

*In the Supreme Court of Ohio*

**CLEO J. RENFROW**

PLAINTIFF-APPELLEE

vs.

**NORFOLK SOUTHERN RAILWAY COMPANY**

DEFENDANT-APPELLANT

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO  
CASE NO. 98715

**REPLY BRIEF OF DEFENDANT-APPELLANT  
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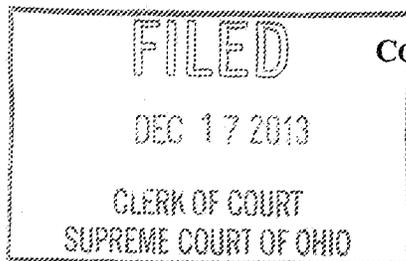
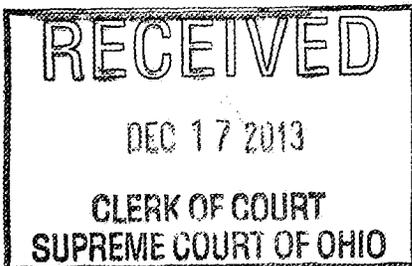
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## SUMMARY OF ARGUMENT

Appellee's myriad arguments urging this Court to adopt the "VA exception" to the competent medical authority requirement of HB 292 are, at best, unpersuasive, and, at worst, disingenuous. First, Appellee asks this Court to accept that due to the nature of care at VA facilities, there is no ability for a plaintiff to identify a treating physician who has achieved a "typical" doctor-patient relationship and who can provide the required written report for purposes of HB 292. Neither Appellee (nor, indeed, the Eighth District) has ever explained what a "typical" doctor patient relationship is. The simple fact is that Mr. Renfrow had a "doctor-patient" relationship with the VA doctors because they treated him. In any event, the whole notion that it is somehow impossible for an asbestos plaintiff subject to the requirements of HB 292 to achieve a doctor-patient relationship is belied by the evidence in this case. Appellee identified a specific VA physician to provide a report that, would, presumably, establish that Mr. Renfrow's exposure to asbestos was a substantial contributing factor in causing his lung cancer.

Next, Appellee argues that it is somehow impossible for a plaintiff who is treated in the VA system to obtain a report from a treating physician since VA regulations prohibit its physicians from disclosing testimony or opinions in actions involving private litigants absent a showing of exceptional circumstances. This is a classic red herring. First, Appellee cannot credibly claim that she made a good faith effort to obtain an opinion from a treating physician when she failed to appeal, as was her right, the VA's initial determination. Second, all of this presumes that the VA doctor would have given Appellee an opinion that she could have used to meet the substantial contributing factor test. Given the complete lack of medical record evidence of asbestos exposure, it is difficult to see how any treating physician would be able to offer an

opinion that asbestos was a “substantial contributing factor” in causing Mr. Renfrow’s lung cancer.

Knowing that that the opinion offered in this case by Dr. Rao, a non-treating physician, is specifically not permitted by HB 292, Appellee also contends that his opinion is acceptable here, and that, incredibly, Norfolk Southern’s focus on the “but for” test is a “distraction.” To the contrary, it is Appellee who attempts to divert the Court’s attention from the fact that Dr. Rao’s opinion is barred precisely because he could not say to a reasonable degree of medical certainty that without the exposure to asbestos exposure Mr. Renfrow would not have developed lung cancer.

Appellee also advances a number of arguments suggesting that, without the application of a VA exception, HB 292, as applied here, violates provisions of the federal and Ohio state constitutions. Appellee raises these arguments as alternative reasons to affirm the Eighth District’s decision. These arguments, however, fail on a number of levels. First and foremost, Appellee failed to file a notice of cross-appeal. Therefore, the Court is precluded from considering any of these arguments. Even if these arguments could be considered (which Norfolk Southern does not concede), none have merit. This Court has already held that HB 292 is a procedural statute that does not violate a plaintiff’s substantive rights under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. Sec. 45, *et seq*; *see Norfolk S. Ry. Co. v. Bogle*, 15 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919. However, Appellee argues that *CSX Transportation, Inc. v. McBride*, 131 S.Ct 2630 (2011) somehow “changed” the causation requirements for FELA actions so as to render inoperative the cases from Ohio interpreting the “substantial contributing factor” requirements of HB 292. This argument is easily disposed of, since *McBride* includes a “but for” causation standard. Further, the substantial contributing

