

ORIGINAL

# The Supreme Court of Ohio

No. 2013-0761

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

Plaintiff-Appellee

vs.

**NORFOLK SOUTHERN RAILWAY COMPANY**

Defendant-Appellant

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On Appeal from the Court of Appeals  
Eighth Appellate District  
Cuyahoga County, Ohio  
Case No. CA 12-098715

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

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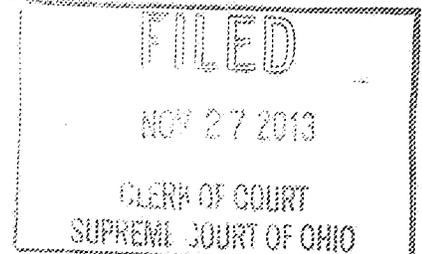
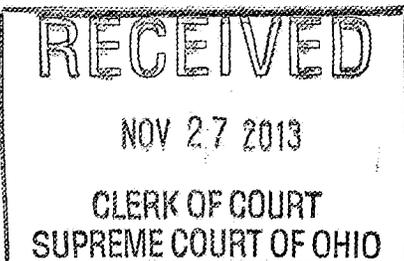


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## INTRODUCTION

This appeal arises at the intersection of the Federal Employers' Liability Act and Ohio's asbestos claims legislation.<sup>1</sup> The principal question to be resolved by this Court is whether an asbestos claimant bringing a lung cancer claim under federal law may be able to comply with the requirements of R.C. 2307.92(C) even where the medical treatment received for that lung cancer was solely through the Veterans' Administration (VA) hospitals, without the benefit of a traditional treating physician. This appeal also asks this Court to reevaluate well-established standards of causation in Ohio common law, as well as under the FELA, and determine whether those standards were properly applied in this case. The Eighth District answered these questions in the affirmative and allowed the asbestos claim of Cleo Renfrow, on behalf of her deceased husband, to avoid administrative dismissal and remain active in Ohio's state courts. In so doing, the decision below allowed the courts of Ohio to remain open to Mrs. Renfrow and preserved her federal and substantive right under the FELA to have a jury decide the claim for her husband's death from occupationally-related lung cancer.

The FELA is a federal law designed solely for the protection of our nation's rail workers. The statute "makes common carrier railroads liable in damages to employees who suffer work-related injuries caused 'in whole or in part' by the railroad's negligence." *Norfolk & Western Ry Co. v. Ayers*, 538 U.S. 135, 140, 123 S.Ct. 1210, 155 L.Ed. 261 (2003). This Court has recognized that "the special features of this statutory negligence action \* \* \* make it significantly different from the ordinary common law negligence action" and "the inquiry in these cases today

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<sup>1</sup>The Federal Employers' Liability Act (FELA) is codified at 45 U.S.C. § 51 *et seq.* Ohio's asbestos claims legislation, commonly referred to as H.B. 292, is codified at R.C. 2307.91 *et seq.* and is attached to Appellant's Brief as Appendix D-F.

rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.” (Citations omitted.) *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 2005-Ohio-5408, 835 N.E.2d 679, ¶ 17. Rail workers do not have the benefit of state workers’ compensation statutes. *See Hilton v. So. Carolina Pub Ry. Comm.*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed. 2d 560 (1991). Consequently, this FELA lawsuit is Mrs. Renfrow’s only means of recovery for the work-related injury suffered by her husband.

FELA jurisdiction is concurrent and “[a]s a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal.” (Citations omitted.) *Hess* at ¶ 18. This Court has noted that “uniform application of the FELA is ‘essential to effectuate its purposes’ and that ‘state laws are not controlling in determining what the incidents of this federal right will be.’” (Citations omitted.) *Id.* Moreover, this Court has recognized that 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.” (Citations omitted.) *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875, N.E.2d 919, ¶ 18.

It is universally recognized that in cases arising under the FELA, “trial by jury is part of the remedy.” (Citations omitted.) *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); *see also Bailey v. Central Vt. Ry.*, 319 U.S. 350, 354, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943)(holding that “[t]he right to a trial by jury is ‘a basic and fundamental feature of our system of federal jurisprudence.’ It is part and parcel of the remedy afforded railroad workers under the Employers’ Liability Act \* \* \* To deprive these

workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief Congress has afforded them.”).

Juxtapose Ohio’s asbestos legislation, R.C. 2307.91 *et seq.*, which has established additional requirements for asbestos claimants who are statutorily defined smokers and have suffered from lung cancer. These claimants or their representatives, after filing a complaint, must submit prima facie evidence in compliance with R.C. 2307.92(C). If they cannot comply with the statute’s requirements, their case becomes inactive and cannot proceed to a jury. The statute requires evidence from a “competent medical authority,” statutorily defined as a treating physician with certain board certifications, that the claimed exposure was a “substantial contributing factor” to the development of the cancer. R.C. 2307.92(C). Absent this demonstration, the case is administratively dismissed and foreclosed from a jury determination until such time – if ever – the required prima facie showing can be made. R.C. 2307.93(C).

At issue here is the Eighth District’s interpretation of R.C. 2307.92(C) as it applies to non-traditional, lung cancer claimants who, because of the nature of their cancer care and treatment, did not have access to traditional treating physicians as contemplated by the statute. Specifically, Gerald Renfrow was a U.S. Air Force veteran and received all of his medical care through the VA hospital system where he “did not have a regular treating doctor, but a variety of doctors and nurse practitioners.” *Renfrow v. Norfolk S. Ry. Co.*, 8th Dist. Cuyahoga No. 98715, 2013-Ohio-1189, ¶ 4. Unfortunately for Mrs. Renfrow, federal regulations have prohibited any of the VA physicians that could be identified from providing any expert causation opinions regarding the cause of her husband’s cancer and death. *See* 38 C.F.R. § 14.8, *see also United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 96 L.Ed. 417 (1951). Here, the VA’s

Office of Regional Counsel specifically rejected Mrs. Renfrow's application to obtain an opinion from one of its physicians regarding the cause of Mr. Renfrow's cancer. (A. 0178-0182).<sup>2</sup>

In sum, Mrs. Renfrow is a non-traditional, FELA asbestos plaintiff whose husband has died from an occupationally-related lung cancer, who cannot produce a report in compliance with R.C. 2307.92(C) from any of her husband's treating physicians because he did not have a traditional treating physician and the medical providers he saw through the VA have been prohibited from giving any opinions whatsoever in this matter. The Eighth District's interpretation of R.C. 2307.92(C), as it applies to individuals receiving treatment through the VA hospital system, allowed the trial court to view Mrs. Renfrow's submissions as a whole and avoid administrative dismissal. *Renfrow* at ¶ 37. Absent that interpretation, this asbestos claim would have been administratively dismissed under the statute and could never be re-activated.

It cannot be overstated that administrative dismissal in Mrs. Renfrow's case *would be a final dismissal*. Because Mr. Renfrow received his medical care solely through the VA, he did not have a traditional treating physician, during his lifetime, from whom a report could be obtained. He will not have any new doctors to comply with the requirements of R.C. 2307.92(C). Without the interpretation posited by the Eighth District and applied by the trial court, Mrs. Renfrow's FELA asbestos claim would be over and the merits of that claim could never be litigated to a jury verdict in Ohio state court. Consequently, Mrs. Renfrow would be denied her right to an open court and to a jury trial, as provided by the Ohio Constitution, as well as denied her substantive right of action under the FELA as set forth by this Court in *Hess* and in

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<sup>2</sup>For ease of reference, citations herein are to the record items reproduced by the Appellant and filed in its Supplemental Appendix. Citations are referenced as (A. \_\_\_).

*Bogle*. This Court has accepted jurisdiction and must now decide whether the precedent set by the Eighth District is “far-reaching and careless” as described by the Appellant or if that precedent has, in fact, preserved the constitutionality of Ohio’s asbestos legislation as it applies to claimants like Cleo Renfrow.

### STATEMENT OF FACTS

#### **I. Procedural History**

Mrs. Renfrow, on behalf of her deceased husband brought the instant action under the FELA, 45 U.S.C. § 51 *et seq.*, and its companion statute, the Locomotive Inspection Act (LIA), 49 U.S.C. § 20701 *et seq.*, for her husband’s lung cancer and eventual death. Mrs. Renfrow alleged that her husband was continuously exposed to various toxic substances while an employee of the railroad, including asbestos and diesel locomotive exhaust, in violation of federal law. She further alleged that the exposure to asbestos and other known carcinogens caused and/or contributed to the development of her husband’s cancer and resulted in his death.

Appellant moved the trial court to administratively dismiss Mrs. Renfrow’s case for failing to comply with the prima facie filing requirements contained in R.C. 2307.92 (C) because she had not demonstrated through a “competent medical authority” that her husband’s exposure to asbestos was a “substantial contributing factor” to the development of his lung cancer and that he had “substantial occupational exposure” to asbestos at the railroad. (A. 0023-0054).

Mrs. Renfrow, through her counsel, responded indicating that her husband was a veteran of the U.S. Air Force and was diagnosed with and treated for his lung cancer only through the VA hospital system. (A. 0055). Mrs. Renfrow further indicated that her deceased husband did not have a regular treating doctor at that facility and was seen there by an ever-changing carousel

of physicians, physician's assistants and nurse practitioners. She further advised Appellant that physicians in the VA medical system are prohibited from serving as expert witnesses in private actions for damages such as this. Specifically, 38 C.F.R. § 14 prohibits employees of the VA from providing expert medical opinions in actions between private litigants to which the United States of America is not a party. 38 C.F.R. § 800, *et seq.* As discussed below, VA's Office of Regional Counsel has explained these regulations and determined that VA personnel are prohibited from providing an expert opinion under these circumstances. (A. 0178-0182).

Consequently, Mrs. Renfrow was unable to produce a "written report" from a treating physician to establish that her husband's exposure to asbestos was a "substantial contributing factor" to the development of the cancer as provided in the statute. Instead, as afforded by the Eighth District in *Sinnott v. Aqua-Chem, Inc.*, 8th Dist. Cuyahoga No. 88062, 2008-Ohio-3806, and *Whipkey v. Aqua Chem*, 8th Dist. Cuyahoga No. 96672, 2012-Ohio-918, Mrs. Renfrow submitted extensive medical records, reports and affidavits to support her claim. (A.0083-0169). The Eighth District previously interpreted the prima facie filing requirements of R.C. 2307.92(C) and allowed a veteran utilizing his veterans' benefits for the treatment of his lung cancer, without a traditional treating doctor, to proceed to a jury trial. *Sinnott* at ¶ 22. This Court declined jurisdiction in that case. *Sinnott v. Aqua-Chem, Inc.*, 120 Ohio St.3d 1490, 2009-Ohio-278, 900 N.E.2d 199.

