Case No. 2009-1070

# In the Supreme Court of Ohio

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

**Plaintiffs-Appellees,**

**v.**

***Consolidated Rail Corporation, et al.,***

**Defendants-Appellants.**

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

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

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## *I.*
## STATEMENT OF INTEREST OF THE AMICUS CURIAE

Grand Trunk Western Railroad Incorporated ("Grand Trunk") is a railroad carrier that has been involved in asbestos litigation in Cuyahoga County for the past several years. Grand Trunk is appearing as Amicus Curiae and filing this brief in support of Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company ("the Railroads" or "Appellants") in order to preserve the important public policies which the Ohio General Assembly sought to protect in enacting Am. Sub. H.B. No. 292 ("H.B. 292").

The General Assembly enacted H.B. 292 as a procedural mechanism to enhance the ability of courts to manage and organize their dockets by prioritizing those asbestos claimants who can demonstrate impairment. Its purpose is to ease the burdens placed on the trial court dockets by prioritizing asbestos cases where claimants have made the requisite prima facie showing under R.C. 2307.92(B), (C) or (D). If the claimant cannot make a prima facie showing, then the case is administratively dismissed without prejudice. See R.C. 2307.93(C). The Eighth Appellate District's decision in *Riedel v. Consol. Rail Corp.,* 8th Dist. Nos. 91237, 91238 & 91239, 2009-Ohio-1242, erodes the very purpose of H.B. 292.

Grand Trunk's appearance as Amicus Curiae is premised upon the recognition that there is a glaring need for this Court to rectify the Eighth Appellate District's decision which unnecessarily restricts the scope of R.C. 2307.93(C) to the point of undermining the effect of the provisions enacted by H.B. 292. If allowed to stand, the Eighth Appellate District's decision provides a mechanism for claimants to avoid the prima facie requirements of H.B. 292, resulting in duplicative litigation which will further inundate an already overburdened trial docket

specifically created to handle asbestos cases. This should not be the law in Ohio, and Grand Trunk urges this Court to reverse the decision of the Eighth Appellate District.

Grand Trunk specifically urges the Court to hold that when a case is filed seeking redress for pulmonary injuries based on asbestos exposure, the entire case must be administratively dismissed pursuant to R.C. 2307.93(C) when the prima facie requirements of R.C. 2307.92(B), (C) or (D) are unmet, regardless of whether claims premised on non-asbestos exposures are asserted in the action. Adoption of Appellants' Proposition of Law will prevent litigants from circumventing the requirements of H.B. 292 and its sound public policies. Thus, Grand Trunk supports reversal of the Eighth Appellate District's decision.

## *II.*
## STATEMENT OF THE CASE AND FACTS

Plaintiffs-Appellees, Jack E. Riedel, Danny R. Six, and Josephine Weldy, as representative of the estate of Jack M. Weldy ("Appellees"), filed three separate lawsuits against the Railroads under the Federal Employers' Liability Act ("FELA"). Since Appellees included the words "Asbestos Docket" in the complaints' caption, these actions were filed on the special docket created to oversee asbestos cases in Cuyahoga County known as the "Asbestos Docket."

In their complaints, Appellees alleged that during their employment they were exposed to various toxic substances and developed various pulmonary injuries (pneumonconiosis, asbestosis, pleural disease, restrictive lung disease, obstructive lung disease, emphysema, asthma, reactive airway disease, fear of cancer, and lost wages).[1] Separate claims were asserted for exposure to asbestos, diesel exhaust, sand and silica, solvents and other toxic substances.

[1] Josephine Weldy asserted a wrongful death claim for her husband, Jack Weldy, based on his chronic obstructive pulmonary disease and his occupational exposure to diesel exhaust.

Appellees chose to file their occupational disease lawsuits on the Asbestos Docket. But Appellees could not make a prima facie showing with respect to their asbestos claims for asbestosis as required by R.C. 2307.92(B). Trial Judge Harry A. Hanna granted the Railroads' motion for administrative dismissal as to the asbestos-related claims, but severed the claims pertaining to non-asbestos substances. In doing so, Judge Hanna ordered that the non-asbestos exposure claims remain on the Asbestos Docket and "*be scheduled for trial* ***." (See Journalized Order of March 21, 2008.) (Emphasis added.)

The glaring problem with the trial court's ruling is that the claims premised on exposures to non-asbestos substances will be litigated on the Asbestos Docket. Non-asbestos exposure claims asserted on the Asbestos Docket should not be severed from the asbestos-related claim when the plaintiff is alleging that both the asbestos and non-asbestos exposure caused the same pulmonary injury. Instead, the entire case should have been administratively dismissed pursuant to R.C. 2307.93(C).