factor requirement of HB 292 deals with medical causation, not legal causation in FELA cases which was addressed in *McBride*. Because the issue in this appeal concerns the “but-for” element of the substantial contributing factor test, *McBride* does not come into play. Equally unavailing are Appellee’s state constitutional arguments based on access to courts, the right-to-remedy- provision and right to jury trial, which are raised for the first time here. HB 292’s provisions simply do not bar access to the Ohio courts for asbestos plaintiffs and do not deny a remedy. Indeed, if Appellee here had been able to present evidence of asbestos exposure, along with an opinion from a treating physician that asbestos exposure was a substantial contributing factor in her husband’s lung cancer, there would have been no question that this lawsuit could proceed beyond the administrative dismissal stage. In addition, the operation of HB 292 does not deprive Appellee or other litigants of her right to a jury trial. Because, as Appellee herself acknowledges, a summary judgment standard is applied to the issue of whether a prima facie case has been met, the proper granting of a motion to administratively dismiss without prejudice is akin to the grant of summary judgment; if properly granted, neither one unconstitutionally infringes on the right to a jury trial.

Most fundamentally, and perhaps most tellingly, Appellants do not, and cannot, dispute that nothing in text of HB 292 creates an exception to the competent medical authority requirements for a particular class of plaintiffs. That is precisely what the Eighth District has done. In the end, this type of revision is for the General Assembly, and not the courts. For all of these reasons, the Court must reverse the Eighth District’s decision.

## ARGUMENT

**Proposition of Law No I: The “VA exception” to the “competent medical authority” requirement of H.B. 292 constitutes an impermissible judicial expansion of the statutory language.**

**I      The VA exception to the competent medical authority requirement is not “well established.”**

Appellee concedes that the operative language of HB 292 does not contain any exceptions for “non-traditional plaintiffs” to the competent medical authority requirement. Indeed, this concession is contained in the heading to Appellee’s argument: “The Eighth District’s Interpretation Of The ‘Competent Medical Authority’ Requirement ...” Appellee’s Br., at 13. (Emphasis added).<sup>1</sup> Having made this concession, Appellee inexplicably proceeds to argue that the Eighth District’s interpretation (or, more accurately, revision) of RC 2307.92(C) is “well-established.” *Id.* at 13-20. This statement must be taken with a grain of salt. The non-traditional plaintiff exception has been judicially created by the Eighth District.

In sum, Appellee attempts to use three cases to justify the creation of the “VA exception.” She relies on *Sinnott v. Acqu-Chem, Inc.*, 8<sup>th</sup> Dist. No. 88062, 2008-Ohio-3806, the opinion that originally established the exception; along with *Whipkey v. Acqa-Chem, Inc.*, 8<sup>th</sup> Dist. No. 96672, 2012-Ohio-918, and *Hoover v. Norfolk Southern Railway Co.*, 8<sup>th</sup> Dist. Nos. 93479, 93689, 2010-Ohio-2482, for the proposition 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 patient. Appellee Br., at 20. By no stretch of the imagination can it be said that that the VA exception is well-established in the context of HB 292 asbestos litigation.

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<sup>1</sup> A recent opinion from the Eighth District, *Cook v. NL Industries, Inc.*, 8<sup>th</sup> Dist. Nos. 98911, 99522, 2013-Ohio-5119 (November 21, 2013), confirmed that the VA exception is not to be found anywhere in HB 292, stating that the Eighth District had “craft[ed] a limited exception” to the treating physician requirement. *Cook*, at ¶ 21.

What is well-established is the rule that it is up to the General Assembly, and not the courts, to create exceptions to statutory enactments. *See, e.g., State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St. 3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 26 (“The court of appeals suggests an exception to RC §2323.52 when the person declared a vexatious litigator seeks to appeal the judgment initially declaring him or her to be a vexatious litigator. **But the plain language of RC §2323.52 recognizes no such exception, and courts cannot add one.**”) (Emphasis added); *see also State ex rel. Triplett v. Ross*, 111 Ohio St.3d 231, 2006-Ohio-4705, 855 N.E.2d 1174, ¶ 55 (“It is not a court’s function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation. The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.”).

