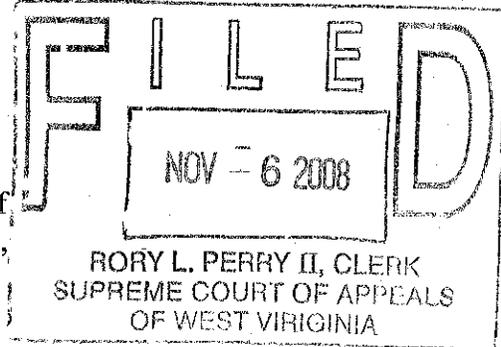


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34156

FREDA RATLIFF,
Executrix of the Estate of
Sparrel Ratliff, Deceased,

APPELLANT



v.

NORFOLK SOUTHERN RAILWAY COMPANY

APPELLEE

REPLY BRIEF ON BEHALF OF FREDA RATLIFF, APPELLANT

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I. DISCUSSION OF THE LAW

A. NS Concedes that FELA 45 U.S.C. § 55 Applies Yet Seeks a Special New “Exception”

NS concedes that this decision is governed by the FELA and 45 U.S.C. § 55. (NS Brief at 6). NS also concedes that federal law controls the determination of whether the release is invalid and that the release intended to wipe out any and all claims of every nature, with the exception of vested pension rights. (NS Brief at 5). The railroad nevertheless asks this Court to carve out a novel “exception” to § 55 of the FELA that would alter the plain and simple language of this statute to apply only to “future liability for future negligence.” (NS Brief at 8). The railroad’s position is completely unsupported by the law and would subvert the statute.

A-1. NS Ignores the Plain Meaning of 45 U.S.C. § 55.

Both appellant Ratliff as well as NS have set forth the language of § 55 in their briefs which in pertinent part states: “Any contract rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act ... shall to that extent be void”. The plain meaning of this provision is all-encompassing. Had Congress meant to limit the breadth of this statute, Congress would have chosen to insert limiting words such as “except as to future liability for future negligence” or would have included any other limiting phraseology. Congress chose not to do so, and no court has read any such illusory limitations into the clear meaning of this statute.

A-2. NS Ignores the U.S. Supreme Court Decision in Ayers.

As noted in Ratliff’s opening brief, at pp.11-12, the U.S. Supreme Court approvingly discussed the “separate disease rule” with regard to FELA asbestos claims and subsequent mesothelioma claims. *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 153 n.12 (2003). The Supreme Court noted that the rule allows “recovery for successive diseases and would

necessarily only exclude double recovery for the same elements of damages.” *Id.* The nature of asbestos liability involves past conduct that manifests itself at some time in the future and the statute of limitation period under the FELA does not begin to accrue until manifestation occurs. *Urie v. Thompson*, 337 U.S. 163, 170-71 (1949). The evidence in this case shows that Ratliff’s mesothelioma claim did not accrue until April 2005, 19 years after his railroad separation agreement was signed. [R. 63-64: Freda Ratliff affidavit at 1-2] Ratliff had no awareness that he suffered from any asbestos-related disease when his separation agreement was signed [R. 131-132: Kirchner deposition at 18:25 – 19:11; R. 63-64: Freda Ratliff affidavit at 1-2.]. NS boldly argues however that because some asbestos FELA suits were pending in 1986 – somewhere in the U.S. courts system – that this proves Ratliff’s “awareness” of asbestos risks. This is no evidence whatsoever and is certainly no part of the record in this case.

A-3. No Reported Appeal Decision Supports the Narrow Exception NS Seeks.

A careful reading of the NS Brief reveals no reported appellate decision supporting the NS “exception” to § 55.

B. Under the *Babbitt* “Bright Line” Test the Release is Invalid

NS and its subsidiary railroads’ have vexatiously filed multiple appeals, re-litigating losing arguments, relating to 45 U.S.C. § 55. NS argued the *Babbitt* case in the Sixth Circuit (*Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89, (6th Cir. 1997), and then about a year later, NS made alternative arguments in *Wicker v. Consolidated Rail Corp.* 142 F.3d 690 (3rd Cir. 1998).

The *Babbitt* “bright line” test clearly invalidates the NS release in this Ratliff appeal because it is uncontroverted that NS sought to release a future accruing claim in the subject separation agreement with Ratliff. Also, under *Babbitt*, there was no underlying “claim or controversy” under negotiation between NS and Ratliff at the time the separation agreement was

signed. For either or both reasons the NS release is invalid.

C. Under the Wicker “Appreciation of Risk of Harm” Test The Release is Invalid.

NS asks this court to ignore Babbitt, and to follow the Wicker “appreciation of risk of harm” test because it sees Wicker as the lesser of two evils. Here both decisions mandate reversal. As explained further, NS as well as the Amicus Brief filed by the Association of American Railroads (AAR) favor Wicker but fail to outline the multi-part legal analysis that the Wicker appeal decision requires. It is apparent that for “appreciation of risk of harm” to be recognized by parties negotiating a FELA claim release, a subjective analysis is necessary. NS and the AAR simply ignores this. It is for this reason that this court should question the Loyal v. Norfolk Southern Corp., 507 S.E.2d 499 (Ga. App. 1998) decision cited by NS. The Loyal decision ignores Wicker’s subjective multi-part analysis: (1) the release must arise from a claim or controversy, (2) the release must spell out the risks to be released, and (3) the parties must appreciate the nature of the claim to be released. See Ratliff Brief at 13-20. A reviewing court must not only analyze whether there was an underlying claim or controversy (and again, here there was not) but the release must spell out the risk to be released (here there was no mention of FELA, asbestos or mesothelioma) and the parties must subjectively appreciate the nature of the claim to be released. The uncontradicted evidence shows Ratliff did not have an asbestos claim pending when the separation agreement was signed, and he was unaware that asbestos was even toxic at that time. On behalf of NS, its company representative Kirchner pointed to no evidence that Ratliff was apprised of the nature or dangers of asbestos, much less mesothelioma, which accrued 19 years after the separation agreement was signed.

Ratliff’s counsel has found no federal or state appellate decision expressly following the Georgia Court’s decision in Loyal. Indeed, Loyal cannot be squared with Wicker, and should not have relied on by this Court for the various reasons outlined above the release is invalid as to

Ratliff's mesothelioma claim.

C-1. NS Provided No Quantity or Quality of Risk Information and there is no Evidence that Ratliff was Aware of the Harm.

Here, the evidence is uncontradicted that NS provided Ratliff no information whatsoever relating to asbestos or its associated cancers, and Ratliff testified he had no known injury or asbestos claim dispute when he retired and signed the separation agreement.

D. The Overwhelming Weight of Authority Invalidates Releases of Future Accruing FELA Liability.

Under *Babbitt* and *Wicker*, and the numerous decisions cited in Appellant's opening brief, the NS release is invalid as to Ratliff's mesothelioma claim, which accrued 19 years after the execution of the retirement/separation agreement.

II. CONCLUSION – RELIEF REQUESTED

WHEREFORE, for all of the foregoing reasons, the Appellant respectfully requests the Court reverse summary judgment for NS, hold that the release violates 45 U.S.C. § 55 and is void as to the Appellant's mesothelioma claims.

FREDA RATLIFF, Appellant

By: _____


Of Counsel

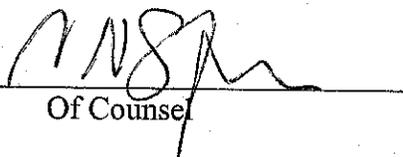
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CERTIFICATE OF SERVICE

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