The Railroads appealed, and the Eighth Appellate District upheld the trial court's decision, stating:

> The administrative dismissal provision is limited to the asbestos-related claims that are specified in R.C. 2307.92. The legislature could have allowed the court to administratively dismiss the entire tort action, but chose to limit R.C. 2307.93(C) to asbestos-related nonmalignancy claims, lung cancer in a smoker and wrongful death claims.

*Riedel* at ¶13. In response to this decision, the Railroads timely filed a discretionary appeal to this Court. On September 16, 2009, jurisdiction was accepted over the case.

This case represents a perfect opportunity for this Court to determine whether an asbestos claim subject to H.B. 292 may be severed from non-asbestos claims arising from the same lawsuit and involving the same indivisible injury. Adopting the approach taken by the Eighth

Appellate District would allow non-asbestos exposure claims to be litigated on the Asbestos Docket. Not only does this subvert the very purpose of H.B. 292, but it undermines the entire purpose of having a specialized docket which is solely dedicated to adjudicating asbestos cases in Cuyahoga County. It also encourages claimants to bypass the rules of random judicial assignment and engage in judge shopping by allowing them to file their multi-exposure complaints on the Asbestos Docket yet escape administrative dismissal of their case under H.B. 292. The Asbestos Docket should not have to bear the additional unnecessary burden of litigating non-asbestos exposure claims. The decision of the Court of Appeals should be reversed.

## *III.* ARGUMENT

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

### A. The Creation of the Asbestos Docket in Cuyahoga County and the Passage of H.B. 292.

The Supreme Court of the United States has characterized asbestos litigation as an "'elephantine mass' of cases that "'defies customary judicial administration.'" *Norfolk & W Ry. Co. v. Ayers,* 538 U.S. 135, 166 (2003). See, also, *CSX Transp., Inc. v. Hensley* (2009), 556 U.S. ____, (commenting on the "systemic difficulties posed by the 'elephantine mass of asbestos cases.'"). Ohio in particular has become one of the most attractive venues for filing asbestos cases. There is no denying that Ohio has been inundated with an overwhelming number of asbestos filings, and is "one of the top five state court venues for asbestos filings." H.B. 292, Section 3(A)(3)(b).

In response to the mass filings of asbestos cases in the Cuyahoga County Court of Common Pleas, the Asbestos Docket was created to secure an efficient resolution of asbestos-related personal injury cases. See *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, ¶2; *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 2007-Ohio-5268. The Asbestos Docket is separate from the common pleas court docket for criminal, civil or probate cases.

The Chief Justice of the Ohio Supreme Court appointed Judge Harry A. Hanna in March 1997 to preside over the Asbestos Docket in the Cuyahoga County Court of Common Pleas. Since March 1997, Judge Hanna has served and continues to preside over the Asbestos Docket. A search on Lexis-Nexis File & Serve reveals that at the inception of Judge Hanna's appointment in 1997, there were approximately 2,000 asbestos cases pending on the Cuyahoga County docket.[1] Steadily and without delay, plaintiffs began flocking to Cuyahoga County resulting in an "unending flood of asbestos cases" being filed. H.B. 292, Section 3(A)(4)(c). The number of asbestos cases pending in the Cuyahoga County Common Pleas Court has grown from approximately 12,800 in 1999 to more than 39,000 with 200 additional cases being filed every month. *In re Special Docket No. 73958* at ¶3.

In January 2001, due to the exponential rate in which asbestos cases were being filed in Cuyahoga County, the Chief Justice of the Ohio Supreme Court appointed Judge Leo M. Spellacy to aid in managing the Asbestos Docket. Pursuant to this Court's directive, Judges Hanna and Spellacy are sitting by assignment to oversee the Asbestos Docket in the Cuyahoga County Court of Common Pleas. As such, the scope of the judges' authority and the Asbestos Docket is limited to the adjudication of asbestos cases, nothing more.

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[1]This estimate of cases is derived from the electronic filing system known as Lexis-Nexis File & Serve, which handles the enormous Asbestos docket in Cuyahoga County.

### 1. The Enactment of H.B. 292

Ohio, especially Cuyahoga County, has become a breeding ground for non-resident plaintiffs to file their asbestos claims, and there appeared to be no end in sight.[3] Indeed, the Ohio General Assembly had become well aware that "[t]he extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts." H.B. 292, Section 3(A)(3).