In any event, Appellee attempts to divert attention from actual issues presented in this appeal (*i.e.*, whether the VA exception is a recognized and valid exception to the competent medical authority requirement), and the obvious fact that the language of the statute itself does not contain an exception for “non-traditional” plaintiffs. She does this by going to considerable lengths to try to pigeon-hole this case into the exception created by the Eighth District in *Sinnott*, an exception that ostensibly is narrowly tailored to avoid “penaliz[ing] veterans or other non-traditional patients who were properly diagnosed by competent medical authority personnel and have the medical records and other evidence to support their claim.” *Sinnott* at ¶23; *see also* Appellee Br., at pp. 14-20. However, even if the VA exception was recognized by this Court (which Norfolk Southern does not concede), the proof presented here would still fall far short of reaching the *prima facie* threshold. In this case, as opposed to *Sinnott*, *Whipkey* and *Hoover*, there is no medical record evidence demonstrating that Mr. Renfrow’s cancer was connected to asbestos. Mr. Renfrow’s records from the VA facility are completely devoid of references to

asbestos exposure, but rather focus on the ill effects of his smoking. Compare this situation with the medical record evidence in *Sinnott*, where the plaintiff's medical records from the VA facilities were littered with references to asbestos exposure. As the Eighth District noted "there are comments, such as, 'patient has significant asbestos exposure in past when works [sic] in a factory for 35-36.' Another report states, 'A: right upper lobe mass with h/o smoking and asbestos exposure make the patient high risk of lung cancer.'" *Sinnott*, at ¶16. Additionally, in explaining its reasoning, the Eighth District noted that "James provided ample evidence demonstrating that his occupational asbestos exposure was a substantial factor in causing his lung cancer. Appellee submitted hospital records documenting his diagnosis of lung cancer, history of smoking, and asbestos exposure." *Id.* at ¶18.

In *Whipkey*, even though the plaintiff there presented documents from a non-treating, physician (which is, by itself, problematical, and, which, as noted earlier, Norfolk Southern does not concede is proper), there was at least some reference to medical evidence of asbestos exposure and its link to his illness:

Dr. Altmeyer, a certified B-Reader, initially opined in 2003 that William's pulmonary function test and chest x-rays demonstrated impairment and interstitial changes consistent with asbestosis. He further opined 'that the asbestosis was caused by the inhalation of asbestos fibers in the work place.' Dr. Altmeyer recommended additional testing because the x-ray revealed a mass in William's left lung. Subsequent tests and a lung biopsy confirmed the malignancy. At Dr. Altmeyer's recommendation, both William and James consulted with other specialists and learned that they had lung cancer. Once the additional medical testing was completed, Dr. Altmeyer reviewed these documents and confirmed his original suspicions.

*Whipkey* at ¶ 24.

In stark contrast, a review of the entirety of Mr. Renfrow's medical records demonstrates that there is not one reference by Mr. Renfrow's VA treating physicians or other personnel at the VA facilities that states that Mr. Renfrow was exposed to asbestos or that asbestos was a cause or

a contributing factor to his lung cancer. What his medical records do reflect is that he was repeatedly counseled by his VA physicians that he must immediately stop smoking and refused to do so. (A. 0036-0054). Thus, even if it could be said that *Sinnott* and its progeny are “well-established,” the fact remains that this case, due to the lack of any medical evidence suggesting exposure to asbestos, should still have been administratively dismissed.

**II. In crafting the VA exception, the Eighth District created its own definition of a “doctor patient relationship” which is not contained in the statute.**

Appellee latches onto language from the Eighth District’s decision in *Sinnott* for the proposition that the VA exception was “crafted ... recognizing that it may be impossible for a veteran with lung cancer to ‘achieve the typical doctor-patient relationship envisioned by the statute.’” Appellee’s Br., at 14 (quoting *Renfrow v. Norfolk S. Ry. Co.*, 8<sup>th</sup> Dist. 98715, 2013-Ohio-1189, at ¶ 37). Neither Appellee, nor the Eighth District, have ever attempted to explain what a “typical” doctor-patient relationship encompasses. The simple fact is that Mr. Renfrow had a doctor patient relationship with the VA doctors because they treated him. Indeed, as pointed out in Norfolk Southern’s opening brief, in *Lownsbury v. VanBuren*, 94 Ohio St.3d 241, 2002-Ohio-646, 762 N.E.2d 354, this Court held that a physician-patient relationship can be established between a physician who “contracts, agrees, undertakes, otherwise assumes the obligation to provide resident supervision at a teaching hospital and a hospital patient with whom the physician had no direct or indirect contact.” Appellant’s Br., at p. 15-16; *see also* Brief of *Amici Curiae*, at p. 9 (“The statute does not require a ‘typical’ doctor-patient relationship, it merely requires the existence of a doctor-patient relationship.”).

