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Albert M. Wade, Executor of the Estate of James Buford Wade, Deceased v. Norfolk Southern Railway Company, No. CL05-523
Circuit Court of the City of Roanoke

Dear Counsel:

This is a suit for wrongful death, brought under federal railroad law by the executor of James B. Wade's estate. The threshold question is whether the executor's claim is barred by a release that Wade signed when he settled an earlier case. To answer .this question, the court must apply federal law to undisputed facts. Doing so, I find:

- that Supreme Court precedent authorizes this suit, notwithstanding the settlement agreement Wade entered into and the release he signed;
- that the executor seeks relief in this case for a claim that had not yet arisen when Wade signed the release settling his earlier suit;

- that under federal railroad law, a claim that has not arisen cannot be released;
- that the release, by its own terms, did not cover the claim asserted in this suit; and
- that for these and other reasons discussed below, the court must overrule the defendant's Plea in Bar.

BACKGROUND

James Buford Wade was employed by the Norfolk & Western Railway Company (NW) in 1928 and 1929, and from 1941 through 1957. In this suit, brought under the Federal Employers' Liability Act[1] (FELA) and Locomotive Boiler Inspection Act[2] (BIA), Wade's son and executor contends that NW's negligence was a legal cause of Wade's death. Under the FELA and BIA, a common carrier railroad engaged in interstate commerce must pay damages if its negligence played any part in causing an employee's injury or death.[3]

NW's corporate successor, Norfolk Southern Railway Company (NS), responded to the suit by filing a Plea in Bar —"a defensive pleading that

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[1] 45 U.S.C. §§ 51-60 (2006). FELA cases may be brought, at the plaintiff's option, in federal court or in state court. *Id.* § 56.

[2] 49 U.S.C. §§ 20701-20903 (2006). For simplicity, I will not mention the BIA in the pages that follow; reference to it adds nothing to the discussion of the Plea in Bar. The practical difference between the two statutes comes in the jury's calculation of damages. Under both statutes, the jury, if it finds for the plaintiff, determines the amount of the plaintiff's damages. Under the BIA, if it applies, that is the end of the inquiry. The FELA, however, is a comparative negligence statute. If the jury finds that the plaintiff's own negligence contributed to causing his injuries, the jury must reduce its damage award proportionally.

[3] 45 U.S.C. § 51; *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 160 (2007). NS concedes that, at all material times, NW was a common carrier railroad engaging in interstate commerce.

reduces the litigation to a single issue, which, if proven, creates a bar to the plaintiff's right of recovery."[4]

The parties furnished with their briefs a number of documents, stipulating that, for purposes of ruling on the Plea in Bar only, the court could (a) consider these documents without further need for foundation or authentication; and (b) consider the contents of these documents as true. Because of these stipulations, there are no material facts in dispute.

FACTS

In ruling on the Plea in Bar, the court must accept the facts stated in the executor's complaint as true and give him the benefit of all inferences fairly to

[4] *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000) (internal quotation marks and citations omitted). Under state law, "[t]he party asserting a plea in bar carries the burden of proof." *Id.* at 594, 537 S.E. at 590. When an FELA case is filed in state court, state rules of pleading and procedure apply, unless they conflict with or abridge federally created substantive rights. *See* 45 U.S.C. § 56. As a matter of substantive federal law, "one who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." *Callen v. Pa. R.R. Co.*, 332 U.S. 625, 630 (1948). The executor does not attack the settlement of Wade's earlier suit. Rather, he asserts, and I agree, that that settlement has no legal relevance to the claim made in this suit. Therefore, the *Callen* burden of proof seems not to be an issue in this case. As discussed below, the court is amply satisfied that the claims made in this suit are not claims that were released in the earlier suit. *Compare Rumberg v. Norfolk & W. Ry.*, No. CL06-287, letter op. at 10 (Roanoke City Cir. Ct. Apr. 10, 2007) (Apgar, J.); *Aswad v. Norfolk S. Ry. Co.*, No. 04-2536, 2006 Va. Cir. LEXIS 43 at *19 (Portsmouth Cir. Ct. Apr. 18, 2006) (Davis, J.) (In June of 2008, Judge Mark S. Davis became a judge of the United States District Court for the Eastern District of Virginia.)

be drawn from the facts pleaded and stipulated.[5] I therefore state the facts in the light most favorable to the executor.

1. Wade's Work History, Diseases, and Death

Wade worked for NW in its headquarters city, Roanoke. As a youth, he worked in the railroad's Roanoke materials yard. He later worked in the roundhouse, on the shop track, as a machinist, and as a laborer in the Shaffer's Crossing shops. During the course of Wade's employment, the railroad, violating specific legal duties, exposed him to toxic dust and substances, including asbestos particles and fibers. As a result, he developed asbestosis — "[a] chronic, progressive lung disease caused by prolonged inhalation of asbestos particles"[6] — diagnosed in 1993, and mesothelioma — "a fatal cancer of the lining of the lung or abdominal cavity"[7] — which was diagnosed in January 2003.

"One who has mesothelioma, Justice Kennedy explains, "faces agonizing, unremitting pain in the lungs, which spreads throughout the thoracic cavity as tumors expand and metastasize. The symptoms do not subside. Their severity increases, with death the only prospect for relief. And death is almost

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[5] *See Glascock v. Laserna*, 247 Va. 108, 109, 439 S.E.2d 380, 380 (1994); *Cabaniss v. Cabaniss*, 46 Va. App. 595, 600 n.1, 620 S.E.2d 559, 561 n.1 (2005). "Motion for Judgment" is synonymous with "Complaint" in federal and post-2005 Virginia practice.

