



**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 BROOKE COUNTY, WEST VIRGINIA

STEPHANIE DEMPSEY, *Administratrix of the*  
*Estate of Carl Dempsey, deceased,*

Plaintiff,

v. CC-05-2023-C-66

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”).<sup>1</sup> 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 Brooke 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, pursuant to West Virginia Trial Court Rule 26.09. Plaintiff opposes the Motion.<sup>2</sup> Having reviewed the Motion, Plaintiff’s Response, Defendant’s Reply,<sup>3</sup> and for good and sufficient reasons appearing to the Court therefore, the Court finds, and rules as follows:

---

<sup>1</sup> (Transaction ID 71083313) filed October 16, 2023.

<sup>2</sup> *Plaintiff’s Response in Opposition to Defendant Norfolk Southern Railway Company’s Motion to Join in Existing Mass Litigation* (Transaction ID 71105612) filed October 16, 2023.

<sup>3</sup> *Defendant Norfolk Southern Railway Company’s Memo in Reply to Plaintiff’s Response to Motion to Join in Existing Mass Litigation* (Transaction ID 71133613) filed October 18, 2023.

***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 ¶¶ 5, 6, 12, and 13, *Plaintiff's Complaint*, copy attached to NSRC's Motion as *Exhibit A*.

2. Plaintiff alleges he contracted bladder cancer due to "Exposure to dangerous and toxic substances and chemicals including diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other occupational hazards..." ¶9, *Plaintiff's Complaint, Exhibit A*.

3. Plaintiff further alleges the Defendant violated the FELA by its negligent acts or omissions

- ...b) in failing to limit Mr. Dempsey's exposure to **hazardous substances**;
- c) in failing to warn Mr. Dempsey of the danger of his chronic exposure to **hazardous substances**;
- d) in failing to furnish Mr. Dempsey with safe and suitable safety garments, tools, and other personal protective equipment, including adequate protective masks, protective inhalation devices, and/or protective gloves, which would minimize Mr. Dempsey's exposure to **hazardous substances**;
- e) in failing to warn Mr. Dempsey of the true nature and hazardous effects of the dangerous and toxic levels of diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**, to which he was exposed;
- ...g) in failing to provide instructions or a method for the safe use and/or safe encountering of the **dangerous and toxic substances and chemicals** including diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**, to which Mr. Dempsey was exposed;
- h) in failing to provide adequate, if any, instructions in the use of and/or encountering of **dangerous and toxic substances and chemicals** including diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils as well as other **occupational hazards**;
- ... j) in failing to formulate and implement a safe method of handling **dangerous and toxic substances and chemicals**, including diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**, thereby exposing Mr.

Dempsey to concentrations sufficient to cause disease;

... m) in failing to exercise reasonable care in publishing and enforcing a safety plan and method of working with or around **dangerous and toxic levels of substances and chemicals** including diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**;

n) in failing to inspect or monitor Mr. Dempsey's workplace and/or equipment to discover the presence of **hazardous substances**;

o) in requiring employees to work with or around hazardous products or materials;

... q) in failing to test and examine Mr. Dempsey periodically to determine if he was subject to any ill effects of his exposure to diesel exhaust, gasoline exhaust, creosote, solvent, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**;

... s) in failing to inspect its locomotives, rail cars, facilities, or premises periodically in order to ascertain the existence of any **unsafe conditions** related to exposure to **dangerous and toxic levels** of diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**;

... u) in failing to conduct adequate, if any, industrial hygiene, epidemiological, or medical studies related to **dangerous and toxic substances and chemicals**, including diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**, and their effect on the employees of the Defendant;

... w) in failing to timely install adequate engineering controls to protect workers such as Mr. Dempsey from **exposure and/or over-exposure to toxic substances**;

x) in failing to timely implement medical monitoring and testing of employees such as Mr. Dempsey to determine their **exposure and/or over-exposure to toxic substances**;

and y) in failing to design and/or implement adequate administrative controls to prevent employees and workers such as Mr. Dempsey's **exposure and/or over-exposure to dangerous and toxic substances and chemicals**, including diesel exhaust, gasoline exhaust, creosote, solvents, welding fumes, benzene-containing substances, chemicals, torch/cutting/burning smoke and fumes, grinding dusts, metal dusts and fumes, greases and oils, as well as other **occupational hazards**.

¶13(b)-(e), (g), (h), (j), (m)-(o), (q), (s), (u), (w), (x), and (y), *Plaintiff's Complaint, Exhibit A* (emphasis added).

4. Although not mentioning asbestos explicitly, Plaintiff alleges generally his cancer was the result of workplace exposures to “dangerous and toxic substances and chemicals,” “toxic substances,” and “other occupational hazards.”

5. 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).

6. Plaintiff contends Defendant’s Motion should be denied because this is not an asbestos case; “Plaintiff does not allege that asbestos and/or asbestos-containing materials caused, in whole or in part, her husband’s development of bladder cancer and his untimely death;” and similar non-asbestos-related cancer FELA cases against defendant railroads have been litigated in the circuit courts of West Virginia, including against NSRC. Plaintiff’s *Response*, pp. 1-3 and footnote 1.

7. Defendant argues Plaintiff’s claims are broad enough to encompass asbestos exposure; around the country, cases have been filed under FELA alleging the injury of bladder cancer resulting, in whole or in part, from asbestos exposure; and while asserting she has not alleged asbestos injury explicitly, Plaintiff does not expressly disavow the possibility she might do so in the future. Reply, ¶¶ 1-2, 4.

***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 civil action subject to the April 29, 2009, Administrative 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.

4. 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 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.

5. 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 February 5, 2024**. 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 23-C-66 BRK 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 Brooke County, West Virginia, for service on the Honorable Michael J. Olejasz and all counsel of record in the above-captioned civil action. All counsel of record in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, shall this day be electronically served with this Order via File & ServeXpress.

The parties' objections and exceptions to this Order are noted.

It is so **ORDERED**.

**ENTERED:** January 26, 2024.

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