The implication created by *Sinnott* and its progeny is that the actual identity of a treating physician or physicians who can meet the statutory requirements is somehow not ascertainable in the context of treatment provided at a VA facility. *See Renfrow, supra*, at ¶ 4 (“During the

course of his treatment at the Veteran's Administration, Mr. Renfrow did not have a regular treating doctor, but a variety of doctors and nurse practitioners." This is a canard. In fact, Appellee identified a specific VA physician, Dr. Thomas Lynch, to provide an opinion comporting with the requirements of RC §2307.92. (A.0179, 0181-82). Indeed, at least one of the VA medical records in this case identifies Dr. Lynch as Mr. Renfrow's "PCP" (primary care physician) (A.0083). Although the VA initially denied this request based on a reading of its regulations, this demonstrates that the fact that a physician or several physicians treat a particular patient in a hospital setting does not inexorably lead to the conclusion that none of them could be identified as a "treating" physician for purposes of the statute. Thus, the very underpinnings of the *Sinnott* exception are simply unfounded.

**III. Appellee's arguments related to VA regulations are without merit.**

Appellee places a great deal of emphasis on VA regulations which supposedly prohibit VA personnel from disclosing testimony or opinions in civil litigation between private litigants absent "exceptional circumstances." Appellee Br., at pp. 21-26. This argument is a red herring. Even if it was demonstrated that VA physicians are prohibited by regulations from offering the necessary report in this matter it would add nothing to the analysis. Under the Eighth District's logic, the inability to obtain a report from a VA physician is a condition precedent of invoking the VA exception in the first place. Appellee's contention that this somehow decreases her burden is nonsensical. Under the Eighth District's rationale, whether a report was unobtainable because Mr. Renfrow lacked a doctor-patient relationship with any particular VA physician, or because such a physician was not authorized to author such a report, only goes to whether the VA exception applies, it does not serve to negate it.

In any event, the entire discussion of the VA regulations misses the point. The Eighth District, in *Sinnott* and *Whipkey*, created an exception for so-called non-traditional plaintiffs who may not be able to identify a treating physician who can provide an opinion concerning the cause of an asbestos plaintiff's lung cancer. Given that, the supposedly futile attempts to obtain a VA "opinion" regarding the cause of Mr. Renfrow's lung cancer are irrelevant. Simply stated, based on the complete lack of medical evidence of asbestos exposure, it cannot be assumed that a competent medical authority would actually provide an opinion complying with the requirements of R.C. §2307.92(B).

Indeed, the record in this case amply illustrates this point. Here, on May 9, 2012, counsel for Appellee sent a signed authorization to the VA Office of Regional Counsel in Indianapolis requesting that Dr. Lynch "complete a Physician's Report to support Mrs. Renfrow's asbestos-related lawsuit." (A.0179).<sup>2</sup> The "Physician's Report" that was included with the authorization "includes language that would reflect Dr. Lynch's expert opinion." (*Id.*). In her letter to Appellee's counsel dated May 14, 2012, VA Regional Counsel stated that Appellee's May 9 letter "contained insufficient information to determine that exceptional circumstances exist in this case which would convince me to authorize Dr. Lynch to complete the Physician's Report." (*Id.*). Regional Counsel sent Appellee's counsel a follow-up letter on May 18, 2012 (A.0181-82), which sets forth in greater detail the reasons for denying the request to have Dr. Lynch complete the Physician's report. The May 18 letter concludes by stating that Appellee could appeal the denial to the VA's General Counsel in Washington, D.C. (A.0182). There is nothing in the record indicating that counsel appealed this decision.

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<sup>2</sup> It does not appear as though the actual authorization and the Physician's Report sent by counsel to the VA are included in the record. What is included are two letters from the VA's regional counsel, dated May 14 and 18, 2012, denying counsel's request.

The totality of circumstances here amply demonstrates the larger point, namely, that Appellee is presuming, with no foundation whatsoever, that Dr. Lynch's opinion would have actually helped her survive a motion to administratively dismiss the complaint. Given the complete lack of medical record evidence of any asbestos exposure, it seems highly likely that Dr. Lynch could not have opined that asbestos exposure caused Mr. Renfrow's lung cancer. In this regard, it is telling that Appellee apparently chose not to administratively appeal the decision denying her request to have Dr. Lynch provide a treating physician report. Perhaps counsel was not interested in obtaining Dr. Lynch's report for the simple reason that his opinion probably could not have linked Mr. Renfrow's lung cancer to asbestos exposure. Appellee's arguments regarding the VA regulations are therefore merely a distraction from the real issues in this appeal; which involve whether the VA exception is valid and whether Appellee's expert's report complied with the requirements of HB 292.

