

The Supreme Court of Ohio

ORIGINAL

No. 2013-0761

**CLEO J. RENFROW, as personal representative of
the ESTATE OF GERALD B. RENFROW,**

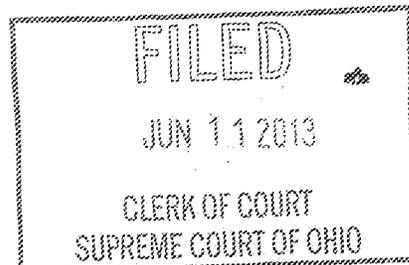
Plaintiff-Appellee,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY:

Defendant-Appellant.

On Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio
Case No. 98715



**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE CLEO J. RENFROW as personal representative of
the ESTATE OF GERALD B. RENFROW**

MICHAEL L. TORCELLO, ESQ.

Ohio I.D. No. 0088466

CHRISTOPHER M. MURPHY, ESQ.

Ohio I.D. No. 0074840

DORAN & MURPHY, PLLC

1234 Delaware Avenue

Buffalo, New York 14209

Phone: (716) 884-2000

Fax: (716) 884-2146

Attorneys for Plaintiff-Appellee

DAVID A. DAMICO, ESQ.

Ohio I.D. No. 0056053

BURNS WHITE, LLC

Four Northshore Center

106 Isabella Street

Pittsburgh, PA 15212

Phone: (412) 995-3000

Fax: (412) 995-3300

Attorneys for Defendant-Appellant

A rectangular stamp with a dashed border containing the text: RECEIVED.

JUN 11 2013

CLERK OF COURT

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS.....	8
ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW.....	10
I. Argument in Opposition to Proposition of Law No. I:	
The Eighth District’s interpretation of the “competent medical authority” requirement of R.C. 2307.92(C) as applied to non-traditional asbestos plaintiffs is well-established and serves to protect the substantive rights of cancer victims who, because of the nature of their medical care, are unable to achieve the typical doctor-patient relationships envisioned by the statute.....	10
II. Argument in Opposition to Proposition of Law No. II:	
The Eighth District was correct in holding that an opinion from a “competent medical authority” stating to a reasonable degree of medical certainty that asbestos contributed to the development of a lung cancer, is sufficient to establish the causal link required by R.C. 2307.92(C).....	13
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	16

**EXPLANATION OF WHY THIS CASE IS NOT A CASE
OF PUBLIC OR GREAT GENERAL INTEREST**

The issues presented in this appeal are fact-specific. Appellant essentially asks this Court to consider whether or not Cleo Renfrow, the personal representative of the estate of her late husband Gerald, presented sufficient prima facie evidence under R.C. 2307.92(C), as interpreted by *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. No. 88062, 2008-Ohio-3806 (hereinafter, *Sinnott II*), for this Federal Employers' Liability Act (FELA) claim for occupational lung cancer to be tried to a jury in Ohio state court. The trial court reviewed the facts of this case and determined that "the evidence submitted by Mrs. Renfrow, consisting of her husband's hospital records, history of smoking, asbestos exposure and a report from a competent medical authority is sufficient to establish a prima facie case as required by R.C. 2307.92 and 2307.93." *Renfrow v. Norfolk Southern Railway Co.*, Cuyahoga C.P. No. 764958 (July 2, 2012).

On appeal, the Eighth District reviewed the evidence once again and determined that Mr. Renfrow met the statute's prima facie requirements. *Renfrow v. Norfolk Southern Railway Co.*, 8th Dist. No. 98716, 2013-Ohio-1189, ¶ 37. The court held that an "affidavit detailing Mr. Renfrow's asbestos exposure, along with the Veterans' Administration hospital records documenting his diagnosis of lung cancer, history of smoking, as well as the report of Dr. Rao, a competent medical authority, . . . provided ample evidence demonstrating that [Mr. Renfrow's] asbestos exposure was a substantial contributing factor in causing his lung cancer." *Id.* at ¶ 36. "The above evidence, when viewed collectively, is sufficient to survive administrative dismissal." *Id.* at ¶ 37.