In 2003, at least 39,000 asbestos personal injury cases were pending in Ohio's state courts. As noted by the Ohio General Assembly, there appeared to be no end in sight because approximately 200 new asbestos cases were being filed every month:

> [T]here are at least thirty-five thousand asbestos personal injury cases pending in Ohio state courts today [in 2003]. If the two hundred thirty-three Ohio state court general jurisdictional judges started trying these asbestos cases today, Ms. [Laura] Hong noted, each would have to try over one hundred and fifty cases before retiring the current docket. That figure conservatively computes to at least one hundred fifty trial weeks or more than three years per judge to retire the current docket.
>
> The current docket, however, continues to increase at an exponential rate. According to Judge Leo Spellacy, one of two Cuyahoga County Common Pleas Court judges appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999 there were approximately twelve thousand eight hundred pending asbestos cases in Cuyahoga County. However, by the end of October 2003, there were over thirty-nine thousand pending asbestos cases. Approximately two hundred new asbestos cases are filed in Cuyahoga County every month.

H.B. 292, Section 3(A)(3)(c), (d) & (e).

Faced with overburdened dockets and an unending number of newly filed asbestos actions, Ohio's courts needed a mechanism to manage the large volume of asbestos cases on their dockets. Finding that "[t]he current asbestos personal injury litigation system is unfair and

[3]Jack E. Riedel is a resident of Niles, Michigan. Danny R. Six is a resident of Princeton, West Virginia, and Jack M. Weldy was a resident of Decatur, Indiana.

inefficient, imposing a severe burden on litigants and taxpayers alike," Ohio's General Assembly enacted H.B. 292. *Bogle* at ¶2.

H.B. 292 went into effect on September 2, 2004. See H.B. 292, 150 Ohio Laws, Part III, 3995. It enacted Ohio Revised Code Sections 2307.91 through 2307.98 to serve four primary purposes:

> In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos- related bankruptcy proceedings; and (4) conserve the scare resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

H.B. 292, Section 3(B).

The General Assembly enacted H.B. 292 as a procedural mechanism to enhance the ability of courts to manage and organize their dockets by prioritizing asbestos-related actions in which the claimant can demonstrate impairment. H.B. 292, Section 3(B). At the same time, H.B. 292 fully preserves the rights of the unimpaired claimants to pursue their asbestos-related claims. Id.

**2. The Procedural Requirements of R.C. 2307.92 and R.C. 2307.93**

R.C. 2307.92(B) sets forth certain minimal medical criteria for non-malignant asbestos cases. It requires evidence that a competent medical authority take a detailed occupational and asbestos exposure history, as well as a detailed medical and smoking history of the claimant. The competent medical authority is required to diagnose an asbestos-related, non-malignant

condition based on those histories, as well as a medical examination and a pulmonary function test. See R.C. 2307.92(B)(1)-(3). The statute also contains prima facie filing requirements for asbestos claimants who bring a wrongful death action and for claimants who are smokers diagnosed with lung cancer. See R.C. 2307.92(C) and (D).

At issue in this case is R.C. 2307.93(C), which sets forth the administrative dismissal process for cases where the plaintiff cannot meet the prima facie requirements:

> The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any *case* that is administratively dismissed under this division. Any plaintiff whose *case* has been administratively dismissed under this division may move to reinstate the plaintiff's *case* if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

(Emphasis added.)

Thus, if a plaintiff cannot meet the prima facie medical criteria (which none of the Appellees could do here) the *case* is administratively dismissed without prejudice. See R.C. 2307.93(C). Under this procedure, the trial court retains jurisdiction over the case, the statute of limitations is preserved, and the dismissal does not count against the plaintiff. The case can be reinstated when the plaintiff complies with R.C. 2307.92 (B), (C) or (D).

### B. The Eighth Appellate District's Decision Allows Claimants to Circumvent the Administrative Dismissal Procedure Set Forth in R.C. 2307.93.

All asbestos claimants, including FELA claimants, must meet the procedural medical requirements contained in R.C. 2307.92 at the early stage of the litigation in order to prioritize the cases on the trial court's docket. *Bogle* at syllabus. This Court has expressly held that R.C. 2307.92 and 2307.93 "apply to all asbestos claims filed in Ohio *regardless* of the theory or

statutory basis giving rise to relief, and serve to make efficient use of judicial resources." *Bogle* at ¶31. (Emphasis added.)