**Proposition of Law No II: Regardless of whether a VA exception applies, the opinion of a competent medical authority must still state that "but for" a plaintiff's exposure to asbestos, he would not have contracted lung cancer.**

**I. Even if Dr. Rao was considered a competent medical authority, his report still fails to satisfy the *prima facie* criteria.**

Since Appellee's medical expert, Dr. L.C. Rao, was admittedly was not a treating physician in this case, it stands to reason that if the Court agrees with Norfolk Southern's argument that there is no recognized VA exception to the competent medical authority requirement, Dr. Rao's opinions regarding the causes of Mr. Renfrow's lung cancer are simply not admissible under HB 292. In these circumstances, to permit Dr. Rao's report to be used as a substitute in place of a report from a competent medical authority would engraft a "substantial compliance" component into the statute which is not there. *See* Appellant's Br., at 17 (there is

no “substantial compliance component” written into HB 292 by the General Assembly) (*citing Bland v. Ajax Magethermic Corp.*, 8<sup>th</sup> Dist. No. 95249, 2011-Ohio-1247, at ¶ 26).

However, even if Dr. Rao’s report were to be considered, Appellee’s arguments in support of its inclusion are meritless. In addressing the specific causation issues raised by Dr. Rao’s report, Appellee inexplicably states that Norfolk Southern’s argument regarding “but for” causation is a “distraction” (Appellee’s Brief at p. 31). Labeling Norfolk Southern’s argument in this way is a brazen attempt to deflect the Court from the issues actually presented in this appeal. Rather than being a distraction, the question of “but for” causation is the exact proposition of law presented to and accepted by this Court for review. Beyond the specific issues before the Court in this appeal, but-for causation is especially critical in smoking lung cancer cases. When a smoker develops lung cancer and also had exposure to asbestos, the exposure to asbestos may or may not be a “but-for” cause of the cancer. Dr. Rao failed to conclude that Mr. Renfrow would have developed lung cancer even if he never smoked. He only states that asbestos “in part contributed” to the development of his lung cancer. Norfolk Southern’s argument on but-for causation does not involve “utilizing magic words” or semantics, it is about how Dr. Rao failed to meet the “but-for” requirement under HB 292.

It was the Eighth District’s opinion in *Renfrow*, and now Appellee, not Norfolk Southern, which inappropriately focused on so-called “magic words.” This can be seen in Appellee’s misleading treatment of *Holston v. Adience, Inc.*, 8<sup>th</sup> Dist. No. 93616, 2010-Ohio-2482. According to Appellee, the treating physician’s opinion in *Holston*, which used the phrase “I feel,” was an “example of conjecture” and “therefore not sufficient to express an opinion as to a reasonable degree of medical certainty.” Appellee’s Br., at 37 (*quoting Renfrow*, at ¶ 33). To the contrary, a reading of the *Holston* opinion reveals that the Court’s determination was not

based on the physician's use of the words "I feel," but rather on the doctor's statement that "Holston's [sic] work history and his history of tobacco use directly contributed to his diagnosis of Lung Cancer." *Holston*, at ¶¶ 6, 13, 19. In other words, the doctor's opinion in *Holston* was inadequate not because he used the words "I feel," but rather because he could not say to a medical certainty that "without the exposure to asbestos the injury would not have occurred." *Id.*, at ¶¶ 2, 19. The report in *Holston* failed precisely because it could not meet the but-for standard set forth in R.C. 2307.91(FF)(2). As was the case in *Holston*, Dr. Rao's opinion in this case leaves open the possibility that the alleged asbestos exposure was not a "but for" cause of Mr. Renfrow's lung cancer.

In the same vein, both Appellee and the *Renfrow* panel have also misread *Rossi v. Consolidated Rail Corp.*, 8<sup>th</sup> Dist. No. 94628, 2010-Ohio-5788. Appellee's Br., at 36-37; *Renfrow*, at ¶¶ 27-28. Although it is true that the *Rossi* panel found fault with the words "may have" in the treating physician's report, *see Rossi*, at ¶ 6 (physician's report stated "I believe that this [asbestos] exposure may have played a role in the development of [decedent's] lung cancer."), the panel actually based its decision on the failure of the treating physician's report to comply with the "but for" standard. Thus, the *Rossi* panel concluded that "[t]he doctor's letter did not state an opinion that Robert's lung cancer would not have occurred without exposure to asbestos nor did it indicate that asbestos was the substantial contributing factor of Robert's lung cancer." *Id.* (Emphasis added). The exact same thing can be said of Dr. Rao's report in this case; it did not say that "but for" Mr. Renfrow's exposure to asbestos he would not have developed lung cancer; it only said that asbestos exposure, along with his smoking, "in part contributed" to his lung cancer. It again leaves open the possibility that asbestos exposure was not a "but for" cause of his illness.