The Eighth District recognized in *Sinnott* that, because the plaintiff decedent's treating physicians were employed by the VA, his ability to achieve the typical doctor-patient relationship envisioned by R.C. 2307.92 was limited. *See Sinnott*, 8th Dist. Cuyahoga No. 88062, 2008-Ohio-3806, at ¶ 22. Consequently, the court rejected the strict application of the statute's prima

facie filing requirements and carved out an exception for veterans, holding “[t]he 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. The court held that Sinnott “should not be penalized for utilizing his veteran benefits in order to obtain affordable and necessary health care. Although [the decedent] may have lacked a traditional doctor, he was examined by a competent medical doctor, as defined in the statute.” *Id.* at ¶ 24.

The Eighth District recently reaffirmed this decision in *Whipkey*, holding that “the doctor-patient relationship, which is not statutorily defined, varies depending on the treatment context.” (Citations omitted.) *Whipkey*, 8th Dist. Cuyahoga No. 96672, 2012-Ohio-918, at ¶ 22.

Consequently, Mr. Whipkey could not be penalized for seeking the care, diagnosis, and treatment based upon his union benefits. *Id.* at ¶ 20. Notably, in *Whipkey*, there were no references whatsoever to Mr. Whipkey’s asbestos exposure contained within the medical records submitted to the trial court. In that case, as here, the Eighth District determined that in context of the non-traditional claimant, reports from retained experts in pulmonology and occupational medicine, together with medical records detailing the diagnosis, care and treatment of the cancer, satisfied the prima facie filing requirements of the R.C.2307.92(C) – even without the filing of a report from a treating physician that asbestos was a “substantial contributing factor” to the lung cancer. *Id.* at ¶ 19-23.

In holding that a non-traditional plaintiff was not strictly bound by the “competent medical authority” requirement of the statute, the Eighth District has permitted veterans of the United States military, receiving care through the VA medical system to meet the requirements of

the R.C. 2307.92(C) by submitting the medical records relative to their care and treatment as well as an expert opinion that asbestos played a role in the development of the lung cancer. *Sinnott* at ¶ 24; *see also Whipkey* at ¶ 32. Here, the trial court found that Mr. Renfrow's VA medical records, together with the expert report of Dr. Rao and the other affidavit evidence submitted, satisfied the prima facie filing requirements of the statute.

The trial court's order was journalized and appeal followed to the Eighth District. In keeping with its precedent in *Sinnott* and *Whipkey*, the Eighth District affirmed the ruling of the trial court holding:

Along with [a co-worker's] affidavit detailing Mr. Renfrow's asbestos exposure, along with the Veterans' Administration's hospital records documenting his diagnosis of lung cancer, history of smoking, as well as the report of Dr. Rao, a competent medical authority, Mrs. Renfro [sic] provided ample evidence demonstrating that her husband's occupational asbestos exposure was a substantial factor in causing his lung cancer.

The above evidence, when viewed collectively is sufficient to survive an administrative dismissal.

*Renfrow*, 8th Dist. Cuyahoga No. 98715, 2013-Ohio-1189, at ¶ 36-37.

This Court granted jurisdiction. Appellant now argues that the Eighth District precedent is an "impermissible judicial expansion of the statutory language" and that R.C.2307.92(C) requires administrative dismissal. This Court has held that the statutory prima facie requirements are procedural only and may not affect the substantive rights of claimants. *See Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875, N.E.2d 919, at ¶ 15-16. Simply put, Mrs. Renfrow's substantive rights under the Ohio Constitution and under the FELA to have the merits of her claim decided by a jury would be eliminated by the strict application of these requirements to her FELA asbestos claim. The Eighth District construed the statute to avoid that result.

## II. Apposite Facts

Gerald Renfrow worked as a brakeman and conductor for the Appellant railroad for many years throughout Ohio. (A. 0055). In March of 2010, he was diagnosed with inoperable lung cancer that had spread to his brain. He was sixty-eight years old. A veteran of the United States Air Force, Mr. Renfrow's diagnosis, care and treatment took place at various VA hospital facilities, including the Richard L. Roudebush VA Medical Center in Indianapolis, Indiana. (A. 0082-152; 0160-0169). Prior to his diagnosis, Mr. Renfrow suffered from severe headaches, neck pain and balance problems. (A. 0047). A CT scan of the head revealed that he had several lesions on his brain, metastatic to a primary cancer, likely lung cancer. (A. 0161-0162). A VA hospital radiology report indicated showed a large mass in the right upper and lower lobes of the lungs. (A. at 0160). The radiologist concluded this was metastatic lung cancer. *Id.*

Suffering from stage IV lung cancer and brain tumors, Mr. Renfrow underwent extensive radiation and chemotherapy treatments. (A. 0102). By November of 2010 he had relapsed and his VA medical providers indicated that Mr. Renfrow likely had less than six months to live. (A. 0102). Mr. Renfrow was placed on palliative care treatment to control his severe pain until he passed away in hospice care on January 22, 2011. (A. 0158). His death certificate listed the immediate cause of death as lung cancer with brain metastasis. (A. 0158). All of these records were submitted to and reviewed by the trial court. (A. 0083-0152).

Mr. Renfrow's extensive medical records were reviewed by Dr. L.C. Rao, a NIOSH certified B-reader who is also board certified in Internal Medicine and Pulmonary Medicine. (A. 0153-0156). Dr. Rao determined that Mr. Renfrow's occupational asbestos exposure was a

contributing cause of Mr. Renfrow's lung cancer and greatly increased his risk of cancer in conjunction with his history of smoking. Dr. Rao's report was submitted to the trial court.

Dr. Rao opined:

Therefore it is my opinion within a reasonable degree of medical certainty that occupational exposure to asbestos dust, diesel fumes and exhaust in part contributed to the development of his lung cancer and eventual death. Asbestos exposure acted synergistically with the cigarette smoking, diesel fumes and exhaust to greatly increase the risk of lung cancer beyond that expected from either exposure alone.

(A. 0156).

Mrs. Renfrow also submitted evidence in the form of an affidavit from her husband's co-worker, Mr. Darl Rockenbaugh, confirming that Mr. Renfrow was exposed to asbestos on a regular basis during his railroad employment. Mr. Rockenbaugh stated, in pertinent part:

2. Gerald Renfrow was a co-worker of mine on the railroad beginning in 1968. We worked together throughout Indiana, Ohio, Illinois and Michigan.
3. I do have first hand, personal knowledge of the use of asbestos-containing products on the railroad as a result of my over thirty years of railroad work. Gerald and I worked with and around these asbestos-containing products.
4. Our work shifts during this time period were 8 to 16 hours per shift and often worked 7 days per week. The condition of the asbestos insulation was poor from wear and tear and poorly maintained. This insulation was generally dusty and Gerald and I worked with and around these asbestos products and regularly breathed that dust in throughout the 1960's and 1970's.
5. I recall the locomotives that we worked on in the 1960's and 1970's contained a good amount of asbestos insulation throughout the units. The locomotive cabs were heated with hot water and the pipes that fed the radiators were wrapped with white asbestos insulation. These pipes were near the floor level and we would come into contact with this insulation. It became worn, frayed and dusty. The piping throughout the engine

compartment was wrapped with asbestos insulation and Gerald and I would have to walk through the compartment often.

(A. 0157).

The trial court found that all of this evidence – the VA medical records, the report of Dr. Rao and the Affidavit of Mr. Rockenbaugh – taken as a whole, satisfied the prima facie filing requirements of R.C. 2307.92 for a non-traditional asbestos plaintiff like Mrs. Renfrow who was not able to obtain a “substantial contributing factor” report from any physician who treated her husband for his lung cancer due to the nature of the care he received in the VA health system. *See generally Sinnott*, 8th Dist. Cuyahoga No. 88062, 2008-Ohio-3806 , at ¶ 24; *Whipkey*, 8th Dist. Cuyahoga No. 96672, 2012-Ohio-918, at ¶ 32; *see also Hoover v. Norfolk S. Ry. Co.*, 8th Dist. Cuyahoga Nos. 93479, 93689, 2010-Ohio-2894 (holding that the trial court may review the evidence *in toto* and finding that the medical records, reports and affidavits submitted were sufficient to establish a causal link between the plaintiff’s lung cancer and his asbestos exposure even where no treating doctor had issued a “substantial contributing factor” report). The Eighth District affirmed the decision of the trial court. That court’s ruling should not be disturbed.

### LAW AND ARGUMENT

#### **I. Standard of Review and the Applicable Summary Judgment Standard**

In resolving the issue of whether a plaintiff has made the prima facie showing required by R.C. 2307.92, the trial court applies the standard for resolving a motion for summary judgment. R.C. 2307.93(B); *see also Sinnott v. Aqua-Chem*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 28. The statute “directs trial courts to apply the evidentiary standard of summary judgment when making a determination whether the minimum medical standard has been met.”

*Id.* Appellate review of the trial court's decision is *de novo*. *McKee v. A-Best Prod. Co.*, 7th Dist. Mahoning No. 06 MA 164, 2009-Ohio-3348, ¶ 53-54.

Summary judgment may only be granted where “looking at the evidence as a whole, (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party.” *Sinnott*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, at ¶ 29. As this Court has noted, “[i]f a defendant challenges the medical evidence presented by a plaintiff, the evidence must be construed most favorably for the plaintiff and against the defendant.” *Id.* Any doubts as to the sufficiency of the prima facie showing must be resolved in favor of the plaintiff. *See id.*

Given the well-established relaxed standard of proof in cases brought under the FELA, railroad defendants moving for summary judgment face a substantially heavier burden than other parties because “[t]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (2008). In FELA actions, the substantive evidentiary burden is considerably lessened for plaintiffs such that “[a] FELA plaintiff need only present a minimum amount of evidence in order to defeat a summary judgment motion.” *Hines v. Conrail*, 926 F.2d 262, 268 (2d Cir.1991). Jury determinations were intended to be a part of the FELA remedy. *Id.* at 269; *see also Bailey*, 319 U.S. 350, 354, 63 S.Ct. 1062, 87 L.Ed. 1444. Appellant's burden in seeking administrative dismissal in this case is substantially increased by the preference for jury determination of all issues in actions brought under the FELA.