To circumvent the administrative dismissal procedure set forth in R.C. 2307.93, Appellees asserted a laundry list of non-asbestos exposures in their complaints as potential causes of the pulmonary diseases from which they or their decedent allegedly contracted. By not applying the administrative dismissal process to the entire case, the Eighth Appellate District has allowed the mechanism by which claimants can avoid the prima facie requirements of R.C. 2307.92 and the administrative dismissal procedure of R.C. 2307.93. To keep a meritless asbestos-related action active, the claimant need only assert numerous types of exposure in addition to the asbestos-exposure. Clearly, this is not the intent of the statutes enacted by the General Assembly through H.B. 292.

Under the guise of the Eighth Appellate District's decision, litigants will be permitted to file their lawsuits on the Asbestos Docket by merely including the words "Asbestos Docket" in the complaint's caption, while at the same time including claims premised on exposures to non-asbestos substances in order to avoid administrative dismissal of the entire case under H.B. 292. Under the Eighth Appellate District's decision, the asbestos claim can be administratively dismissed, yet the non-asbestos exposure claims can be severed and adjudicated on the Asbestos Docket. This approach defies logic and should not be accepted by this Court.

Public policy concerns regarding the adjudication of non-asbestos exposure claims on the Asbestos Docket undeniably exist. The overwhelming amount of asbestos cases lodged on the Asbestos Docket "defies customary judicial administration" and poses "systemic difficulties." *Hensley*, supra; *Ayers* at 166. Non-asbestos exposure claims should not remain on the already overburdened Asbestos Docket. Litigants should not be permitted to force Ohio's courts to

unnecessarily expend time and judicial resources to adjudicate non-asbestos exposure claims on a docket specifically created to handle the "elephantine mass" of asbestos claims that are currently pending.

The statutes enacted through H.B. 292 were implemented in response to the "elephantine mass" of asbestos cases clogging the dockets of Ohio's courts. If legislative measures have been taken to weed out non-malignant asbestos cases from the already strained Asbestos Docket, then certainly non-asbestos exposure claims should not be allowed to stand on the Asbestos Docket. Accordingly, the non-asbestos exposure claims asserted on the Asbestos Docket should not be severed from the asbestos-related claims. Instead, the entire case should be administratively dismissed as intended by H.B. 292.

As for the Eighth Appellate District's reliance on *Wagner v. Anchor Packing Co.*, 4th Dist. No. 05CA47, 2006-Ohio-7097, *Nichols v. A.W. Chesterson Co.*, 172 Ohio App.3d 735, 2007-Ohio-3828, and *Penn v. A-Best Products Co.*, 10th Dist. Nos. 07AP-404, 07AP-405, 07AP-406, 07AP-407, 2007-Ohio-7145, these cases offer no support. The particular issue of whether the entire case should be administratively dismissed when the plaintiff has also alleged various non-asbestos exposure claims was never addressed in *Wagner*, *Nichols* or *Penn*.

Rather, the issue in *Wagner* and *Nichols* involved whether the claimants were required to set forth a prima facie case for colon cancer claims. Finding that there was no provision for colon cancer in R.C. 2307.92(B), (C) or (D), the appellate courts answered this question in the negative. *Wagner* at ¶32; *Nichols* at ¶26. Likewise, in *Penn*, the appellate court determined that R.C. 2307.92 imposes no burden upon a nonsmoker with lung cancer to present a prima facie case. *Penn* at ¶34.

*Wagner* and *Nichols* also determined that the definition of "competent medical authority" contained in R.C. 2307.91(Z) was inapplicable to colon cancer claims. Likewise, the appellate court in *Penn* determined that "competent medical authority" did not apply to non-smoking lung cancer and laryngeal cancer claims. Instead, R.C. 2307.91(Z) is only applicable in the context of a doctor providing a diagnosis for purposes of constituting prima facie evidence of an exposed person's physical impairment pursuant to the requirements of R.C. 2307.92. *Penn* at ¶17; *Wagner* at ¶36; *Nichols* at ¶28.

Of further significance is that *Wagner, Nichols* and *Penn* involved "other cancer" claims allegedly caused by asbestos exposure. Thus, having these types of asbestos-related claims remain on the specialized Asbestos Docket does not raise the same public policy issues that exist as a result of the Eighth Appellate District's decision here. Asbestos-related claims are the types of claims for which this docket was specifically created. In contrast, the non-asbestos exposure claims, like those asserted by Appellees, do not belong on the Asbestos Docket.