In short, the “but for” standard contained in R.C. 2307.92(FF)(2) has not been met by Appellee’s hired expert Dr. Rao as he only states that asbestos-exposure “in part contributed” to Mr. Renfrow’s lung cancer. To suggest otherwise would complete the process of gutting HB 292 that began when the Eighth District created the VA exception out of whole cloth, thereby permitting litigants to altogether avoid the competent medical authority requirement.

**II. Appellee’s federal and state constitutional arguments, which were not raised in a cross-appeal and which were not discussed by either the trial court or the Eighth District, should be rejected on both procedural and substantive grounds.**

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Appellee devotes the last portion of her brief (Appellee’s Brief, at pp. 39-50), to a discussion of why HB 292, if interpreted to require administrative dismissal of Mrs. Renfrow’s claims, violates the Supremacy Clause of the United States Constitution and various provisions of the State Constitution of Ohio. At the outset, this Court cannot even consider any of these arguments. In particular, with respect to the Ohio state constitutional arguments (Appellee’s Brief, at pp. 44-50), these issues were never before raised at any level in this litigation, either before the trial court or before the Eighth District, and certainly were not discussed in any lower court opinion. With respect to the Supremacy Clause issues, while they were raised by Appellee in front of the trial court and the Eighth District, neither court addressed this issue in their opinions. With respect to all of the constitutional issues, Appellee did not file any cross-appeal in this Court raising these alternative grounds for affirmance.

It is clear that Appellee is precluded from raising any of these constitutional issues before this Court in this appeal, as she failed to file a notice of cross-appeal with respect to the issues. If an appellee fails to file a notice of cross-appeal on a particular issue, the Supreme Court of Ohio will not consider the appellee’s arguments with respect to that issue. *See Rowland v. Collins*, 48 Ohio St. 2d 311, fn. at 312, 358 N.E.2d 582 (1976). This is true even where the appellee asserts

alternative grounds in his or her brief that would support the decision appealed from. *Lenart v. Lindley*, 61 Ohio St. 2d 110, 115, fn 1, 399 N.E. 2d 1222 (1980); *Parton v. Weilnau* (1959), 169 Ohio St. 145, 170-171, 158 N.E.2d 719. This is as it must be. The Court's review "is limited to the propositions of law raised by appellant." *Lenart* at 115, fn. 1. Norfolk Southern, as the appellant, framed and presented two issues of great public importance for this Court's consideration, and the Court granted jurisdiction to determine these two issues. Now, perhaps in hindsight, Appellee introduces issues that were not passed on by the Court of Appeals nor raised in a cross-appeal and, in the case of the Ohio state constitutional issues, never previously raised at any level.<sup>3</sup> In the absence of a cross-appeal raising any of the alternative grounds for affirmance asserted in Appellee's brief, this Court's review is strictly limited to Norfolk Southern's propositions of law, and nothing else. Thus, the constitutional issues are not properly before the Court.

However, even if the Court could review these constitutional issues, none of them have any merit. At the outset, in resolving claims contesting the constitutionality of legislation, it is presumed that the legislation is valid, and the party challenging the validity of the statute bears the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State*

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<sup>3</sup> In response, Appellee may be tempted to rely on the recent amendment to App. R. 3(C)(2) of the Ohio Rules of Appellate Procedure providing that an appellee seeking an affirmance of a trial court order on an alternative ground than the one relied on by the trial court is not required to file a cross-appeal. App. R. 3(C)(2). This argument is unavailing for two reasons. First, by their terms, the Rules of Appellate Procedure apply only to "appeals to courts of appeals from the trial courts of record in Ohio." App. R. 1(A). In contrast, the Supreme Court of Ohio operates by its own set of rules (the Rules of Practice of the Supreme Court of Ohio). Second, as noted above, the Supreme Court's jurisdiction in this case, unlike that of the Courts of Appeals, is wholly discretionary. Thus, in the absence of a cross-appeal raising any of the alternative grounds for affirmance asserted in Appellee's brief, this Court's review is strictly limited to Norfolk Southern's propositions of law, and nothing else.