## II. Appellee's Response 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 are Unable to Achieve the Typical Doctor-Patient Relationships Envisioned by the Statute.**

There is no dispute in this case that Mr. Renfrow was a "smoker" as defined by R.C. 2307.91(DD), bringing an asbestos claim for lung cancer under the FELA. This Court has previously determined that "the prima facie filing requirements of R.C. 2307.92 are procedural in nature, and their application to claims brought in state court pursuant to the FELA and the LBIA does not violate the Supremacy Clause, because the provisions do not impose an unnecessary burden on a federally created right." *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, at ¶ 29. Therefore, the Eighth District held that the statute's requirements did apply to this FELA case. *Renfrow*, 8th Dist. Cuyahoga No. 98715, 2013-Ohio-1189, at fn.1. The Eighth District recognized, however, that in a non-traditional setting such as this, 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." (Citations omitted.) *Whipkey*, 8th Dist. Cuyahoga No. 96672, 2012-Ohio-918, at ¶ 22.

Therefore, that court relied on its previous interpretation whereby the statute's prima facie filing requirements may be fulfilled – in the non-traditional plaintiff context – without a written report from a treating physician, through the submission of medical records, reports and other evidence which supports the claim. *Sinnott*, 8th Dist. Cuyahoga No. 88062, 2008-Ohio-3806, at ¶ 23. In *Sinnott*, *Whipkey*, and *Hoover*, the Eighth District approved the trial court's finding where only medical records, expert reports and other information was submitted, and where no

treating doctor authored any “substantial contributing factor” report. *Sinnott* at ¶ 24-25; *Whipkey* at ¶ 32; *Hoover*, 8th Dist. Cuyahoga Nos. 93479, 93689, 2010-Ohio-2894, at ¶ 17. As discussed below, to do otherwise would have impaired the substantive rights of the plaintiffs in those cases and in this one, threatening the constitutionality of the asbestos legislation.

In the instant case, the trial court and the Eighth District reviewed all of the records, reports, and affidavits before it and found that Mrs. Renfrow, whose deceased husband was a veteran of the U.S. Air Force, who obtained affordable care and treatment for his lung cancer through the VA health system, demonstrated a prima facie case for purposes of R.C. 2307.92 without submitting a “substantial contributing factor” report from a treating physician. *Renfrow* at ¶ 37. The Eighth District has crafted this exception recognizing that it may be impossible for a veteran with lung cancer to “achieve the typical doctor-patient relationship envisioned by the statute.” *Sinnott* at ¶ 23. Here, two lower courts have reviewed the evidence *in toto* and determined that Mrs. Renfrow has submitted hospital records from the VA documenting the diagnosis, care and treatment of his lung cancer as well as additional reports and affidavit evidence demonstrating that her husband’s exposure to asbestos was a substantial contributing factor in his cancer. *See Renfrow* at ¶ 37. This factual determination should not be disturbed.

**A. *Sinnott, et al. v. Aqua-Chem, Inc.***

In *Sinnott*, U.S. Army veteran James Sinnott brought an action – prior to the passage of the asbestos legislation – against various asbestos manufactures for lung cancer resulting from his workplace exposure to products containing asbestos. *Sinnott*, 8th Dist. Cuyahoga No. 88062, 2008-Ohio-3806, at ¶ 2-3. After the passage of H.B. 292, Sinnott submitted his VA medical records from his physicians to the trial court, as well as the expert reports of his expert

pulmonologist and occupational medicine physician, as evidence of his compliance with the prima facie case requirements of the statute. *Id.* at ¶ 4.

In that case, the evidence submitted by the plaintiff consisted of his VA hospital records and the reports of two experts, Dr. Robert Altmeyer and Dr. Arthur Frank, establishing that asbestos was a substantial contributing cause of his lung cancer. *Id.* at ¶ 17-18. Notably, *no treating physician authored any expert reports, nor opined that asbestos was a substantial contributing factor to the cancer.* The trial court, as affirmed by the Eighth District, found the opinions of Sinnott’s experts to be “consistent with the hospital pulmonologists as to the causes of James’ lung cancer.” *Id.* at ¶ 19. Carving out an exception to the statute’s prima facie filing requirements for veterans without traditional doctor-patient relationships, the court held:

**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.**

\* \* \*

**[P]art of 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.**

(Emphasis added.) *Id.* at ¶ 22-23.

The evidence that was submitted to the trial court in *Sinnott* included VA hospital records which mentioned asbestos exposure, but, contained no opinion that asbestos exposure was a substantial contributing factor to the development of Sinnott’s cancer. *Id.* at ¶ 16. Additionally, Sinnott submitted the expert reports of Dr. Altmeyer and Dr. Frank who had reviewed Mr. Sinnott’s records for the purposes of rendering an opinion in the ongoing litigation. Dr. Altmeyer, based upon his review of the records, opined that Sinnott’s “tobacco smoking history

and his asbestos exposure/asbestos were both significant contributing causes for the development of his lung cancer.” *Id.* at ¶ 17. Similarly, Dr. Frank, also based upon his review of the medical records, provided his opinion that Sinnott suffered from “cancer of the lung due to his exposure to asbestos in combination with his cigarette smoking.” *Id.* at ¶ 18. Both doctors were expert physicians hired for the purposes of litigation and neither doctor ever rendered any treatment to Mr. Sinnott for his lung cancer. The lower courts found this evidence to be sufficient in meeting the prima facie filing requirements of the statute in this non-traditional context, even where no “substantial contributing factor” report was provided by any treating physician.

Importantly, *Sinnott* was filed prior to the passage of asbestos legislation, therefore, application of the statute to that claim would have been retroactive in nature. *Id.* at ¶ 2. Sinnott’s rights under the retroactivity provision of the Ohio Constitution would have been implicated by a substantive change in the law after the claim had been filed. The Eighth District preserved Sinnott’s substantive rights under the Constitution by interpreting the “competent medical authority” requirement broadly and allowed Mrs. Sinnott to maintain her action even without a report from a treating physician. Notably, this Court declined jurisdiction in *Sinnott*, 120 Ohio St.3d 1490, 2009-Ohio-278, 900 N.E.2d 199.

**B. *Hoover v. Norfolk Southern Railway Co.***

Similarly, in *Hoover*, a railroad worker suffering from lung cancer brought suit against his railroad employer under the FELA, alleging that his exposure to asbestos and diesel locomotive exhaust contributed to his cancer. *Hoover*, 8th Dist. Cuyahoga Nos. 93479, 93689, 2010-Ohio-2894, at ¶ 3. While maintaining his objections to the application of the statute to his FELA case, Hoover submitted prima facie evidence pursuant to R.C. 2307.92(C) in the form of

his medical records, a co-worker affidavit regarding his asbestos exposure and his family doctor's report. *Id.* at ¶ 18. The report of Hoover's family physician, board certified only in family practice and thus, outside the strict "competent medical authority" requirements of the statute, indicated that Hoover's "toxic chemical exposures \* \* \* while working did contribute to his problems with his long-term health." *Id.* Additionally, Hoover submitted medical records from another treating physician indicating that Hoover had been exposed to asbestos, a report from a non-treating expert physician that asbestos had contributed to the cancer and an affidavit from his co-worker detailing the asbestos exposure. *Id.* at ¶ 19-22, 27. No "substantial contributing factor" report was submitted by any treating physician.

In *Hoover*, the trial court concluded that the plaintiff had "submitted evidence to create a genuine issue of material fact to go to a jury to determine, "including records and reports which, when read together, allow this court to procedurally prioritize this case to receive a trial date." *Id.* at ¶ 5. The railroad appealed. The Eighth District reviewed the evidence *de novo* and agreed, holding:

The evidence submitted was sufficient to establish a causal link between Hoover's lung cancer and his asbestos exposure \* \* \* Hoover provided ample evidence demonstrating that his occupational asbestos exposure was a substantial factor in causing his lung cancer.

*Id.* at ¶ 22.

*Hoover*, like *Renfrow*, was a case brought under the FELA. Hoover, like Renfrow, was not able to produce a report from a physician that met the strict statutory definition of "competent medical authority." Since Hoover was deceased and would not be having any additional treating physicians, his substantive rights under the FELA to have his case determined by a jury would

have been impaired by the strict application of the statute's prima facie filing requirements in that case. The Eighth District preserved Hoover's substantive rights under the FELA by interpreting the "competent medical authority" requirement broadly and allowed Mrs. Hoover to maintain her action even without a report from a treating physician. Notably, this Court declined jurisdiction in *Hoover*. *Hoover v. Norfolk S. Ry. Co.*, 127 Ohio St.3d 1504, 2011-Ohio-19, 939 N.E.2d 1267.

C. *Whipkey v. Aqua-Chem, Inc.*

Recently, the Eighth District reaffirmed its decisions in *Sinnott* and in *Hoover* in the case of *Whipkey v. Aqua Chem.*, 8th Dist. Cuyahoga No. 96672, 2012-Ohio-918. Whipkey was filed prior to the passage of the asbestos legislation and, therefore, application of the statute to that claim would have been retroactive application. *Id.* at ¶ 2. In *Whipkey*, after years of appellate litigation, several asbestos manufacturer and supplier defendants moved the trial court to administratively dismiss the plaintiff's lung cancer claim because Mr. Whipkey's estate representative failed to provide a "substantial contributing factor" report from a "competent medical authority" and instead, only produced medical records and expert reports in satisfaction of the statute's prima facie requirements. *Id.* The trial court agreed and administratively dismissed Whipkey's action holding:

[Marilyn's] experts have failed to establish a prima facie case demonstrating that William Whipkey's alleged exposure to asbestos was a substantial contributing factor in causing his lung cancer.

*Id.* at ¶ 5.

Whipkey appealed, arguing that because her deceased husband was a non-traditional asbestos plaintiff, utilizing union benefits to obtain affordable health care, without his own treating pulmonary physician, she could comply with the prima facie filing requirements of R.C.

