' argument is that the phrase "as described in" means that the only wrongful death causes of action that are subject to the statute are those brought pursuant to 2125.01. This is not a fair reading of the language. The language clearly describes wrongful death actions that are of the same nature as R.C. 2125.01. If the legislature had wished to limit the reach of the statute to only those cases

brought pursuant to R.C. 2125.01, they could have used exactly that language: “pursuant to.” They also could have used “brought under,” “based on,” “seeking relief from,” or a host of other terminology.

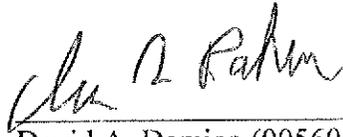
This Court in *Bogle* has already determined that the legislature intended the statute to apply to FEELA actions. It is not realistic to assume that the legislature wanted H.B. 292 to apply to all FEELA actions involving asbestos claims except those for wrongful death.

CONCLUSION

Every one of Appellees’ claims, by its very nature, inseparably involves a claim for pulmonary asbestos exposure. It is impossible to litigate these cases without dealing with the asbestos matters. As long as the asbestos portion of these claims remains potentially viable, the claimed injuries from other substances, which are identical to the asbestos claims, must fall within the requirements of the statute. Therefore, Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company respectfully request the Court to reverse the decision of the Court of Appeal with directions that the three lawsuits be administratively dismissed in their entirety.

Dated: January 22, 2010

Respectfully submitted,



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