Today, Appellant seeks yet another *de novo* review of the facts of this case urging that the interpretation of the statute's prima facie filing requirements found in *Sinnott II*, as it applies to

veterans of the armed forces, “constitute[s] an impermissible judicial expansion of the statutory language.” In its submission to the Eighth District, Appellant credited *Sinnott II* as a “well conceived and limited interpretation of the statute, created to protect the rights of veterans . . .” and “put veterans on equal footing with all other asbestos plaintiffs.” Appellant now asks this Court to reject *Sinnott II* and reevaluate the evidence submitted by Mrs. Renfrow. This Court has twice declined similar invitations to reassess evidence presented under the prima facie filing requirements of R.C. 2307.92 and 2307.93, notably in *Sinnott II* itself. *Sinnott*, 8th Dist. No. 88062, 2008-Ohio-3806, *appeal not allowed*, 120 Ohio St.3d 1490, 2009-Ohio-278, 900 N.E.2d 199; *see also Hoover v. Norfolk Southern Railway Corp.*, 8th Dist No. 93479, 93689, 2010-Ohio-2894, *appeal not allowed*, 127 Ohio St.3d 1504, 2011-Ohio-19, 939 N.E.2d 1267. The issues presented herein are identical to those presented by *Sinnott* and *Hoover*.

Despite Appellant’s hyperbole that the issues presented are “far-reaching,” will have “extensive impact,” and “continue to arise in asbestos cases filed in Ohio,” lung cancer claims in statutorily-defined smokers make up a very small percentage of asbestos claims. This Court has previously recognized that of the approximately 40,000 total cases in Ohio, “[e]ighty-nine percent of claimants do not allege that they suffer from cancer, and ‘sixty-six to ninety percent of these non-cancer claimants are not sick.’” (Citations omitted.) *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶ 2. It is unknown how many lung cancer claimants received their care and treatment solely through the Veterans’ Administration.

Mr. Renfrow was one of the eleven percent of claimants who suffered from lung cancer and there is no question that he was among the small percentage of claimants that were very sick and is now deceased. This Court has previously recognized that the purpose of Ohio’s asbestos

statute is to “conserve the scarce resources of the defendants so as to allow compensation for cancer victims . . .” (Citations omitted.) *In Re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596, ¶ 3; *see also Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 7 (hereinafter, *Sinnott I*). Appellant herein has ignored that original intent. As the Eighth District has held, “[t]he statute is not in place to penalize veterans or other non-traditional patients who were properly diagnosed by competent medical authority personnel and have the medical records and other evidence to support their claim.” *Sinnott II*, at ¶ 23. The courts below found Mrs. Renfrow’s evidence sufficient. The fact-specific nature of this inquiry does not warrant further review by this Court.

Moreover, Mrs. Renfrow has brought her claims under the FELA, a federal law designed solely for the protection of injured railroad workers and their families. Only a small percentage of the asbestos claims filed in Ohio are FELA claims. As rail workers do not receive the benefit of state workers’ compensation statutes, this FELA lawsuit is Mrs. Renfrow’s only means of recovery for the work-related injury suffered by her deceased husband. *See Hilton v. So. Carolina Pub. Rwy. Comm.*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991). The FELA requires that rail carriers provide a reasonably safe working environment and imposes liability for negligence, even in the slightest, when employees are injured. *See CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2640, 180 L.Ed.2d 637 (2011). A remedial statute, the FELA embodies a diminished standard of proof which has been held to be substantially less than that of ordinary negligence actions. *See id.*

The U.S. Supreme Court recently clarified that “common law formulations of [proximate cause including] . . . the ‘substantial factor test’” have no place in FELA litigation. (Citations

omitted.) *Id.* at 2642. The Supreme Court confirmed that the FELA “does not incorporate ‘proximate cause’ standards developed in non-statutory common-law tort actions” and a “defendant railroad caused or contributed to a plaintiff employee’s injury if the railroad’s negligence played **any part** in bringing about the injury.” (Citations omitted.)(Emphasis added.) *Id.* at 2634. Consequently, the “substantial contributing factor” test found in R.C. 2309.92(C), should not be applied in FELA cases and the issues presented here do not arise in the usual asbestos case filed in Ohio. The issues presented here are specific to the facts of Mrs. Renfrow’s FELA case. This appeal involves no issues that are of great public or general interest. Jurisdiction should be denied.

