

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
IN RE: WEST VIRGINIA ASBESTOS MASS LITIGATION PANEL FOR
FELA CASES- CIVIL ACTION NO. 02-C-9500

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Clerk of Court
Kanawha County, West Virginia

FREDA MARLENE RATLIFF,
as Executrix of the Estate of SPARREL RATLIFF,

Plaintiff,

v. (Formerly In The Circuit Court Of Mingo County, W. Va., Civil Action No. 05-C-423)

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

FINAL ORDER GRANTING SUMMARY JUDGMENT

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This case was filed under the Federal Employers' Liability Act, Title 45, United States Code §41, *et seq.*, by plaintiff Freda M. Ratliff who alleges that as a result of the negligence of defendant Norfolk Southern Railway Company's predecessor, Norfolk and Western Railway Company (hereinafter "NSRC"), her decedent Sparrel "Toddy" Ratliff suffered and died from an asbestos-related malignant pleural mesothelioma.

On June 15, 2007 came the parties by their counsel for a hearing on the parties' motions for summary judgment on the issue of the preclusive effect of a release. It is agreed by the parties that on or about December 12, 1986, as part of a voluntary separation or "early retirement" program of defendant's, plaintiff's decedent Sparrel Ratliff signed a document entitled "Resignation and Release" (hereinafter "Release"), for which he was paid \$35,000, less certain specified deductions. Defendant maintains, and plaintiff disputes, that the Release contained comprehensive language releasing NSRC from all employment-related claims that Mr. Ratliff then had or would ever have against NSRC, including the claim presented in this case. NSRC moved for Summary Judgment in its favor arguing that the release barred the

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instant claim, while plaintiff moved for summary judgment in its favor to bar NSRC's release defense.

After considering the parties' memoranda on the subject and having heard argument of counsel, the court was persuaded initially that NSRC's motion should be granted, but was further persuaded by counsel for plaintiff that a jury trial on the factual issue of intent would serve the interests of judicial economy in that a resolution of that factual issue might narrow the issues to be presented in any appeal of the judgment in this case. Therefore, the court determined to conduct a jury trial on July 30, 2007 solely on the subject of the intent of the parties in entering into the Release, with the parties to conduct any additional necessary discovery on the subject of the Release before trial. Plaintiff thereafter undertook additional discovery in anticipation of the trial, and never suggested to the court that she required additional time to conduct further discovery.

At the hearing scheduled for July 20, 2007, originally scheduled for the pre-trial conference for the "intent" trial, the court, at their request, heard the parties' renewed Motions for Summary Judgment. As before, plaintiff argued that the Release constituted a "prohibited device" under Title 45 U.S.C. § 55, that Mr. Ratliff did not intend the Release to obviate claims brought under the FELA, and suggested that there was fraud somehow involved in the matter. Plaintiff presented no new or additional evidence to support this argument. Defendant argued, as before, that there are only four ways for a plaintiff to overcome a release under the FELA: fraud, mutual mistake of fact, lack of consideration, and "prohibited device," and that plaintiff has no evidence creating a genuine issue of material fact on any of these items. NSRC also presented the additional argument that the scheduled trial on the issue of intent was not necessary because the issue of "intent" is subsumed under the "mutual mistake" defense to the release, and NSRC, for

its part, had no mistaken view about the intended effect of the release since it intended it to preclude all claims, including the instant claim. In addition, NSRC argued that since the time the trial was scheduled, plaintiff had not generated any admissible evidence on the issue of intent sufficient to create a genuine issue of material fact for trial.

Having considered the parties' pleadings and argument, and for good and sufficient reasons appearing to the court therefor, the court makes the following findings:

FINDINGS OF FACT

1. On or about December 12, 1986, as part of a voluntary separation or "early retirement" program of NSRC's, plaintiff's decedent Sparrel Ratliff signed a document entitled "Resignation and Release" (hereinafter "Release"), for which he was paid \$35,000, less certain specified deductions;

2. There is no evidence that the release was not intended to comprehend the alleged occupational injury alleged by the plaintiff. The limiting words of the release are very specific ("...with the exception of any vested pension rights...");

3. There is no evidence in this case of fraud bearing on the Release;

4. The consideration paid is sufficient to support the Release inasmuch as the proper analysis is not necessarily whether the consideration paid, or some fraction thereof, is adequate to compensate the plaintiff for the harm alleged in the instant Complaint, but whether the consideration paid was adequate in light of the risks borne by the parties at the time the Release was executed, viz., in the instant case, the risks that plaintiff's decedent might or might not contract some illness or injury that would be barred by the release;