2307.92(C) by the submission of Mr. Whipkey's medical records and the reports of her experts retained for the purposes of litigation. *Id.* at ¶ 23. Relying on *Sinnott*, Whipkey submitted the report of Dr. Altmeyer concluding based upon his review of the medical records that "asbestos exposure was the primary cause of [Mr. Whipkey's] lung cancer," and the report of Dr. Frank who also reviewed the records and opined that Mr. Whipkey "developed cancer of the lung due to his exposures to asbestos, in combination with his habit of cigarette smoking." *Id.* at ¶ 25-26. Notably, there was no evidence of Mr. Whipkey's exposure to asbestos neither within the medical records, nor submitted by affidavits to the trial court. The only evidence of Mr. Whipkey's asbestos exposure came from the expert reports of Drs. Altmeyer and Frank.

The Eighth District found *Whipkey* analogous to *Sinnott* and re-emphasized that "the doctor-patient relationship, which is not statutorily defined, varies depending on the treatment context." (Citations omitted) *Id.* at ¶ 22. Moreover, where there exists a non-traditional treatment context, where the injured worker must utilize the benefits available to them in order to receive affordable health care, the trial court should review the medical records, expert reports and other information together in making a finding under R.C. 2307.92. *Id.* at ¶ 32. In *Whipkey*, the lower courts found that the non-traditional asbestos plaintiff had established a prima facie case even though no treating doctor had submitted a "substantial contributing factor" report. *Id.*

Since the application of the statute in *Whipkey* was retroactive in nature, Whipkey's rights under the retroactivity provision of the Ohio Constitution would have been impaired by a substantive change in the law after the claim had been filed. The Eighth District recognized this:

When the Whipkeys and the Sinnotts filed their complaint against defendants in 2004, which was before the effective date of H.B.292, there was no requirement of a "diagnosis by a competent medical authority that the exposed person has primary

lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer.” \* \* \* James Sinnott died in August of 2005. Similarly, by the time it had been ruled that H.B. 292 applied to the Whipkeys’ case, William had been dead for nearly two years, which made it impossible fo Marilyn to comply with H.B.292's requirements.

*Id.* at ¶ 28.

The Eighth District preserved Whipkey’s substantive rights under the retroactivity provision of the Ohio Constitution by interpreting the “competent medical authority” requirement broadly and allowing Mrs. Whipkey to maintain her action even without a report from a treating physician. The jurisdiction of this Court was not sought in *Whipkey*.

**D. The Medical Records, Reports and Affidavits Submitted Herein Satisfy the Requirements of the Statute**

The Eighth District has established – now three times in *Sinnott*, *Hoover* and *Whipkey* – that a “substantial contributing factor” report from a treating doctor is not required to establish a prima facie case in the context of the non-traditional, lung cancer plaintiff. *See Sinnott*, 8th Dist. Cuyahoga No. 88062, 2008-Ohio-3806, at ¶ 23; *Hoover*, 8th Dist. Cuyahoga Nos. 93479, 93689, 2010-Ohio-2894, at ¶ 22; *Whipkey*, at ¶ 32. That court has established, and re-established, that the statute is not in place to penalize non-traditional plaintiffs and where these individuals have been “properly diagnosed by competent medical authority personnel and have medical records and other evidence to support [their] claim,” the requirements of R.C. 2307.92 have been satisfied. *Sinnott* at ¶ 23; *see also Rossi v. Consolidated Rail Corporation*, 8th Dist. Cuyahoga No. 94628, 2010-Ohio-5788, ¶ 11 (noting that “a plaintiff who is treated by a team of doctors at a Veterans’ Administration hospital sufficiently demonstrates a doctor-patient relationship” for purposes of the asbestos statute).

Here, Mrs. Renfrow submitted the records and reports of the VA hospitals at which her husband treated for his cancer. (A. 0082-00153; 0160-0169). These records detail the diagnosis, care and treatment of his lung cancer. The VA hospital records also note that Mr. Renfrow had positive “[e]xposure to brake dust/coal dust while working as a brakeman” on the railroad. (A. 0152). Consistent with these records, Mrs. Renfrow also submitted reports of Dr. Rao indicating that Mr. Renfrow’s asbestos exposure was a contributing factor to his lung cancer and his death (A. 0153-0156) and her husband’s Death Certificate. (A. 0158). Additionally, she submitted the affidavit of her husband’s co-worker confirming his occupational exposure to asbestos. (A. 0157). Like James Sinnott, Mrs. Renfrow has “provided ample evidence demonstrating that occupational asbestos exposure was a substantial factor in causing his lung cancer.” *Sinnott* at ¶ 19. All of this evidence, reviewed *in toto* by the trial court was found to be sufficient to establish that the occupational exposure to asbestos suffered by Mr. Renfrow while working for the railroad was a substantial factor in causing the cancer. *See Sinnott* at ¶ 19-23; *Whipkey* at ¶ 32; *Hoover* at ¶ 22. The Plaintiff has complied with the requirements of the statute, as interpreted by the Eighth District. That court’s findings should not be disturbed.

**E. Veterans’ Administration Personnel are Generally Prohibited from Offering Expert Opinions in Private Litigation by Federal Regulations**

As the Eighth District plainly recognized in *Sinnott*, the nature of medical care and treatment through the VA hospital system, while necessary and affordable, limits the ability of a veteran bringing an asbestos claim for lung cancer to obtain a report from a treating physician as contemplated by the statute. *Sinnott* at ¶ 22. As a general rule, VA physicians are precluded from offering opinions in civil cases for a private party by federal regulations:

VA personnel *shall not provide*, with or without compensation, opinion or expert testimony in any legal proceedings concerning official VA information, subjects or activities, except on behalf of the United States or a party represented by the United States Department of Justice.

(Emphasis added.) 38 C.F.R. § 14.808.

These regulations also provide an exception where “exceptional circumstances” exist:

Upon a showing by the requester or court or other appropriate authority that, in light of the factors listed in §14.804, there are exceptional circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Veterans Affairs or to the United States, the responsible VA official designated in §14.807(b)<sup>3</sup> may, in writing, grant special authorization to appear and testify.

*Id.*

Consequently, a VA physician may not provide his or her expert opinion in civil litigation between private parties unless it is determined by VA officials that exceptional circumstances exist and the factors enumerated in 38 C.F.R. § 14.804 have been satisfied. These include, but are not limited to:

§ 14.804. Factors to consider.

In deciding whether to authorize the disclosure of VA records or information or the testimony of VA personnel, VA personnel responsible for making the decision should consider the following types of factors:

- (a) The need to avoid spending the time and money of the United States for private purposes and to conserve the time of VA personnel for conducting their official duties concerning servicing the Nation's veteran population;
- (b) How the testimony or production of records would assist VA in performing its statutory duties;
- (c) Whether the disclosure of the records or presentation of testimony is necessary to prevent the perpetration of fraud or other injustice in the matter in question;

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<sup>3</sup>38 C.F.R. § 14.807(b) designates the Office of the VA General Counsel or Regional Counsel to make this determination.

(d) Whether the demand or request is unduly burdensome or otherwise inappropriate under the applicable court or administrative rules;

\* \* \*

(i) Whether such release or testimony reasonably could be expected to result in the appearance of VA or the Federal government favoring one litigant over another;

(j) Whether such release or testimony reasonably could be expected to result in the appearance of VA or the Federal government endorsing or supporting a position advocated by a party to the proceeding;

(k) The need to prevent the public's possible misconstruction of variances between personal opinions of VA personnel and VA or Federal policy.

(l) The need to minimize VA's possible involvement in issues unrelated to its mission;

38 C.F.R. § 14.804.

Here, Mrs. Renfrow attempted to identify one of the physicians from among her husband's team of physicians, physicians assistants, and nurse practitioners at the various VA facilities where he was treated. Through her attorneys, Mrs. Renfrow contacted the VA to obtain a "substantial contributing factor" report to attempt to comply with R.C. 2307.92 and maintain the lung cancer claim for her deceased husband. (A. 0176). The Office of Regional Counsel, citing 38 C.F.R. § 14.808, advised that Renfrow's physicians would not be allowed to provide any expert opinion absent "exceptional circumstances." (A. 0179). Upon review of the circumstances here, VA counsel applied the factors enumerated in §14.804 and determined that the VA physicians would not be allowed to provide any expert opinion in this matter. VA counsel stated:

My decision is based on a weighing of the factors in §14.804. This litigation involves a dispute between private individuals in which the U.S. Government is not a party. Dr. Lynch's compliance with your request would not assist the VA in performing its statutory duties or minimize VA's possible involvement in issues

unrelated to its mission. VA's waiver of these regulations and compliance with your request could reasonably be expected to result in the appearance of VA favoring one litigant over another and Dr. Lynch's testimony is not necessary to prevent the perpetration of a fraud or other injustice in the matter in question

(A. 0181).

Even though Mrs. Renfrow attempted to identify one of her husband's VA physicians, no expert opinion could be obtained because of the prohibition contained in 38 C.F.R. § 14.808. Notably, a VA decision to deny a physician's testimony can only be overturned if a court finds that decision to be "arbitrary and capricious." *Solomon v. Nassau Cty.*, 274 F.R.D. 455, 458 (E.D.N.Y. 2011); *see also State v. Hudson*, 8th Dist. Cuyahoga No. 91803, 2009-Ohio-6454, ¶ 26. Here, Mrs. Renfrow provided the only evidence available to her given the boundaries of these regulations.

*Amici* argue that VA personnel are at the disposal of Mrs. Renfrow and that the state court here had authority to compel any VA physician's expert opinion testimony. This position is simply wrong. It is well-established that the head of a federal agency has the authority to publish regulations restricting testimony of his subordinates. *See Touhy*, 340 U.S. at 469-470, 71 S.Ct. 416, 96 L.Ed. 417. In *Touhy*, the Supreme Court held that a subordinate official could not be held in contempt for refusing to disclose agency records, which he was prohibited from disclosing by valid federal regulation. *See id.* at 468. "The policy behind such prohibitions on the testimony of agency employees is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business." (Citation omitted.) *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir.1989).