Appellant’s first Proposition of Law maintains that the Eighth District’s interpretation of the “competent medical authority” requirement of the asbestos statute, as it pertains to non-traditional asbestos plaintiffs, constitutes an impermissible judicial expansion of the statutory language. This Court already answered that question in the negative when it declined jurisdiction in *Sinnott II*. See *Sinnott*, 8th Dist. No. 88062, 2008-Ohio-3806. The Appellant herein has merely presented the common sense and well-settled question of whether or not a court may view a claimant’s prima facie submissions as a whole in making its determination as to whether that claimant has met the requirements of R.C. 2307.92 and 2307.93.

This Court set forth the appropriate standard in *Sinnott I* where it directed trial courts to look “at the evidence as a whole” and determine whether or not any “genuine issue of material fact remains to be litigated.” (Citations omitted.) *Sinnott*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 29; see also *Hoover*, 8th Dist No. 93479, 93689, 2010-Ohio-2894, ¶ 17 (“We agree with the trial court that we may look at the evidence *in toto* to see if [the plaintiff]

established his prima facie case.”) This Court concluded that where a “defendant challenges the medical evidence presented by the plaintiff, the evidence must be construed most favorably for the plaintiff and against the defendant.” *Sinnott I* at ¶ 29. Relief to the defendant “must be awarded with caution” and “doubts must be resolved in favor of the non-moving party.” *Id.* This standard has been followed in the courts below.

In *Sinnott II*, the Eighth District reviewed the entire record to determine whether or not Mr. Sinnott’s widow complied with the prima facie filing requirements of the statute. The Eighth District held that where, as here, no single report could be obtained from a “competent medical authority” because Mr. Sinnott was treated at Veterans’ Administration medical facilities and did not have a traditional treating physician, Sinnott “submitted hospital records documenting his diagnosis of lung cancer, history of smoking and asbestos exposure,” together with expert reports “render[ing] opinions consistent with the hospital pulmonologists as to the causes of” the cancer. *Sinnott II* at ¶ 19. The court concluded that Sinnott produced “ample evidence demonstrating that his occupational asbestos exposure was a substantial factor in causing his lung cancer.” *Id.*

In this case, as in *Sinnott II*, the decedent’s status as a non-traditional asbestos plaintiff, without the benefit of a regular, treating physician, permitted the trial court to view the entirety of Mr. Renfrow’s medical records, expert reports, and other evidence in satisfaction of R.C. 2307.92(C). *Sinnott II* enables an individual receiving medical care and treatment for lung cancer through the VA to meet the statute’s prima facie filing requirements even where he or she is not seen by a regular treating physician and even where federal government regulations prohibit VA employees from offering expert reports or opinions in private lawsuits. *See* 38 C.F.R.14.804. Therefore, because a veteran without the benefit of a traditional treating physician cannot

otherwise comply with the statute's prima facie filing requirements, *Sinnott II* affords the non-traditional plaintiff a remedy. *See Sinnott II* at ¶ 23.

Absent the interpretation wisely posited by the Eighth District, the substantive rights of the non-traditional asbestos plaintiff, here a veteran of the United States armed forces, would be impaired and in fact eliminated. Such an individual would never be able to have his case tried to a jury because there would never be a treating physician to serve as a "competent medical authority" in satisfaction of the statute. In essence, the doors to Ohio's state courts would be closed to veterans suffering from lung cancer, seeking to establish a prima facie case under R.C.2307.92(C). The Eighth District's interpretation of the "competent medical authority" requirement of the asbestos statute, as it pertains to non-traditional asbestos plaintiffs, is well-founded and well-established. No further review of this issue is warranted.

Appellant's second Proposition of Law asks this Court to reevaluate the standard of causation required of this FELA plaintiff in meeting R.C. 2307.92's prima facie filing requirements. The Eighth District found sufficient Dr. Rao's opinion, "within a reasonable degree of medical certainty that occupational exposure to asbestos dust . . . in part contributed to the development of his cancer and eventual death." *Renfrow*, 8th Dist. No. 98716, 2013-Ohio-1189, ¶ 26-27. The Eighth District held that even "without utilizing magic words, Dr. Rao's opinion supplied the causal link between Mr. Renfrow's exposure to asbestos dust, diesel fumes and exhaust and him developing lung cancer and eventually dying." *Id.*

This Court has already reviewed the "substantial contributing factor" language of R.C. 2307.91(FF). *Ackison v. Anchor Packing Company*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, ¶ 30. Finding it ambiguous and subject to judicial interpretation, this Court held

that the legislature did not intend a substantive change in the common law. *See id.* at ¶ 36, 48. This Court held “that R. C. 2307.91(FF) does not alter the common law as it existed at the time Ackison filed her claim.” *Id.* at ¶ 49. Consequently, the common law governing causation is the same today as it was prior to the passage of the asbestos statute.