*ex. rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶ 24. Appellee's constitution-based arguments do not meet this standard.

The first constitutional argument Appellee makes is that without the inclusion of the VA exception in this case, HB 292 would violate the Supremacy Clause of the United States Constitution. The crux of Appellee's argument is that because her action is based on federal law, the Ohio Asbestos statute, if applied here to administratively dismiss her lawsuit without prejudice, unconstitutionally infringes on her rights under the FELA. Acknowledging that, on at least two occasions, this Court has upheld HB 292 as a procedural statute and has held that it does not impair a litigant's substantive rights under the FELA, *see Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919 (HB 292's administrative dismissal procedures do not unconstitutionally infringe on substantive FELA rights), *and Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228, 2008-Ohio-5243, 897 N.E.2d 1118 (HB 292's provisions are procedural, not substantive), Appellee, without expressly seeking to have either opinion overturned, nevertheless argues that that HB 292, as applied, works in this case to deprive her of her federal cause of action.

Appellee's primary argument in this regard is that, pursuant to the United States Supreme Court's decision in *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011), the Ohio courts may no longer apply the "substantial contributing factor" requirement set forth in the *prima facie* filing requirements of RC §§ 2307.92 and 2307.93 to cases brought under the FELA. Appellee Br., at pp. 34-35. This argument lacks merit. At the outset, it must be stressed that all preemption cases, courts operate with the presumption that the states' historic police powers (including administration of their courts) shall not be superseded by federal law unless that is shown to be the clear and manifest purpose of Congress." *City of Gerard v. Youngstown Belt*

*Railway Co.*, 134 Ohio St.3d 79, 83, 2012-Ohio-5370, ¶ 15, 979 N.E.2d 1273 (citing *Rice v. Satna Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The party seeking to overcome the presumption against preemption bears a heavy burden. *City of Gerard*, at ¶ 15 (citing *De Buono v. NYSA-ILAMed & Clinical Serv. Fund*, 520 U.S. 806, 814 (1997)). Appellees' have not come close to meeting their burden. In *McBride*, the Supreme Court resolved a dispute over whether the common law standard for proximate causation applies in FELA actions. The Court held that "[u]nder FELA, injury is 'proximately caused' by the railroad's negligence if that negligence 'played any part ... in ... causing the injury.'" 131 S.Ct. at 2641. In doing so, *McBride* reaffirmed the requirements of FELA as set forth by the United States Supreme Court in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1952). See *McBride*, 131 S. Ct. at 2641 ("[T]he understanding of *Rogers* we here affirm 'has been accepted as settled law for several decades'"). The *McBride* court thus confirmed that under FELA, "juries would have no warrant to award damages in far out 'but for' scenarios" and "judges would have no warrant to submit such cases to the jury." *Id.* at 2643. Further, as the Solicitor General of the United States has explained, see Br. for the United States as *Amicus Curiae* at 16-17, *Weldon v. Norfolk S. Ry. Co.* (No. 07-1152), the "substantial contributing factor" requirement of HB 292 bears on the questions of injury and medical causation. The definition of "substantial contributing factor" in HB 292 incorporates two separate components, which correspond to proximate causation and "but for" causation in fact. See *Ackison, supra*, 120 Ohio St. 3d at 237, 2008-Ohio-5243, 897 N.E.2d 1118, 1128 (interpreting § 2307.91(FF)). The issue in this appeal is whether Appellee has satisfied the "but for" requirement (causation in fact) of the "substantial contributing factor" test. Thus, the United States Supreme Court precedent reaffirms the requirement of "but for" causation and does not call HB 292 into question in this case.

For the first time in this litigation, Appellee claims that, without the utilization VA exception as applied by the trial court and the Eighth District, her lawsuit would be unsustainable, in violation of the “access to courts” guarantee of the Ohio constitution. This argument is frivolous for several reasons. First, as noted by this Court in *Bogle*, the medical evidence criteria of HB 292 are mere administrative procedures, not substantive limits on a plaintiff’s access to the courts, Br., at 45-47. See *Bogle*, at ¶ 17 (HB 292 provisions “do not relate to the rights and duties that give rise to the cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Rather, they pertain to the machinery for carrying on a suit. They are therefore procedural in nature, not substantive.”). In fact, the Eighth District itself recently rejected this very argument in the context of HB 292. In *Cook v. NL Industries, Inc.*, 8th Dist. Nos. 98911, 99522, 2013-Ohio-5119, the Court refused to find that HB 292 violated Ohio’s guarantees of access to the courts, noting that “the statutory provisions of HB 292 do not prevent [plaintiff] from pursuing his claims.” *Id.* at ¶ 35. HB 292 does not in any way restrict the ability of plaintiffs, including Appellee here, to access the Ohio courts to obtain compensation for injuries.