State courts cannot compel testimony from a federal official because “the *Touhy* doctrine is jurisdictional.” *Swett v. Schenk*, 792 F.2d 1447, 1452 (9th Cir.1986). In *Swett*, the Ninth Circuit held that the state court lacked jurisdiction over a National Transportation Safety Board investigator who had declined to give certain testimony pursuant to valid agency regulations. *See id.* at 1449. The court held that the federal court “acquired no jurisdiction on removal” because the state court could not compel the testimony in the first instance. *Id.* at 1451. Moreover, the doctrine of sovereign immunity precludes state courts from compelling federal officials to testify contrary to agency regulation. *See Boron* at 70. In *Boron*, the court also held that federal employees are beyond the subpoena power of state courts, and district courts lack jurisdiction on removal. *Id.* The court emphasized that

**properly promulgated agency regulations implementing federal statutes have the force and effect of federal law which state courts are bound to follow.**

(Emphasis added.) *Id.* at 71 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96, 99 S.Ct. 1705, 1714-15, 60 L.Ed.2d 208 (1979)).

*Amici* cite two cases in support of its argument. Both cases, however, originated in the *federal courts* and have no bearing whatsoever on the issue here, that is, whether or not a *state court* may compel expert testimony of a federal official. In each, federal courts analyzed the federal court’s subpoena power over a federal official and determined that the federal court could invoke jurisdiction. *See Res. Investments, Inc. v. United States*, 93 Fed. Cl. 373, 375 (2010); *Carter v. Mississippi Dep’t of Corrections*, N.D.Miss. No. 4:88cv213-D-B, 1996 U.S. Dist. LEXIS 21118 (May 22, 1996). Contrary to the contention of the *Amici*, the Ohio state court could not have compelled a VA physician to provide an expert opinion. *See Swett*, 792 F.2d at 1452; *see also Boron*, 873 F.2d at 70. A state court subpoena of a VA physician implicates the

Supremacy Clause of the federal Constitution, as well as principles of sovereign immunity. *See Boron*, 873 F.2d at 70. The courts of Ohio are bound by 38 C.F.R. § 14.808, which prohibits VA personnel from offering expert opinion testimony in legal proceedings, absent exceptional circumstances. The VA's Office of Regional Counsel determined there are no exceptional circumstances in this case.

The Eighth District recognized the obstacles facing individuals who were only treated for their lung cancer through the VA. It recognized the problems inherent in obtaining a "substantial contributing factor" report from a treating physician for the non-traditional plaintiff and crafted an exception for veterans like Mr. Renfrow. The lower courts properly interpreted the statute in this case and read Mr. Renfrow's medical records together with the other reports and affidavits to allow Mrs. Renfrow to maintain her action. To do otherwise would be to impair and, in fact, eliminate Mrs. Renfrow's substantive rights under the Ohio Constitution and under FELA.

### **III. Appellee's Response to Proposition of Law No. II:**

#### **The Eighth District's 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).**

Appellant next maintains that the report offered by Dr. Rao does not meet the requirements of the statute because it states that Mr. Renfrow's asbestos exposure "in part contributed to" the development of Mr. Renfrow's cancer. Appellant asks this Court to revise the standard of causation required of this FELA plaintiff in meeting R.C. 2307.92(C)'s prima facie filing requirements despite this Court's prior holdings that the requirements are procedural only and make no substantive change in the law. *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243,

897 N.E.2d 1118, at ¶ 47-49, *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, at ¶

29. Dr. Rao opined:

I have come to the conclusion within a reasonable degree of medical certainty that Mr. Renfrow had inoperable lung cancer with brain metastasis. \* \* \* I have also come to the conclusion, based upon his occupational exposure to asbestos dust and diesel fumes and exhaust, that he was occupationally exposed to these carcinogens. Asbestos dust and diesel fumes and exhaust are known carcinogens, and exposure to these increases the risk of lung cancer substantially. In addition he was a smoker. Smoking increases the risk of lung cancer substantially in the presence of occupational exposure to asbestos dust, diesel fumes and exhaust. Therefore it is my opinion within a reasonable degree of medical certainty that occupational exposure to asbestos dust, diesel fumes and exhaust in part contributed to the development of his lung cancer and eventual death.

*Renfrow*, 8th Dist. Cuyahoga No. 98715, 2013-Ohio-1189, at ¶ 26.

First, all of Dr. Rao's opinions were "to a reasonable degree of medical certainty." *Id.* Second, Dr. Rao opined that asbestos is a known carcinogen that "increases the risk of lung cancer substantially." *Id.* Next, Dr. Rao opined that smoking and asbestos together "increases the risk of lung cancer substantially." *Id.* Finally, it was his opinion that asbestos dust "in part contributed to the development of Mr. Renfrow's lung cancer and eventual death." *Id.* The trial court and the Eighth District found these opinions to be sufficient. 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.* at ¶ 26-27.

#### **A. The Standard for Expert Causation Opinion in Ohio Common Law**

Leaving aside for the moment the proper standard of causation to be applied in a case brought under the FELA, this Court has made clear in *Ackison* that the standard for expert causation testimony for any case brought in the state of Ohio has not been changed by the

passage of Ohio's asbestos legislation. *Ackison* at ¶ 49. Without question, a change to the standard of causation would have been a substantive change, therefore, the statute could not have been applied retroactively in *Ackison*. *Id.* at ¶ 44 (recognizing that “interpreting the term in that way would alter the common-law element of proximate causation and render the statute unconstitutionally retroactive in this case.”) Importantly, and as discussed fully below, a substantive change to the law of causation would have also foreclosed application of the statute to FELA cases entirely. *See Bogle*, at ¶ 16 (recognizing that “FELA/LBIA preempts all substantive state law in the field.”)

Instead, this Court was clear in *Ackison* that the substantive law of causation remained unchanged by the Ohio asbestos legislation and the standard contained in R.C. 2307.91(FF) “is an embodiment of the common law, not an alteration of it.” *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶ 49. This Court continued:

**Because we hold that R.C. 2307.91(FF) does not alter the common law that existed at the time *Ackison* filed her claim, the statute is not unconstitutionally retroactive and may be applied to her pending claim.**

(Emphasis added.) *Id.*

Simply put, the law of causation is the same now as it was prior to the passage of the asbestos legislation. Here, Dr. Rao's opinion does not depart from the common law of expert causation opinion in Ohio. Any expert physician taking the witness stand in any of Ohio's state courtrooms, either prior to the passage of the legislation or today, would get to a jury with the opinion expressed by Dr. Rao. Here, the Eighth District properly held that Dr. Rao “supplied the causal link” between Mr. Renfrow's occupational exposure to asbestos dust and his development of lung cancer. *Renfrow*, 8th Dist. Cuyahoga No. 98715, 2013-Ohio-1189, at ¶ 27.

This decision is consistent with well-established common law regarding expert opinions in Ohio where no specific language or “magic” words are required for medical opinion testimony to be submitted to a jury. *See e.g. Jeffrey v. Marietta Mem’l Hosp*, 10th Dist. Franklin Nos. 11AP-492 and 11AP-502, 2013-Ohio-1055, at ¶ 48; *Ochletree v. Trumbull Memorial Hospital*, 11th Dist. Trumbull No. 2005-T-0015, 2006-Ohio-1006, at ¶ 43; *Verbryke v. Owens Corning Fiberglas Corp.*, 84 Ohio App.3d 388, 616 N.E.2d 1162 (6th Dist 1992); *Humphrey v. Rockwell*, 10th Dist. Franklin No. 88AP-1094, 1989 Ohio App. LEXIS 2253 (June 8, 1989); *Norris v. Babcock and Wilcox*, 48 Ohio App.3d 66, 548 N.E.2d 304 (9th Dist.1988); *Cleveland Electric, Illuminating Co. v. Dingess*, 11<sup>th</sup> Dist. Ashtabula No. 1327, 1987 Ohio App. LEXIS 9569 (Nov. 13, 1987).

For example, in *Dingess*, the Eleventh District addressed this issue. *See Dingess* at 2-3. In that case, Appellant asserted that a physician’s testimony was “legally insufficient to establish the requisite causal connection between appellee’s employment and the claimed occupational disease.” *Id.* The physician testified: “Having heard those facts, Mr. Dingess would have had an extremely high and prolonged exposure to asbestos which *could* very well result in asbestosis.” (Emphasis in original.) *Id.* at 3. The appellate court affirmed this language of causation holding that “the record establishes that there was sufficient evidence on the issue of medical causation to permit the issue to be submitted to the jury. Dr. Wittmann’s testimony made it clear that it was his opinion that appellee’s asbestosis condition resulted from occupational exposure to asbestos, with the requisite degree of medical certainty.” *Id.* at 7.

The Tenth District held similar language was sufficient to establish causation in *Humphrey*. *See Humphrey* at 8. In that case, a physician was allowed to testify that “[b]ased on

those facts and those are the only facts that I base what I say on - I would say there is - it's certainly altogether probable that asbestos had something to do with it." *Id.* at 7. The appellate court held that the doctor's "testimony, although not stated in legally precise language, does raise a genuine issue as to the material fact of proximate cause of the appellant's lung cancer." *Id.* at 8.

In another asbestos exposure case, the Ninth District approved a physician's opinion, to a reasonable degree of medical certainty that "I believe that the exposure, extensive exposure to asbestos as described by you was clearly a contributing cause to the development of the cancer of the larynx that he ultimately died from." *Norris*, 48 Ohio App.3d at 67, 548 N.E.2d 304. That court recognized that "the basic principles of proximate causation are applicable to dual causation of occupational diseases \* \* \* [i]n Ohio, when two factors combine to produce damage or illness, each is a proximate cause." (Citations omitted.) *Id.*; *See also Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 590, 575 N.E.2d 828 (1991)(also holding that the issue of proximate causation "is a factual question to be resolved by the fact-finder."); *Neal v. A-Best Products*, 2nd Dist. Montgomery No. 22026, 2008-Ohio-6968, ¶ 90 (recognizing that "[h]ad *Ackison* not construed \* \* \* [the definition of substantial contributing factor] in the manner it did, H.B. 292 would have effected a substantial change in the law and would have imposed new burdens, by eliminating the concept of dual causation and by requiring trial courts, rather than juries, to decide issues of proximate cause.").

The common law of causation in asbestos cases prior to the passage of the asbestos legislation is exemplified in these cases. Physicians' opinions that asbestos "could very well result in asbestosis," or "had something to do with it," or "was clearly a contributing cause," have all proven sufficient to establish causation prior to the passage of the asbestos legislation.

