



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

THIS DOCUMENT APPLIES TO:

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA
JOHNATHAN N. DOTSON,

Plaintiff,

v.

CC-20-2022-C-85
Judge Kelly Dodispoti

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

**ORDER GRANTING NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION TO JOIN IN EXISTING MASS LITIGATION**

Pending before the Court is *Defendant Norfolk Southern Railway Company's Motion to Join in Existing Mass Litigation* ("Motion") (Transaction ID 69851049). Pursuant to West Virginia Trial Court Rule 26.09, Defendant Norfolk Southern Railway Company ("NSRC") has moved the Court for an Order joining the above-captioned civil action pending in the Circuit Court of Mingo County, West Virginia, with *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, pending in the Circuit Court of Kanawha County, West Virginia. Having reviewed the Motion, the Response filed by Plaintiff (Transaction ID 69851119), and for good and sufficient reasons appearing to the Court therefore, the Court finds, and rules as follows:

Findings of Fact:

1. This is a case brought under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 *et seq.* ("FELA"). See ¶3, *Plaintiff's Complaint*, copy attached to NSRC's Motion as *Exhibit A*.
2. Plaintiff alleges he contracted colon cancer due to "Plaintiffs exposure to diesel fuel vapors as well as diesel exhaust fumes in addition to second-hand tobacco smoke..." in his workplace with Defendant. *Id.*, ¶10.

3. However, Plaintiff's claims of exposure are not limited to "diesel fuel vapors as well as diesel exhaust fumes in addition to second-hand tobacco smoke." Although not mentioning asbestos explicitly, Plaintiff also alleges more generally that "Plaintiffs colon cancer was the result of the negligence of the Defendant in that it utilized known **cancer-causing materials** in its operations, **including** the Toxic Substances, which the Defendant knew, or in the exercise of ordinary care should have known, were deleterious, poisonous, and highly harmful to their employees' health." *Id.*, ¶11 (*emphasis added*). *See also, Id.*, ¶¶15(e), 15(g), and 15(h).

4. Asbestos has been characterized as a "toxic substance." *See, e.g., Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 440 (1997). Exposure to asbestos has been described as a "toxic exposure." *See, e.g., Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 153 (2003). Asbestos-related litigation has been described as "toxic-tort litigation." *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 599 (1997).

5. In Response to the Motion, Plaintiff asserts he was exposed to asbestos and/or asbestos-containing materials while working for Defendant NSRC and consents to this case being transferred to the Circuit Court of Kanawha County, West Virginia, for coordinated or consolidated resolution in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500. Response, Paragraphs 4-5.

Conclusions of Law:

1. Pursuant to West Virginia Trial Court Rule 26.08(b), "With the advice and consent of the Panel, the Presiding Judge is authorized to consolidate and/or transfer Mass Litigation or proceedings therein from one circuit to one or more other circuits to facilitate the Panel's case management and trial methodologies and to order the transfer of court files to the appropriate circuit."

2. By Administrative Order entered on April 29, 2009, the Supreme Court of Appeals of West

Virginia referred “. . . all pending and subsequently filed cases in West Virginia asserting claims under FELA for personal injury and damages caused, in whole or in part, from exposure to asbestos and asbestos-containing materials” to the Mass Litigation Panel and transferred such cases to the Circuit Court of Kanawha County, West Virginia, for coordinated or consolidated resolution in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500.

3. Plaintiff’s case qualifies as a lawsuit subject to the Supreme Court of West Virginia’s 2009 Order and under the provisions of West Virginia Trial Court Rule 26.09 this case should be transferred and joined with *In re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, pending in the Circuit Court of Kanawha County, West Virginia.

Considering the foregoing, with the advice and consent of the Mass Litigation Panel, the Court **GRANTS** *Defendant Norfolk Southern Railway Company’s Motion to Join in Existing Mass Litigation* and **ORDERS** the above-captioned civil action transferred from the Circuit Court of Mingo County, West Virginia, to the Circuit Court of Kanawha County, West Virginia, for coordinated or consolidated resolution in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500.

The above-captioned civil action is designated for electronic filing and service, as provided in West Virginia Trial Court Rule 15.01, *et seq.*, **effective April 26, 2023**. To facilitate electronic filing and service in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, pending in the Circuit Court of Kanawha County, West Virginia, the number for the above-captioned civil action shall hereinafter be 22-C-85 MNG FELA.

The Clerk of the Circuit Court of Kanawha County, West Virginia, is **ORDERED** to send a copy of this Order to the Clerk of the Circuit Court of Mingo County, West Virginia, for service on the Honorable Kelly Codispoti and all parties in the above-captioned civil action. All counsel

of record in the FELA Asbestos Litigation shall this day be served with this Order electronically via File & Serve*Xpress*.

It is so **ORDERED**.

ENTERED: April 19, 2023.

/s/ Jay M. Hoke
Presiding Judge
FELA Asbestos Cases