Appellee boldly claims, with no proof, that “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,” which, in turn, denied her access to the courts since she was unable to obtain the opinion of a treating physician which would permit her to present “the type of evidence required by RC 2307.92.” *Id.* at 46. As demonstrated earlier, see *supra* at pp. 8-10, this argument is plain nonsense. The very notion that Mr. Renfrow did not have a “doctor-patient” relationship is belied by the record in this case, since Appellee specifically sought a treating physician opinion from Dr. Thomas Lynch of the VA, who is identified in the medical

records as Mr. Renfrow's primary care physician. (A.0083, 0179). Additionally, as was also discussed earlier, Appellee's entire argument regarding her inability to obtain an opinion from Dr. Lynch by operation of the VA regulations is rendered moot by her failure to exhaust her right to appeal the VA Regional Counsel's initial determination to the VA's General Counsel. (A.0182). It is disingenuous for Appellee to argue that she was prejudiced by the operation of the VA regulations when she did not seek to exhaust her administrative remedies. If anything, this proves the point made earlier in this brief, at p 10, that perhaps Appellee was not interested in obtaining Dr. Lynch's opinion, since he probably could not have given her an opinion that would have complied with the substantial contributing factor standard.<sup>4</sup>

Appellee also makes the argument that HB 292 violates the Ohio Constitution's guarantee of a right "to pursue a remedy" in the Ohio Courts. Appellee Br., at pp. 46-47. This argument was also properly disposed of by the Eighth District in *Cook*. *Cook*, ¶¶ 32-34. HB 292 does not take away a remedy; "it merely affects the method and procedure by which the cause of action is recognized, protected, and enforced, not the cause of action itself." *Id.*, ¶ 33 (citations omitted). Appellee's arguments therefore add nothing to this analysis.

Finally, Appellee briefly argues, again for the first time in this lawsuit, that the operation of the statute serves to violate the Ohio Constitution's guarantee of a right to a jury trial in civil cases. *See* Appellee's Br., at pp. 47-50. Yet Appellee concedes that a trial court is required to employ a "summary judgment" standard when determining whether an asbestos plaintiff's evidence meets the *prima facie* requirements of HB 292. Appellee's Br., at 11-12. Ohio appellate courts have consistently held that where a case is properly disposed of on summary

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<sup>4</sup> In any event, Norfolk Southern disagrees with Appellee that Ohio courts were powerless to compel the VA to allow Dr. Lynch to provide an opinion in this case. In that regard, Appellee adopts the arguments set forth in *Amici's* Brief, at pp. 8-10.

judgment, the right to a jury trial has not been violated. *See, e.g., Bank of New York Mellon v. Ackerman*, 2nd Dist. No. 24390, 2012-Ohio-956, at ¶ 21 (right to jury trial not violated where trial court properly grants summary judgment); *State Farm Mut. Auto Ins. Co. v. Advance Impounding & Recovery Servs.*, 10th Dist. No. 05AP-497, 2006-Ohio-760, ¶ 19 (same); *see also Goodwin v. Columbia Gas of Ohio*, 141 Ohio App.3d 207, 231,750 N.E.2d 1122 (4th Dist. 2000) (holding that grant of summary judgment did not violate right to jury trial, noting that “the Rules of Civil Procedure expressly authorize the summary judgment procedure, and the Ohio Supreme Court has sanctioned the procedure.”). Thus, if a court were to properly administratively dismiss an asbestos claim without prejudice pursuant to HB 292, there is no dispute that such a dismissal implicates a summary judgment standard which would not violate the Ohio Constitution’s jury trial provisions. Thus, this argument is likewise without merit and should be rejected.

### CONCLUSION

Defendant-Appellant Norfolk Southern Railway Company respectfully requests that the Court reverse the decision of the Court of Appeal with directions that the lawsuit be administratively dismissed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that Appellants have served an accurate copy of **REPLY BRIEF OF DEFENDANT-APPELLANT NORFOLK SOUTHERN RAILWAY COMPANY** upon the following individual via U.S. Mail, postage pre-paid, on this 16<sup>th</sup> day of December, 2013:

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