*Dingess*, 11<sup>th</sup> Dist. Ashtabula No. 1327, 1987 Ohio App. LEXIS 9569; *Humphrey*, 10th Dist. Franklin No. 88AP-1094, 1989 Ohio App. LEXIS 2253; *Norris*, 48 Ohio App.3d 66, 548 N.E.2d 304. They must still be sufficient today.

In *Ackison*, 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.

Appellant’s argument regarding “but-for” causation is only a distraction. In *Ackison*, this Court found that R.C.2307.91(FF)’s “requirement is, in essence, a ‘but for’ test of causation, which is the standard test for establishing cause in fact.” *Id.* at ¶ 48. In referencing the standard test for establishing cause in fact, *Ackison* relied upon *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84-85, 671 N.E.2d 225 (1996), which explained “but for” causation:

The standard test for establishing causation is the sine qua non or “but for” test. Thus, a defendant’s conduct is a cause of the event (or harm) if the event (or harm) would not have occurred but for that conduct; conversely, the defendant’s conduct is not the cause of the event (or harm) if the event (or harm) would have occurred regardless of the conduct. *Prosser & Keeton, Law of Torts (5 Ed. 1984), 266.*

*Id.*

Dr. Rao's opinion in this matter, given to a reasonable degree of medical certainty, was that "occupational exposure to asbestos dust, diesel fumes and exhaust in part contributed to the development of [Mr. Renfrow's] lung cancer and eventual death. Asbestos exposure acted synergistically with the cigarette smoking, diesel fumes and exhaust to greatly increase the risk of lung cancer beyond that expected from either exposure alone." Dr. Rao has opined that he is certain that asbestos contributed to the development of Mr. Renfrow's lung cancer. His opinion is that asbestos contributed to the harm. Therefore, it cannot be said that the harm would have occurred regardless of the asbestos exposure. This *is* "but for" causation.

Dr. Rao also notes that other railroad exposures and Mr. Renfrow's cigarette smoking also played a role in the cancer, noting that Mr. Renfrow's asbestos exposure acted synergistically with cigarette smoking and other exposures in this case. This is exactly the type of dual causation analysis made by this Court in *Murphy*, 61 Ohio St.3d 585, 590, 575 N.E.2d 828, the Ninth District in *Norris*, 48 Ohio App.3d 66, 548 N.E.2d 304, and most recently by the Second District in *Neal*, 2nd Dist. Montgomery No. 22026, 2008-Ohio-6968. Dr. Rao's report fulfils the common law requirements for causation in Ohio.

The evidence viewed as a whole satisfies the requirement that the claimant demonstrate that asbestos was a "but for" cause and a "substantial contributing factor" to the development of the lung cancer. Dr. Rao's opinion comports with the traditional common law standards of causation required of expert opinion in Ohio and virtually everywhere else. The trial court and the Eighth District correctly directed that Mrs. Renfrow met that standard and that her FELA claims should be resolved by a jury.

## B. The Standard for Expert Causation Opinion Under the FELA

*Ackison* requires that the same common law standards of causation that have always been recognized in Ohio are still to be followed. *Ackison* at ¶ 49. In a FELA case, the proper standard for finding causation is clear and well-settled. As recognized by this Court, causation is established where “employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.” *Vance v. Consolidated Rail Corporation*, 73 Ohio St.3d 222, 233, 652 N.E.2d 776 (1995)(citing *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) and holding “plaintiff easily met his burden of proving that Conrail’s negligence played at least a slight part in producing his injury”); *see also Hess*, 106 Ohio St.3d 389, 2005-Ohio-5408, 835 N.E.2d 679 (citing *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943) and “recognizing that “a railroad shall be liable in damages to any employee who suffers work-related injury or death ‘resulting in whole or in part’ from the railroad’s negligence.”); *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, at ¶ 17 (citing *Ayers*, 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261, and recognizing that “[t]o recover for an injury, an employee must prove \* \* \* that the injury resulted in whole or in part from the railroad’s negligence.”).

Without exception, Ohio courts have uniformly followed this direction. *See Hager v. Norfolk and Western RR.*, 8th Dist. Cuyahoga No. 87553, 2006-Ohio-6580, at ¶ 37 (Citations omitted.)(holding that “the fact the court used the words ‘even in the slightest’ imparts the standard that the railroad need not be the sole cause of the injury.”); *Blankenship v. CSX*, 8th Dist. Cuyahoga Nos. 63070, 63071, 1993 Ohio App. LEXIS 3521 (July 15, 1993), at 11-12 (Citations omitted.)(holding that “The standard for proximate cause is broader under FELA than

the common law. Causation is established if the railroad's negligence 'played any part, even the slightest,' in causing the injury."); *Shepard v. Grand Trunk Western Railroad, Inc.*, 8th Dist. Cuyahoga No. 92711, 2010-Ohio-1853 (Emphasis added.)(Citations omitted.) (recognizing that under the FELA "employers conduct must also play *a role* in causing the employee's injury.").

Any doubts regarding the proper standard of causation to be applied in cases brought under the FELA was recently resolved by the Supreme Court of the United States in *CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2632, 180 L.Ed.2d 637 (2011). The Supreme Court has clarified that **"common law formulations of [proximate cause] includ[ing] \* \* \* the 'substantial factor' test"** have no place in FELA litigation. (Emphasis added.) *Id.* at 2642. The Supreme Court has 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."** (Emphasis added.) *Id.* at 2634.

Consequently, the "substantial contributing factor" requirement of the asbestos legislation found in R.C. 2309.92(C), should no longer be applied to FELA cases in any event. The standard which requires FELA plaintiffs to show that their occupational asbestos exposure was "a substantial contributing factor" in producing the injury can not be applied to Mrs. Renfrow's FELA action. The FELA requires only that Plaintiff demonstrate that Decedent's railroad asbestos exposure played any part, no matter how small, in causing his cancer. *Id.* at 2644.

This Court, recognizing that any other finding would be a substantive change in the law and would render the statute unconstitutional, when applied retroactively, has held that standard of causation set forth in R.C. 2307.91(FF) is **"an embodiment of the common law, not an**

alteration of it.” (Emphasis added.) *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶ 49. *Ackison* commands that R.C. 2307.91(FF) leaves the common law as it found it. Any departure from that common law would be a substantive change, and clearly contrary to the intent of the legislature. *Id.* The common law standard of causation in a FELA occupational disease case, the Gerald Renfrow case, is well-settled and could not be clearer: Causation is established where the railroad exposure played any part, even in the slightest, in producing the injury. *Vance*, 73 Ohio St.3d 233, 1995-Ohio-134, 652 N.E.2d 776; *Hess*, 106 Ohio St 3d 389, 2005-Ohio-5408, 835 N.E.2d 679; *Hager*, 8th Dist. Cuyahoga No. 87553, 2006-Ohio-6580, at ¶ 37; *Shepard*, 8th Dist. Cuyahoga No. 92711, 2010-Ohio-1853.

This standard has come down from the Supreme Court of the United States; most recently, Justice Ginsberg stated for the majority:

**[A] railroad caused or contributed to a railroad worker’s injury ‘if [the railroad’s] negligence played a part - no matter how small - in bringing about the injury.’ That indeed is the test Congress prescribed for proximate causation in FELA cases.**

(Citations omitted.)(Emphasis added.) *McBride*, 131 S.Ct. at 2644, 180 L.Ed. 2d 637.

Since any change to the common law standard of causation would mean a substantive change in the law and this statute is procedural only, R.C. 2307.91(FF) can only be interpreted consistently with the existing common law. The records and reports of the VA, consistent with the report of Dr. Rao, opining that the railroad’s negligence in exposing Mr. Renfrow to toxic substances including asbestos, in part, caused his cancer and death, would have been sufficient under the common law. This report must, therefore, be sufficient under the statute. Appellant’s proposition of law should be overruled.

C. *Rossi v. Consolidated Rail Corporation and Holston v. Adience, Inc.*

Appellant devotes scant attention to this issue relying principally on two Eighth District decisions for the proposition that an expert may not opine that asbestos “in part” contributed to the disease for which damages are sought. (*Appellant’s Brief*, at 18-19). *Rossi v. Consolidated Rail Corporation*, 8th Dist. Cuyahoga No. 94628, 2010-Ohio-5788, and *Holston v. Adience, Inc.*, 8th Dist. Cuyahoga No. 93616, 2010-Ohio-2482, are readily distinguished from the matter at hand because the opinions expressed by the physicians in those cases differed from the opinion expressed in this case that, to a reasonable degree of medical certainty, asbestos in part contributed to Mr. Renfrow’s cancer.

In *Rossi*, the plaintiff brought an asbestos claim on behalf of her deceased husband who was a smoker. *Rossi* at ¶ 1-2. In compliance with R.C. 2307.92(C), Mrs. Rossi submitted reports from her husband’s treating physician and from an expert B-reader, who had not treated Mr. Rossi. *Id.* at ¶ 4. The Eighth District found these two reports insufficient to meet the prima facie requirements of the statute. Specifically, as it pertains to the case at bar, Rossi’s treating physician, opined: “I believe that this [asbestos] exposure may have played a role in the development of his lung cancer.” *Id.* at ¶ 5. The Eighth District found the “I believe” and the “may have” language of this report insufficient because it did not state an opinion to a reasonable degree of medical certainty and instead “offered conjecture that cannot suffice to make a prima-face case.” *Id.* at ¶ 6.

The *Renfrow* court properly distinguished this case on its facts finding that Dr. Rao’s opinion “provided the crucial link” between Mr. Renfrow’s exposures and his disease

Unlike, for example, the situation we faced in *Rossi v. Conrail* \* \* \* where decedent’s treating physician’s belief that asbestos exposure may have played a role in the

development of his lung cancer, did not state an opinion to a reasonable degree of medical certainty.

\* \* \*

We also note that the decedent's estate in *Rossi* also offered the opinion of a certified b-reader who conducted a records review of decedent's medical files. \* \* \* [t]he record showed that decedent was consistently treated by a single doctor and was never treated by the B-reader. \* \* \* Unlike the instant case, the decedent in *Rossi* was without the benefit of our pronouncement in *Sinnott* \* \* \*

*Renfrow*, 8th Dist. Cuyahoga No. 98715, 2013-Ohio-1189 at ¶ 27-8; *see also Paul v. Consolidated Rail Corporation*, 8th Dist. Cuyahoga No. 98716, 2013-Ohio-1038, *appeal not allowed*, 136 Ohio St.3d 1473, 2013-Ohio-3790, 993 N.E.2d 778 at ¶20 (holding the expert opinion satisfactory and distinct from flawed opinion in *Rossi v. Consolidated Rail Corp*).