5. That there is no mutual mistake of fact in this case, there being, at most, a unilateral mistake on the part of plaintiff's decedent, since the deposition testimony of NSRC's employee Marcellus Kirchner shows that NSRC intended for the Release to obviate claims like the instant claim;

6. The risk of claims being brought by employees under the FELA for asbestos-related malignant pleural mesothelioma was known at least to NSRC at the time the Release was executed, as shown by the 1983 article published in the peer-reviewed American Journal of Industrial Medicine entitled, "Mesothelioma Among Machinists in Railroad and other Industries" by Mancuso, and by the Complaint and other documents from other, similar lawsuits antedating the execution of the Release, filed by NSRC in support of its Motion for Summary Judgment.

7. Plaintiff has no direct evidence bearing on the issue of Mr. Ratliff's intent, since Mr. Ratliff died without testifying about the Release, since the plaintiff filed an affidavit saying that she and Mr. Ratliff never discussed the meaning and effect of the Release, and since the plaintiff has pointed to no witness or other direct evidence showing what Mr. Ratliff believed about the release beyond the text of the Release itself.

CONCLUSIONS OF LAW

1. The validity of the Release is governed by federal rather than state law. Maynard v. Durham and S. Ry. Co., 365 U.S. 160 (1961); Dice v. Akron, Canton and Youngstown R.R. Co., 342 U.S. 359 (1952).

2. Under federal law, the plaintiff has the burden of showing the Release is invalid. Callen v. Pennsylvania R.R. Co., 332 U.S. 625 (1948).

3. There is no evidence of fraud, mutual mistake of fact, or lack of consideration regarding the Release in this case; and therefore no genuine issue of material fact for trial concerning these issues;

4. The Release is not a "prohibited device" under Title 45 U.S.C. § 55 in this case, since the purpose of this provision of the FELA is to address limitations on liability to employees for negligent acts and omissions occurring after a release is signed, and plaintiff's decedent was no longer to be an employee of defendant after the release was signed;

5. "'FELA cases are inherently fact-bound.' The evaluation of the parties' intent at the time the agreement was made is an essential element of this inquiry. ...The meaning to be given to the words of a contract must be the one that carries the intent of the parties as determined by the circumstances under which the contract was made." Wicker v. Consolidated R. Corp., 142 F.3d 690, 700 (3rd Cir. 1998)(cert. den. 525 U.S. 1012 (1998)) (citations and internal punctuation omitted.); and

6. The plaintiff has not met her burden of showing the Release is invalid.

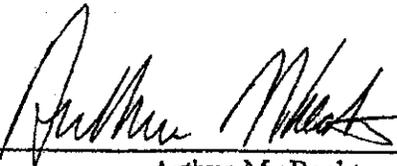
In light of the foregoing, and for good and sufficient reasons appearing to the court therefor, it is accordingly

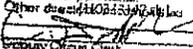
ORDERED that defendant Norfolk Southern Railway Company's Motion for Summary Judgment should be, and the same hereby is, **GRANTED**, and accordingly further

ORDERED that this action should be, and the same hereby is, **DISMISSED** and **STRICKEN** from the docket of this court, with each party to this action to bear his or its own costs.

The plaintiff's objections and exceptions to the foregoing are hereby noted.

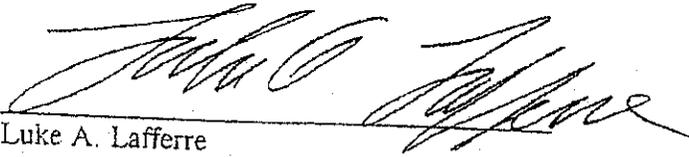
Dated: September, 2007


Arthur M. Recht

Date: 9/26/07
Certified Copy sent to:
 County of record MS
 partner RS
 other
(circle one)
By: 
 Certified Copy sent to:
 fax
 hand deliver
 internet transmission
Other date of filing 10/23/07
Deputy Official Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. BATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 26
DAY OF Sept. 2007
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

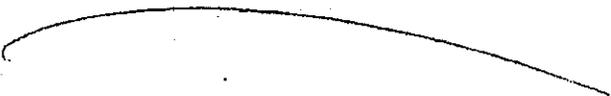
Approved by:



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