Here, the Eighth District held that an opinion to a reasonable degree of medical certainty that asbestos contributed to Mr. Renfrow’s cancer “supplied the causal link” between Mr. Renfrow’s occupational exposure to asbestos dust and his development of lung cancer. *See Renfrow* at ¶ 27. This decision is consistent with well-established common law regarding expert opinions here in Ohio where no specific language or “magic” words are required for medical opinion testimony to be submitted to a jury. *See Stanley C. Humphrey v. Rockwell*, 10th Dist. No. 88AP-1049, 1989 WL 61735 (June 8, 1989); *Jeffrey v. Marietta Mem’l Hosp.*, 10th Dist. Nos. 11AP-492 and 11AP-502, 2013-Ohio-1055; *Cleveland Electric Illuminating Co. v. Dingess*, 11th Dist. No.1327, 1987 WL 20082 (Nov. 13, 1987); *Ochletree v. Trumbull Memorial Hospital*, 11th Dist. No. 2005-T-0015, 2006-Ohio-1006.

Moreover, the common law standard of causation under the FELA provides that “causation is established if the railroad’s negligence played any part, even the slightest, in causing the injury.” (Citations omitted.) *Blankenship v. CSX*, 8th Dist. Nos. 63070 and 63071, 1993 WL 266919, *4 (July 15, 1993); *see also McBride*, 131 S.Ct. 2634, 180 L.Ed.2d 637 (2011). Mrs. Renfrow’s “competent medical authority” opinion that asbestos contributed in part to the development of her husband’s lung cancer meets the standard both here in Ohio and under the FELA.

This Court has now held, at least twice, that the asbestos statute is merely a procedural device designed only to prioritize asbestos claims and that “no new substantive burdens are placed on claimants . . .” *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, at ¶ 16; *see also Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶16-17. This Court has also held that trial courts must view the evidence as a whole and draw all inferences in favor of the plaintiff. *In Re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268, 875 N.E.2d 596. The Eighth District has consistently followed this mandate in *Sinnott II* and numerous other cases. *Sinnott*, 8th Dist. No. 88062, 2008-Ohio-3806; *see also Whipkey v. Aqua-Chem*, 8th Dist. No. 96672, 2012-Ohio-918; *Hoover*, 8th Dist No. 93479, 93689, 2010-Ohio-2894. This Court has declined jurisdiction in *Sinnott II* and in *Hoover*. Moreover, this Court has already held that the definition of “substantial contributing factor” found in R.C.2307.91(F) is ambiguous and has not changed the common law requirements for expert testimony in Ohio. Neither proposition of law raises any new issues of public concern or general interest. Jurisdiction should be denied.

STATEMENT OF THE CASE AND FACTS

Gerald Renfrow worked for the Norfolk Southern Railway Company for twenty-seven years throughout Ohio. He left the railroad in 1995. A veteran of the United States Air Force, Mr. Renfrow was diagnosed with lung cancer in March of 2010 at Richard L. Roudebush VA Medical Center. The medical treatment he received for his lung cancer was solely through the VA. Mr. Renfrow died from his cancer on January 22, 2011 in a hospice care center.

Mrs. Renfrow filed suit for her husband’s cancer and wrongful death under the FELA, alleging that through the railroad’s negligence and violations of federal locomotive regulations,

Mr. Renfrow had been exposed to asbestos and diesel engine exhaust which caused and/or contributed to the development of his cancer. Appellant moved to administratively dismiss Mrs. Renfrow's claims under R.C. 2307.92(C) for lack of prima facie evidence. Due to the nature of Mr. Renfrow's care and treatment at the VA, he did not have a regular, treating physician, but instead was seen by a revolving group of doctors, physicians' assistants and nurse practitioners. Even more problematic, VA personnel are generally prohibited from providing expert testimony or reports in private lawsuits. *See* 38 C. F. R. 14.808. Therefore, Mrs. Renfrow responded to Appellant's motion by producing her husband's VA hospital records and test results, a report from Dr. L.C. Rao, and an affidavit from Mr. Renfrow's co-worker of many years regarding his railroad exposure to asbestos. *See Renfrow*, 8th Dist. No. 98716, 2013-Ohio-1189, ¶ 7.