Appellant also relies on *Holston v. Adience, Inc.*, 8th Dist. Cuyahoga No. 93616, 2010-Ohio-2482. There, the court found that the treating doctor's opinion that "I feel that Mr. Holstons [sic] work history and his history of tobacco use directly contributed to his diagnosis of lung cancer," unlike the opinion herein, did not meet the statutory requirements. The Eighth District rejected the use of the phrase, "I feel", holding that the language of Holston's doctor was "another example of conjecture," and that it was "just as inadequate as 'may have' in *Rossi*," therefore, not sufficient to express an opinion to a reasonable degree of medical certainty. *Renfrow* at ¶ 33; *see also Paul*, at ¶ 21 (stating that "[i]n *Holston*, \* \* \* we found the doctors use of the term "I feel" to be insufficient to state an opinion to a reasonable degree of medical certainty.").

The Eighth District has recently explained that *Rossi* and *Holston* "did not create a bright line rule require substantial-contributing-factor opinions to employ magic words or phrases precisely mirroring the statutory language in R.C. 2307.91(FF)." *Paul*, at ¶ 22-23; *see also Renfrow* at ¶ 33. Here, Dr. Rao's opinion, when read together with the extensive medical records submitted and the affidavit of Renfrow's coworker who confirmed Renfrow's asbestos exposure

was sufficient to meet the requirements of the statute. Dr. Rao's opinion is consistent with the common law of expert causation opinion here in Ohio. Moreover, it is consistent with the language of the FELA which requires causation be proven "in whole or in part" as defined by courts around the country, including this Court and the Supreme Court of the United States. Appellant's second Proposition of Law should be overruled.

**IV. Appellee's Substantive Rights Under the FELA and the Ohio Constitution May Not be Impaired by Ohio's Asbestos Legislation**

Because R.C.2307.92 is procedural rather than substantive, it may not be interpreted to impair substantive rights afforded to plaintiffs under federal law, nor those afforded to individuals under the Ohio Constitution. The interpretation of the Eighth District in this case protects the substantive rights of Mrs. Renfrow to maintain her asbestos claim and, at the same time, protects Ohio's asbestos legislation from serious constitutional problems.

Should Mrs. Renfrow's substantive right to action under the FELA be impaired by the operation of R.C. 2307.92, the Supremacy Clause of the federal Constitution is implicated and as applied to the facts of this case, the statute should be found unconstitutional. This Court has already held, in *Bogle*, that no substantive rights would be impaired by the application of the statute, therefore the statute could be applied to FELA plaintiffs without offending that provision. *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919 at ¶ 29. In this case, however, absent the interpretation of the Eighth District, Mrs. Renfrow could never proceed with her case unless one of her husband's VA treating physicians provided an expert opinion to support her claim. At the same time, VA physicians are prohibited by federal regulations from providing expert opinions of that nature. In this case, administrative dismissal would be final dismissal and

Mrs. Renfrow's substantive right under the FELA to have her case decided by a jury would have been eliminated.

In addition to her federal right to maintain an action under the FELA, Mrs. Renfrow enjoys important rights under the Ohio Constitution. The Constitution provides her with a right to an open court, a right to a meaningful and timely remedy and a right to have her claims tried to a jury. Without the interpretation posited by the Court of Appeals, the administrative dismissal of her asbestos claim – a dismissal that could never be re-activated – would eliminate those rights as they apply to Mrs. Renfrow in this case.

**A. Appellee's Substantive Rights Under the FELA May Not be Impaired by Ohio's Asbestos Legislation**

The instant asbestos claim is made under the FELA. For more than 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 v. Thompson*, 337 U.S. 163, 186, 69 S.Ct. 1018, 93 L.Ed.1282 (1949). The *Urie* Court held, "[i]n 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 lightening." *Id.*; see also *Ayers*, 538 U.S. at 148, 154, 123 S.Ct. 1210, 155 L.Ed.2d 261 (recognizing that "asbestosis is a cognizable injury under the FELA" and "[t]here is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related lung cancer.")

**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.” *Ayers* at 145 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994)). 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. *See Gottshall* at 542. The general congressional intent to promote liberal recovery for injured workers is well-established. *Id.*; *see also Ayers* at 145.

It has been long recognized that the FELA “was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed 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.” (Citation omitted.) *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 93 L.Ed. 497 (1949) (Douglas, J., concurring).

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 (1917). 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. at 150, 37 S.Ct. 546, 61 L.Ed.1045 (1916).

Accordingly, for almost one hundred years, it has been an overriding principle of FELA jurisprudence, emphasized repeatedly by the Supreme Court of the United States and well-recognized here in Ohio, that “a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice.” *Norfolk S. RR v. Ferebee*, 238 U.S. 269, 273, 35 S.Ct. 781, 59 L.Ed.1303 (1915); *see also South Buffalo Rail Company v. Ahern*, 344 U.S. 367, 372, 73 S.Ct. 340, 97 L.Ed. 395 (1952) (“Peculiarities of local law may not gnaw at rights rooted in federal legislation.”); *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875, N.E.2d 919 at ¶ 18 (“[P]rocedural 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.”); *Vance*, 8th Dist. Cuyahoga No. 63806, 1993 Ohio App. LEXIS 5351, 11 (Nov. 10, 1993) (“The FELA supersedes both common law and any state law which relates to the liability of railroads for injury to their employees.”)

## **2. The FELA Grants a Substantive Right of Action to Rail Workers**

The FELA has conferred upon railroad employees a substantive right of action for occupational injuries caused, in any part, by the negligence of the railroad, which may not be impaired by the application of state procedure. *Urie*, 337 U.S. at 180, 69 S.Ct. 1018, 93 L.Ed. 1282. 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.” *Dice v. Akron, Canton and Youngstown Railroad Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398 (1952) (citing *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157 (1931); *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 759 (2d. Cir.1946)). 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. *See Urie*, 337 U.S. at 180, 69 S.Ct. 1018, 93 L.Ed. 1282 (silicosis); *Ayers*, 538 U.S. at 148, 123 S.Ct. 1210, 155 L.Ed.2d 261 (asbestosis, lung cancer).

### 3. State Procedure May Not Impair Substantive Rights of FELA Plaintiffs

This Court is well-aware that 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*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919 at ¶ 18 (quoting *Davis v. Wechsler*, 26 U.S. 22, 24, 44 S.Ct.13, 68 L.Ed.143(1923)). Significant to the case at bar, state procedure may not “bear upon [a railroad worker’s] substantive right to recover.” *Id.* at ¶ 24 (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285(1994)).

Any state law that impairs these substantive rights would be preempted under the Supremacy Clause of the federal Constitution. *Id.* at ¶ 6. “The clause grants Congress the power to preempt state laws.” *Id.* This Court has already held, in *Bogle*, that no substantive rights would be impaired by the application of the statute, therefore the statute could be applied to FELA plaintiffs without offending that provision. *Bogle* at ¶ 29. *Bogle*, however, was a “case involv[ing] field preemption,” where this Court recognized that although Congress did “‘intend to occupy the field’ when it passed the FELA \* \* \* ‘FELA cases adjudicated in state courts are subject to state procedural rules,’” so long as those rules do not operate to impair substantive rights of FELA plaintiffs. (Citations omitted.) *Id.* at ¶ 8.

Here, however, absent the interpretation of the Eighth District, this state’s procedural rule would be in direct conflict with purpose of the FELA, presenting a problem of conflict

preemption rather than the field preemption of *Bogle*. This Court has recognized that “Congress preempts state law when a state law actually conflicts with a federal law, i.e., ‘where it is impossible for a private party to comply with both state and federal requirements.’” (Citations omitted.) *Id.* at ¶ 7. In this case, it would be impossible for Mrs. Renfrow to proceed with her FELA asbestos claim unless an expert opinion could be obtained from the VA treating physicians who are prohibited by federal regulations from providing expert opinions in civil litigation. 38 C.F.R. § 14.808, *infra*, p. 23-4. Administrative dismissal of this case would be final dismissal and Mrs. Renfrow’s substantive right under the FELA to have her case decided by a jury would have been eliminated.

This Court has twice held that the prima facie filing requirements of the asbestos statute are procedural only and place no substantive burdens on claimants. *Ackison*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118; *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919 at ¶ 16. In the case at bar, these requirements cannot be interpreted so as to impair the substantive rights of Cleo Renfrow to proceed with her FELA action in Ohio state court. The narrow interpretation of the statute urged by the Appellant without question would impair her substantive, federal right to maintain her cause of action for exposure to asbestos and the disease that resulted. Mr. Renfrow is dead and will not be getting any sicker. He will not have any new doctors or new test results to offer in compliance with the prima facie requirements of the statute. Under federal regulations, the VA doctors that he did have while he was alive cannot offer any expert opinion regarding the cause of Mr. Renfrow’s cancer. Absent the Eighth District’s interpretation, Mrs. Renfrow can never meet the prima facie requirements R.C. 2307.92(C) and her cause of action for asbestos-related illness can never be litigated in Ohio state court.

The FELA was enacted so that rail carriers, not rail employees, would bear the risk of injury. *Gottshall*, 512 U.S. at 542, 114 S.Ct. 2396, 129 L.Ed.2d 427. This federal remedy “shifted part of the ‘human overhead’ of doing business from employees to their employers.” (Citations omitted.) *Id.* The strict interpretation of R.C.2307.92(C) proffered by the Appellant seeks to shift that burden back to Mrs. Renfrow. Her right to proceed with her federally-created cause of action for lung cancer, as it relates to his railroad exposure to asbestos and diesel exhaust, is a substantive right that may not be impeded by this state’s procedural rules. As this Court has already observed, state procedure may not “operate to impair a claimant’s ability to enforce a federal right or cause of action.” *Bogle* at ¶ 18.

