

News Release

Washington Legal Foundation

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FOR IMMEDIATE RELEASE

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COURT URGED TO BAR ASBESTOS SUITS BY THOSE WHO ARE NOT SICK

(Norfolk & Western Ry. Co. v. Ayers, No. 01-963)

The Washington Legal Foundation (WLF), partnering with former U.S. Attorney General Griffin B. Bell, has asked the U.S. Supreme Court to bar emotional distress damage awards to those who have been exposed to asbestos, in the absence of evidence that they have suffered any physical injury.

In a brief filed in *Norfolk & Western Railway Co. v. Ayers*, WLF argued that such awards are becoming all too common in asbestos litigation and are undermining the fairness of the nation's tort system. WLF prepared its brief with the assistance of attorneys from the law firm of King & Spalding, including Griffin Bell and Jeffrey S. Bucholtz.

"The plaintiffs in this case were awarded \$1 million each, even though the symptoms of their alleged asbestos exposure were nothing more severe than shortness of breath," said WLF Chief Counsel Richard A. Samp after filing WLF's brief. "Such verdicts are all too common as the asbestos litigation debacle continues to spiral out of control. If people who are not sick continue to collect damages that have little or no relationship to any real injury, our tort system will have failed to uphold its obligation to distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other," Samp said.

The case involves six retired employees of Norfolk & Western Railway Co. ("N&W"), who allege that they were injured by on-the-job exposure to asbestos. The employees sued N&W under the Federal Employers' Liability Act ("FELA"), which authorizes suits against railroads by employees who allege that they were injured due to their employer's negligence. The plaintiffs never missed any days of work as a result of the alleged exposure, but they claim that they now suffer shortness of breath.

The principal basis for the plaintiffs' damages claim was their fear that they might later develop cancer, and that that fear had caused them severe emotional distress. However, they produced no evidence of any physical manifestation of the alleged emotional injury. The trial judge instructed the jury that any plaintiff who had a reasonable fear of cancer that was related to a physical injury from asbestos exposure was entitled to damages. Moreover, the judge permitted the jury to hold N&W liable for all emotional distress suffered by the plaintiffs, even though they had been exposed to asbestos at numerous other jobs. The multi-million dollar verdict followed. In April, the U.S. Supreme Court agreed to review the case.

In its brief, WLF argued that FELA does not permit award of fear-of-cancer emotional distress damages in the absence of evidence that there was some physical manifestation of the emotional injury. WLF argued that in the absence of such a rule, companies' liability to uninjured tort claimants would be virtually limitless.

WLF recognized that any rule established by the Supreme Court under FELA would not be binding on state courts hearing state-law asbestos claims. WLF nonetheless argued that the Court should send a strong signal to state courts that common-law tort principles -- including principles limiting damage awards to those who can demonstrate real injuries -- must be adhered to and that the Court may begin imposing constitutional restraints on state courts that fail to adhere to those principles.

WLF termed the current state of asbestos litigation "scandalous," with hundreds of thousands of suits being filed by uninjured plaintiffs. WLF noted that the onslaught of such litigation has forced more than 55 major companies into bankruptcy and imposed severe hardship on untold numbers of shareholders, employees, creditors, and other stakeholders. WLF argued that by allowing uninjured claimants to recover huge awards, the courts are worsening the crisis by encouraging even more such claimants to file suit.

WLF is a public interest law and policy center with supporters in all 50 states. It regularly litigates in support of tort reform and against the creation of new and unfounded theories of tort liability.

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