The affidavit of Mr. Renfrow's co-worker, Darl Rockenbaugh, confirmed Mr. Renfrow's substantial occupational exposure to asbestos. *See id.* at ¶ 7-9. He testified regarding his first-hand knowledge of the use of asbestos-containing products, and that he and Mr. Renfrow worked with and around these products over many years. *Id.* He testified that Appellant's locomotives contained "worn, frayed and dusty asbestos containing insulation," throughout the units and that he and Renfrow regularly came in contact with this insulation. *Id.* at ¶ 9.

Mrs. Renfrow also submitted various records and reports detailing the diagnosis, care, and treatment of her husband's lung cancer. *Id.* at ¶ 4, 7. Mr. Renfrow was diagnosed with lung cancer with brain metastasis at the VA after complaints regarding neck pain, balance and severe headaches. CT scans revealed a large chest mass and brain metastasis. The treatment provided to him at that point was palliative only. Two months later, Mr. Renfrow died from his cancer. Mrs. Renfrow submitted extensive VA Medical Center records to the trial court regarding his care and

treatment at the VA. *Id.* at ¶ 7. Additionally, she submitted the report of Dr. L.C. Rao, who is board-certified in internal medicine and pulmonary medicine, and is a NIOSH-certified B-reader. *Id.* at ¶ 10. After reviewing Mr. Renfrow’s medical records, Dr. Rao opined that “Asbestos dust and diesel fumes and exhaust are known carcinogens, and exposure to these increase the risk of lung cancer substantially.” *Id.* at ¶ 26. Dr. Rao stated his opinion, to a reasonable degree of medical certainty, that Mr. Renfrow’s “occupational exposure to asbestos dust and diesel fumes” was a contributing factor to Mr. Renfrow’s lung cancer. *Id.*

The trial court, finding that the evidence when viewed as a whole satisfied the statutory requirements, denied the motion. *Id.* at ¶ 11. The Eighth District agreed. *Id.* at ¶ 37. Appellant now seeks a third review of this evidence. While the intent of Ohio’s asbestos statute is to require a certain level of medical documentation of asbestos-related illness, it is not to close the doors of Ohio’s state courts to cancer victims who happen to have been treated for their cancer by using the medical benefits available to them through the VA. The Eighth District’s view is well-founded. No public or great general interest is served by further review of the facts specific to this case. Jurisdiction should be denied.

ARGUMENT IN OPPOSITION TO APPELLANT’S PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

Appellant first asks this Court to strike down the Eighth District’s interpretation of the “competent medical authority” requirement of R.C.2307.92(C) as it pertains to non-traditional asbestos plaintiffs, here, a U.S. Air Force veteran. The Eighth District’s interpretation of this requirement, however, is well-established and serves to protect the substantive rights of non-

traditional plaintiffs suffering from cancer who, because of the nature of their medical care, are unable to achieve the doctor-patient relationships envisioned by the statute. The Eighth District's interpretation, consistent with this Court's instruction in *Sinnott I*, allows trial courts to "look at the evidence as a whole" and from the entirety of the evidence determine whether or not the statute's prima facie filing requirements have been met. *See Sinnott*, 116 Ohio St.3d at 163, 2007-Ohio-5584, 876 N.E.2d 1217. The Eighth District's interpretation allows these individuals to maintain access to Ohio's state courts. Further review of this issue is unwarranted.

The Eighth District has recognized that in a non-traditional treatment setting such as a VA hospital, strict compliance with the provisions of the statute may be impossible because "the doctor patient relationship, which is not statutorily defined, varies depending on the treatment context." (Citation omitted.) *Whipkey*, 8th Dist. No. 96672, 2012-Ohio-918, at ¶ 22. The court's interpretation has allowed trial courts to view the entirety of the supporting evidence because "achieving the typical doctor-patient relationship envisioned by the statute is not a bright line test. Nor is it the sole factor in the statute." *Sinnott*, 8th Dist. No. 88062, 2008-Ohio-3806, at ¶ 22. Moreover, "the rationale behind the statute is to preserve scarce resources for individuals who are truly sick as a result of asbestos exposure. The statute is not in place to penalize veterans or other nontraditional patients who were properly diagnosed by competent medical authority personnel and have the medical records and other evidence to support their claim." *Id.* at ¶ 23.