**B. Appellee’s Substantive Rights Under the Ohio Constitution May Not be Impaired by Ohio’s Asbestos Legislation**

The enactments of the General Assembly enjoy a presumed constitutionality. *State v. Sinito*, 43 Ohio St.2d 98, 330 N.E. 2d 896 (1975). Because of this presumption, Ohio courts are obligated to “liberally construe a statute to save it from constitutional infirmities.” *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E. 2d 59 (1955); *see also Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682 (12th Dist.). Here, the Eighth District has done exactly that and interpreted the statute in a manner in which the constitutionality of the statute – along with the substantive rights of Mrs. Renfrow – remains preserved.

Should this Court decline to adopt the solution reached by the Court of Appeals, Ohio’s asbestos legislation should be found unconstitutional as applied to the specific facts of Mrs. Renfrow’s case. “A party may challenge a statute as unconstitutional on its face or as applied to a particular set of facts.” *Harold v. Collier*, 2005-Ohio-5334 at ¶ 37, 107 Ohio St.3d 44 (citing *Belden v. Union Cent. Life Ins. Co.*, 144 Ohio St. 329, 55 N.E.2d 629 (1944), syllabus). When

reviewing whether a statute violates fundamental rights when applied to a certain set of facts, the challenger must present clear and convincing evidence of unconstitutionality under a strict scrutiny standard review. *Id.* (citing *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 633 N.E.2d 504 (1994)). “A statute that infringes on a fundamental right is unconstitutional unless the statute is narrowly tailored to promote a compelling governmental interest.” *Id.* (citing *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003)).

The Ohio Constitution provides Mrs. Renfrow with certain rights that the General Assembly may not abridge. Without the Eighth District’s allowance of an *in toto* review of relevant evidence, the asbestos statute would close the court house doors to her, deny her a remedy and keep her claims from the purview of a jury - all contrary to the guarantees she is afforded in Sections 5 and 16, Article I of the Ohio Constitution.

**1. Article I, Section 16 - Right to Remedy and Open Courts**

Section 16 of Article I guarantees that the courts of Ohio are open to every person to seek remedy for injuries done to his land, goods, person or reputation. Oh. Const. Art. I, §16. This Court has previously determined that, pursuant to this Section, “legislative enactments may restrict individual rights only ‘by due course of law,’ a guarantee equivalent to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *Groche v. GMC*, 117 Ohio St.3d 192, 210, 2008-Ohio-546 (2008)(citing *Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d 193, 199, 551 N.E.2d 938). This section further guarantees that justice shall be administered without denial or delay, and that “the opportunity for such remedy [be] granted at a meaningful time and in a meaningful manner.” *Sedar* at 193.

“A statute need not ‘completely abolish the right to open courts’ to run afoul of Section 16.” *Stetter v. R. J. Corman Derailment Servs., LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, at 42. A statute that is repugnant to the Open Courts Clause is one “so unreasonable and excessive that the chance of recovery of damages \* \* \* is virtually zero.” *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298, 306. As such, this Court has previously determined that this section of the Constitution prohibits “statutes that effectively prevent individuals from pursuing relief for their injuries.” *Id.* (citing *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466, 1994-Ohio-322; *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 60-61, 514 N.E.2d 709). This Court has also previously invalidated such legislation where there was a “serious infringement of a clearly preexisting right to bring suit.” *Stetter* at ¶ 42 (citing *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 355, 1994-Ohio-368).

If not for Ohio’s asbestos legislation, Mrs. Renfrow’s FELA claim would proceed in the Ohio courts to obtain a remedy. The statute, as Appellant would interpret it, serves to block Mrs. Renfrow’s ability to seek a meaningful, timely remedy by administratively dismissing her case. In her case, this is final dismissal. The VA provided Mr. Renfrow with medical care in a manner different from the typical doctor-patient relationship enjoyed by those who get their care outside of the VA. As a result of her husband receiving this necessary and affordable care, Mrs. Renfrow is foreclosed from obtaining the type of evidence required by R.C.2307.92. Without the Eighth District’s interpretation, the statute would require Mrs. Renfrow to produce an expert opinion by a VA physician, who is prohibited by federal regulations from giving that opinion. Thus, the impact of Ohio’s asbestos legislation on Mrs. Renfrow would be to effectively bar her claims from active resolution in the courts of Ohio because her husband took advantage of his

federally-granted right to healthcare through the Veterans' Administration. Ohio's asbestos legislation would be unconstitutional as applied to Mrs. Renfrow because it would effectively bar her from utilizing her constitutionally-guaranteed opportunity to seek a remedy in Ohio's courts.

To argue that an administrative dismissal under the asbestos statute is "without prejudice," is disingenuous at best. Here, administrative dismissal is a final dismissal. Individuals who can never fulfill the requirements of R.C.2307.92 are placed on an inactive docket indefinitely. There is no statutory provision for the re-activation of that case unless the required prima facie evidence is proffered. In this case, that can never happen due to the nature of the care Mr. Renfrow received at the VA. This would represent a "serious infringement to a pre-existing right to bring suit" and foreclose the possibility that any asbestos claimant treating with the VA would be able to survive a motion for administrative dismissal and subsequently proceed to any sort of "meaningful" review in state court. *Stetter* at ¶ 42.

The Eighth District's interpretation saves this statute from being unconstitutional. If not for this interpretation, potential veteran claimants would be forced to attempt to seek out a physician outside the bounds of his federally-provided health insurance, try to form a doctor-patient relationship, pay for the treatment out-of-pocket, only for the purpose of pursuing litigation. Where the veteran dies without accomplishing this, his dependents are left without a remedy. The Eighth District recognized that the Ohio asbestos statute would unfairly penalize veterans of the U.S. military as well as other non-traditional plaintiffs and eliminate their access to a meaningful, timely remedy. Should this Court find that action impermissible, it should also find that R.C.2307.92 is unconstitutional as applied to Mrs. Renfrow.

## **2. Article I, Section 5 - Right to a Jury Trial**

Rejection of the Eighth District's statutory interpretation in this case would also implicate Mrs. Renfrow's right to a jury trial under the Ohio Constitution. This Court has long held that

the right to a jury trial does not involve merely a question of procedure. The right to a jury trial derives from Magna Charta. It is reasserted both in the Constitution of the United States and in the Constitution of the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege.

*Sorrell*, 69 Ohio St.3d 415, 633 N.E.2d 504 (1994)(citing *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 188 N.E. 1 (1933)).

Article I, Section 5 of the Ohio Constitution specifically reasserts the right of a trial by jury for civil cases. The right is explained in no uncertain terms: "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Oh. Const. Art. I, §5. The most important word in this clause is, without a doubt, "inviolate." This word meaning "free from substantial impairment" is pivotal to understanding the clause as a whole. In conjunction with the rest of the clause, "inviolate" should be read as a "forceful way of saying that the right to a trial by jury should in no way be infringed." *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 332, 1996-Ohio-137 (Douglas, J., dissenting).

The right to trial by jury is a substantive right, granting parties in a civil case the right to have a jury determine all of the issues in the case. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948; *see also Sorrell* at 415; *Miller v. Wikel Mfg. Co.*, 46 Ohio St.3d 76, 545 N.E.2d 76 (1989)(Douglas, J., concurring in part and dissenting in part). Significantly,

the founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. \* \* \* Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries

represent the layman's common sense \* \* \* and thus keep the administration of law in accord with the wishes and feelings of the community.

*Gladon* at 332 (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343-344, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)(Rehnquist, J., dissenting)).

This Court has already determined that the jury trial right provided by the State Constitution is so fundamentally important that “[a]ny law that prevents the jury from completing [its fact finding function] or allows another entity to substitute its own findings of fact is unconstitutional.” *Arbino* at 475. “The right to a trial by jury, where it exists, cannot be compromised. To compromise that right in any manner would crack the foundation of our individual liberties.” *Gladon* at 340. The right to a trial by jury “is beyond the power of the General Assembly to impair the right, or materially change its character; that the number of jurors cannot be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors.” *Arbino* at 502 (O’Donnell, J., dissenting)(citing *Work v. State*, 2 Ohio St. 296, 306 (1853)). “A legislative act impairing it would be clearly unconstitutional.” *Arbino* at 503 (O’Donnell, J., dissenting)(citing *Gibbs v. Girard*, 88 Ohio St. 34, 102 N.E. 299 (1913)).

While the right to a jury trial is fundamental, it is not absolute. (Citations omitted.) *Arbino* at 474. Rather, Article I, Section 5, guarantees the right to a jury trial only in cases where the cause of action existed in common law at the time Section 5 was ratified. (Citations omitted.) *Id.* “It is settled that the right applies to both negligence and intentional-tort actions” (Citations omitted.) *Id.* The instant case is a negligence action. Keeping important factual determinations from the jury's view, the Ohio asbestos statute without the Eighth District's interpretation would infringe on Mrs. Renfrow's ability to present and have the facts of her case determined by a jury.

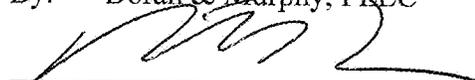
Not only would this be contrary to hundreds of year of state and federal jurisprudence, it would be unconstitutional as applied to this case.

### CONCLUSION

The evidence submitted in this case, 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 was a cause of that lung cancer. The trial court's ruling accurately reflected the law in Ohio. The Eighth District has interpreted R.C. 2307.92 (C) to preserve the rights of Mrs. Renfrow under federal law and under the Ohio Constitution. In so doing, it has also protected the constitutionality of Ohio's asbestos legislation. This Court should not retreat from an interpretation of the law that insures individual rights while maintaining the legislative intent of the asbestos statute. Mrs. Renfrow respectfully requests that this Court affirm the rulings of the courts below and deny the instant appeal in all respects.

DATED: November 26, 2013  
Buffalo, New York

Respectfully submitted,  
By: Doran & Murphy, PLLC



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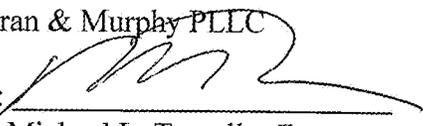
CERTIFICATE OF SERVICE

In accordance with Ohio Rules of Appellate Procedure, the undersigned certifies that a copy of the foregoing **MERIT BRIEF OF APPELLEE CLEO J. RENFROW as personal representative of the ESTATE OF GERALD B. RENFROW** was served VIA Overnight Mail, on the 26<sup>th</sup> day of November, 2013 to the following counsel of record for the Defendant-Appellant:

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