By erroneously relying on and expanding *Wagner, Nichols* and *Penn*, the Eighth Appellate District concluded, in contravention of the language of the statute, that "the administrative dismissal provision is limited to the asbestos-related claims that are specified in R.C. 2307.92. The legislature could have allowed the court to administratively dismiss the entire tort action, but chose to limit R.C. 2307.93(C) to asbestos-related nonmalignancy claims, lung cancer in a smoker and wrongful death claims." *Riedel* at ¶13. The Eighth Appellate District's decision has resulted in and will continue to result in allowing claimants to thwart the very purpose of H.B. 292, thereby rendering the statutory case management efforts of H.B. 292 entirely ineffective.

### C. Severing Claims Undermines Judicial Economy and Promotes Double Recovery by Claimants.

The evidence necessary to prove each element of Appellees' FELA claim for pulmonary disease is the same whether the pulmonary disease is premised on asbestos exposure or exposure to non-asbestos substances. There is only one indivisible injury alleged in each of these cases, that is, pulmonary disease. The same pulmonary conditions are at issue, just different alleged causes. Therefore, the pulmonary injury claims premised on alleged exposures to non-asbestos substances cannot be severed from the claim premised on asbestos exposure.

Judicial economy will not be served by separating these claims. The medical evidence for the alleged pulmonary disease based on asbestos exposure is wholly related to the medical evidence for the non-asbestos exposures. The same treating doctors, as well as the same medical experts, will most likely be called to testify in support of the claimants' pulmonary diseases. Likewise, the time frame of exposure relevant to the asbestos and non-asbestos claims is the same. Both the asbestos and non-asbestos exposure claims concern the entire span of Appellees' work histories. Considering that the same medical testimony, the same work periods and the same work environments are at issue, the asbestos and non-asbestos exposure claims brought by Appellees are virtually dependent on one another. Thus, severing these claims from one another is unwarranted and will result in duplicative litigation should the asbestos claim be revived by a claimant satisfying the prima facie criteria set forth in R.C. 2307.92(B), (C), or (D).

Against this backdrop, if the Eighth Appellate District's decision is allowed to stand, then two separate trials would be had involving virtually the same exact evidence. As the trial court's order stands now, Appellees would proceed to trial on their non-asbestos claims (ironically before an Asbestos Trial Judge) which would necessarily require a discussion of the involvement of asbestos since it also may have contributed to their injuries. Then, later on, if Appellees can

make a prima facie showing under H.B. 292, a second trial would be had on the *same injuries with the same evidence* regarding asbestos. Not only does this defeat judicial economy, it permits Appellees to receive double recovery. Rather than streamline the asbestos litigation process as H.B. 292 intends, the approach adopted by the trial court and the Court of Appeals would double the amount of cases requiring adjudication on the Asbestos Docket, impermissibly expand the authority of the Asbestos Docket (and its Asbestos Trial Judges) to adjudicate non-asbestos exposure claims and undermine the purpose of H.B. 292.

### D. Adjudication of Non-Asbestos Claims on the Asbestos Docket Undermines Judicial Economy.

Non-asbestos claims asserted on the Asbestos Docket should not be severed from the asbestos-related claims when the plaintiff is alleging that the asbestos and non-asbestos exposures caused the same injury. Instead, the entire case should be dismissed. Since Appellees chose to file their FELA action on the Asbestos Docket, they must be bound by the rules applicable to all claimants on this specialized docket – to have the entire case administratively dismissed when the prima facie requirements of R.C. 2307.92(B), (C) or (D) cannot be met. See R.C. 2307.93(C).

To rule otherwise would permit claimants, like Appellees, to improperly litigate their non-asbestos exposure claims on an already overburdened Asbestos Docket. Certainly, non-asbestos exposure claims should not be litigated on the Asbestos Docket. With approximately 200 new asbestos cases filed in Cuyahoga County every month, litigating non-asbestos claims on the already oversized Asbestos Docket thwarts the purpose of H.B. 292 which is to expedite the final determination of asbestos-related disputes that meet the minimum prima facie requirements. Thus, the practice of having non-asbestos related claims adjudicated on the Asbestos Docket defeats judicial economy.

### E. The Eighth Appellate District's Decision Allows for Judge Shopping.

It is fundamentally unfair to allow a claimant to engage in judge shopping. The Eighth District's decision contravenes public policy because it provides claimants with a vehicle to circumvent the random judicial assignment procedure. Local Rule 15(A) of the Rules of the General Divisions of the Cuyahoga County Court of Common Pleas states that "all civil cases shall be assigned to a judge through a process either manual or electronic, which ensures a random selection of the judge and preserves the identify of the judge until selected."