In *Sinnott II*, *Whipkey*, and *Hoover*, the Eighth District has interpreted the prima facie filing requirements of R.C. 2307.92 to allow non-traditional asbestos plaintiffs to submit medical records, reports and affidavits to the trial court to be reviewed *in toto* for a determination on whether or not the requirements have been satisfied. *See Whipkey*, at ¶ 32; *see also Hoover*,

8th Dist No. 93479, 93689 2010-Ohio-2894, ¶ 22; *Sinnott II*, at ¶ 23. This interpretation is a well-reasoned approach which has protected access to Ohio state courts for non-traditional asbestos plaintiffs who, because of the nature of their medical care, do not have the traditional doctor-patient relationships envisioned by the statute. *See Sinnott II* at ¶ 24.

Here, Mr. Renfrow was treated for his lung cancer solely through the VA hospital system. The problem is two-fold. First, Mr. Renfrow's care and treatment at the VA was through a variety of doctors, physicians' assistants and nurse practitioners, without the benefit of a regular, treating doctor in the usual sense. Second, VA physicians are generally precluded from offering expert opinions in civil cases for private parties by federal regulations. *See* 38 C.F.R. 14.808. These federal regulations address expert or opinion testimony given by VA physicians and state the general rule that "VA personnel ***shall not provide***, with or without compensation, opinion or expert testimony in any legal proceedings concerning official VA information, subjects or activities . . ." (Emphasis added.) *Id.*

VA physicians may only provide opinions in a civil litigation between private parties where it is determined by VA counsel that "exceptional circumstances" exist and the factors enumerated in 38 C.F.R. 14.804 have been satisfied. *Id.* No such determination was made in this case. Here, VA's Office of Regional Counsel attorney, Michelle Wagner, stated in correspondence to Mrs. Renfrow's counsel that, based upon her review of the facts and the factors identified in §14.804, no "exceptional circumstances" existed that would allow VA physicians to provide expert opinions or reports in this case. Attorney Wagner's correspondence was provided to and reviewed by the trial court and the Eighth District.

Therefore, given the practical impossibility of obtaining a VA physician's testimony or opinion in a civil litigation, the Eighth District has sensibly interpreted the language of the statute in a manner which would allow non-traditional plaintiffs actually injured by asbestos exposure, and utilizing the benefits available to them for the treatment of lung cancer, without a traditional treating doctor, to meet the prima facie filing requirements and maintain access to Ohio's courts.

PROPOSITION OF LAW NO. II

In its second Proposition of Law, Appellant asks this Court to find that Dr. L.C. Rao's opinion that asbestos contributed in part to the development of Mr. Renfrow's cancer is insufficient and that a "competent medical authority" opinion on causation must employ "magic" words, mirroring the language of statute. This is simply not the law in Ohio, nor is it the law under the FELA, where causation is established where the railroad employer "played any part, even the slightest," in producing the claimed injury. *McBride*, 131 S.Ct. at 2636, 180 L.Ed.2d 637 (2011), fn 3; *see also Blankenship*, 8th Dist. Nos. 63070 and 63071, 1993 WL 266919, *4; *Hager v. Norfolk & W. Ry. Co.*, 8th Dist. No. 87553, 2006-Ohio-6580, ¶ 36; *Shepard v. Grand Trunk W.R.R.*, 8th Dist. No. 92711, 2010-Ohio-1853, ¶ 47.

Ohio courts have uniformly held that an expert witness may establish causation without using any particular "magic" words or legal phrases. *See Humphrey*, 10th Dist. No. 88AP - 1094, 1989 WL 61735, *3 (physician's testimony that "it's certainly altogether probable that asbestos had something to do with it" . . . "although not stated in legally precise language, does raise a genuine issue as to the material fact of the proximate cause of appellant's lung cancer"); *Jeffrey*, 10th Dist. Nos. 11AP-492 and 11AP-502, 2013-Ohio-1055, at ¶ 48 (physician's

testimony permitted because “no ‘magic words’ are required, the expert’s testimony, when viewed in its entirety, must [simply] equate to an expression of probability.”(Citations omitted.); *Dingess*, 11th Dist. No.1327, 1987 WL 20082, *1 (physician’s testimony that “prolonged exposure to asbestos could very well result in asbestosis” found sufficient for submission to the jury); *Ochletree*, 11th Dist. No. 2005-T-0015, 2006 WL 533502, at ¶ 43 (physician’s testimony permitted because there is “no requirement that an expert utter any ‘magic language’”).

Here, the Eighth District found that Dr. Rao supplied the appropriate causal link, opining within a reasonable degree of medical certainty that “[a]sbestos dust and diesel fumes and exhaust are known carcinogens, and exposure to these increases the risk of lung cancer substantially . . . occupational exposure to asbestos dust, diesel fumes and exhaust in part contributed to the development of [Mr. Renfrow’s] cancer and eventual death.” *Renfrow*, 8th Dist. No. 98716, 2013-Ohio-1189, at ¶ 26.

Appellant’s reliance upon this Court’s decision in *Ackison*, where this Court considered the statute’s “substantial contributing factor language,” is misplaced. This Court found the definition of the “substantial contributing factor” language to be “consistent with the common law” as it existed at the time of the passage of the Act. *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶ 48. This Court determined that the legislature’s use of the phrase “predominate cause” was ambiguous and not intended as a substantive change in the law regarding causation. *Id.* at ¶ 47. This Court further concluded in *Ackison* that “it does not appear to us that the General Assembly intended a substantive change” in its definition of “substantial contributing factor.” *Id.* Holding that the statutory definition “does not alter the common law as it existed at the time Ackison filed her claim,” this Court acknowledged that the statute leaves the

common law of causation as it found it. *Id.* at ¶ 49. Any departure from that common law would be a substantive change, and contrary to the intent of the legislature. Here, the evidence viewed as a whole satisfies the requirement that the claimant demonstrate that asbestos was a “substantial contributing factor” to the development of the lung cancer. The trial court and the Eighth District correctly directed that Mrs. Renfrow’s FELA claims should be resolved by a jury. Further review of these facts is unwarranted.

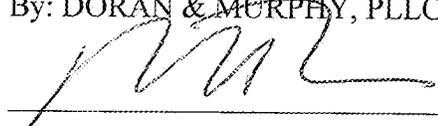
CONCLUSION

The evidence submitted, consisting of Mr. Renfrow’s VA medical records, reports and affidavits, taken together, have confirmed that he suffered from lung cancer and that his exposure to asbestos while working for the railroad has been implicated as a cause of that cancer. The trial court’s decision, as affirmed by the Eighth District, reflects the law in Ohio. There are no issues of public or great general interest here. The instant appeal is a fact-specific inquiry into the issues surrounding Mrs. Renfrow’s FELA claims for occupationally-related lung cancer and the wrongful death of her husband. This Court should deny jurisdiction.

DATED: June 10, 2013

Respectfully submitted,

By: DORAN & MURPHY, PLLC

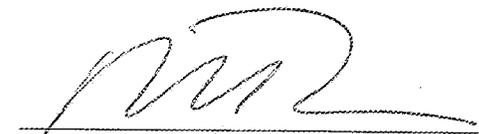


MICHAEL L. TORCELLO, ESQ. (0088466)
CHRISTOPHER M. MURPHY, ESQ. (0074840)
Counsel for Plaintiff-Appellee
1234 Delaware Avenue
Buffalo, NY 14209
(716) 884-2000
(716) 884-2146 (fax)

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE CLEO RENFROW**, as personal representative of the **ESTATE OF GERALD B. RENFROW**, was served via Overnight Mail the 10th day of June, 2013 to the following counsel of record for the Defendant-Appellant:

DAVID A. DAMICO, ESQ.
Burns White LLC
Attorneys for Defendant-Appellant
Four Northshore Ctr.
106 Isabella St.
Pittsburgh, PA 15212



Michael L. Torcello, Esq. (0088466)
Christopher M. Murphy, Esq. (0074840)
Counsel for Plaintiff-Appellee