Judge Hanna was not assigned to handle the three lawsuits pursuant to Loc. R. 15(A). Instead, to circumvent the random judicial assignment procedure, Appellees included the words "Asbestos Docket" in the complaints' caption. When filing their complaints and designating these matters as asbestos cases, it was Appellees' counsel's intent to treat these matters as asbestos cases. Appellees cannot have it both ways. Either the entire matter is to be treated as an asbestos-related case subject to the administrative dismissal process of H.B. 292 or the non-asbestos exposure claims should be prohibited from remaining on the Asbestos Docket.

Claimants (including Appellees) are well aware that a single, specific judge handles all FELA asbestos actions on the Asbestos Docket in Cuyahoga County. Even if the asbestos claim cannot meet the H.B. 292 criteria, a claimant can hand-select the judge who will preside over the remaining non-asbestos claims without dealing with the consequences of meeting the criteria for pursuing an asbestos-related action, i.e., without administrative dismissal. This is precisely what occurred here. Appellees' counsel's hand-selected Judge Hanna to handle their FELA cases by including the words "Asbestos Docket" on their complaints. The Eighth Appellate District ratified this conduct thereby allowing claimants to engage in judge shopping, a practice which

the rules of assignment were specifically designed to prevent. *Brickman & Sons, Inc. v. National City Bank*, 106 Ohio St.3d 30, 2005-Ohio-3559 at ¶21.

Rule 36(B)(1) of the Rules of Superintendence for the Courts of Ohio also speaks to this issue and provides: "As used in these rules, 'individual assignment system' means the system in which, upon the filing in or transfer to the court or a division of the court, a case immediately is assigned by lot to a judge of the division, who becomes primarily responsible for the determination of every issue and proceeding in the case until its termination." Sup. R. 36(B)(1) continues, "[t]he individual assignment system ensures all of the following: (a) [j]udicial accountability for the processing of individual cases; (b) [t]imely processing of cases through prompt judicial control over cases and the pace of litigation; [and] (c) [r]andom assignment of cases to judges of the division through an objective and impartial system that ensures the equitable distribution of cases between or among the judges of the division."

Judicial assignments must be free from the appearance of impropriety. *Brickman* at ¶21. Allowing claimants to add specific claims to their complaints as a means of either circumventing a statute or selecting the judges who will oversee their cases is a practice that should not be tolerated. Appellees should not be permitted to circumvent H.B. 292 or the judicial assignment rules, yet that is precisely what the Eighth Appellate District's decision allows.

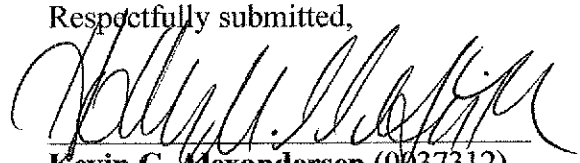
## *IV.*

## CONCLUSION

Grand Trunk Western Railroad Incorporated, as Amicus Curiae, supports the position of Defendants-Appellants, Consolidated Rail Corporation, American Premier Underwriters, Inc., and Norfolk Southern Railway Company. This case affords the Court with the perfect opportunity to ensure that claimants do not circumvent the administrative dismissal procedure set

forth in R.C. 2307.93, as well as prohibit non-asbestos claims from being litigated on a docket specifically designated to handle asbestos cases. The decision of the Eighth Appellate District establishes an unwise rule of law for asbestos-related cases. Grand Trunk urges the Court to administratively dismiss entire asbestos-related cases when the prima facie requirements set forth in R.C. 2307.92(B), (C) or (D) are unmet and when a single, indivisible pulmonary injury is at issue, regardless of the alternative exposures asserted as the basis giving rise to relief. Such an application of H.B. 292 serves to make efficient use of judicial resources and upholds the purpose of the statutes at issue. Public policy favors the reversal of the decision by the Eighth Appellate District.

Respectfully submitted,



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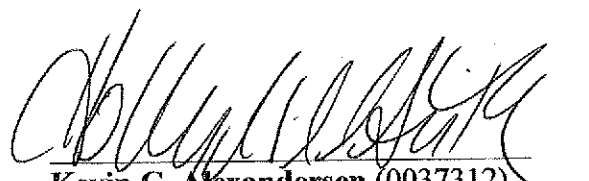

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