[6] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 103 (4th ed. 2000).

[7] *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 142 (2003) (citation omitted).

certain within a short time from the onset of mesothelioma."[8] Asbestosis is the only known cause of malignant mesothelioma among those who, like Wade, have never received radiotherapy at the site of their tumors.[9]

Wade died of mesothelioma at the age of 89.[10]

2. Wade's Asbestosis Suit

Wade sued NW in this court in 1996, seeking damages under the FELA and related statutes.[11] His Motion for Judgment (Complaint)[12] alleged that NW's negligence caused him to work with and around and be exposed to "toxic substances and dust, including asbestos and material containing asbestos,"[13] which in turn caused him to develop asbestosis.[14] Having asbestosis, he continued, increased his risk of contracting mesothelioma,[15] and he therefore sought damages for (among other things) fear of cancer, nervousness, and

[8] *Id.* at 168 (Kennedy, J., concurring in part and dissenting in part) (internal citations omitted).

[9] Eugene J. Mark, M.D., Report, June 9, 2005, at 3 (stipulated).

[10] *Id.* at 2, 4; *see also* Certificate of Death, June 17, 2003 (stipulated)("metastatic lung cancer.")

[11] The suit, styled *James Buford Wade v. Norfolk and Western Railway Company*, No. CL96-1053, was filed in this court on September 24, 1996, and dismissed with prejudice on May 1, 2001.

[12] *See* footnote 4, *supra*.

[13] Def.'s Reply Mem. to Pl.'s Mot. to Strike, Ex. A ¶ 7.

[14] *Id.* ¶ 18.

[15] *Id.* ¶ 19.

mental anguish.[16] He did not claim that he had mesothelioma or any other form of cancer.

"Asbestosis is a noncancerous scarring of the lungs by asbestos fibers; symptoms include shortness of breath, coughing, and fatigue. Ranging in severity from mild to debilitating, it is a chronic disease that, in rare instances, is fatal."[17] "There is usually a long latent period between initial exposure and apparent effect."[18]

Wade's expert in the asbestosis suit, Dr. Dominic Gaziano, opined that Wade had asbestosis, with a minimal degree of pulmonary functional impairment. This diagnosis was not uncontested. Dr. Joseph J. Renn III, who examined Wade at NW's request, was of the opinion that, although Wade's lungs showed exposure to asbestos, he did not have asbestosis or any similar disease. No one, of course, diagnosed mesothelioma.

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[16] *Id.* More specifically, Wade claimed that "[a]s a direct and proximate result of the . . . negligence and statutory violations of the railroad, the worker was caused to contract occupational pneumoconiosis, including but not limited to asbestosis, silicosis, coal workers lung disease and/or cor pulmonale . . . extreme nervousness and mental anguish . . . suffers from extreme nervousness, mental anxiety and fear of contracting mesothelioma, lung cancer and/or other cancers and/or other conditions caused by exposure to harmful and toxic dust... now has an increased risk of contracting mesothelioma, lung cancer, and/or other cancers." *Id.* ¶¶ 18-19.

[17] *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 142 n.2 (2003).

[18] *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 113 n.3 (D.C. Cir. 1982) (citations omitted).

3. The Release Signed on Settlement of the Asbestosis Suit

Wade and NW settled the asbestosis case for $6,500. He signed a four-page release, and the suit was dismissed with prejudice. NS's Plea in Bar is based on this release, a copy of which is appended to, and incorporated in, this opinion letter.

That document recited that Wade released NW, its successors, and a host of others:

> of and from all liability for all claims or actions for pulmonary-respiratory occupational diseases and/or other known injuries, physical, mental or financial, suffered or incurred by [Wade], including, but not limited to: . . . (d) increased risk of cancer, (e) fear of cancer (f) any and all forms of cancer, including mesothelioma (g) and all costs, expenses and damages whatsoever . . . arising in any manner whatever, either directly or indirectly, in whole or in part, arising out of:
>
> > Exposure to toxic substances, including asbestos, silica, sand, dust, coal dust, work place dust and all other toxic dusts, fibers, fumes, vapors, or mists used by [NW] during [Wade's] employment by [NW].[19]

The release continued:

> [Wade] and [NW] desire to compromise and settle ALL their conflicting claims and assertions as forth n [*sic*] the lawsuit described herein.
>
> [Wade] understands that [NW] denies any and all liability and has entered into this settlement solely to buy its peace and to save the time and expense of defending litigation.
>
> . . . .

[19] Def.'s Reply Mem. to Pl.'s Mot. to Strike, Ex. B at 1 [hereinafter *Release*] (emphasis omitted).

> In making this Release, [Wade] acknowledges that no promise or agreement has been made and this Release contains the entire agreement between the parties hereto and all of the terms of this Release are important parts of this contract and binding upon all parties.[20]
>
> In making this Release, [Wade] understands and agrees that this Release covers any and all claims against any of the [NW] entities arising out of matters alleged in the complaint under any Federal or State statute, rule or regulation or any collective bargaining agreement or employee protective condition, including without limitation, any claim under The Americans With Disabilities Act or any State discrimination law.[21]

ANALYSIS

1. Releases Under the FELA

The "validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law."[22] A unique and "fact-driven" set of principles applies to claims of release in federal railroad cases.[23] The FELA is to be "liberally construed";[24] courts construing

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[20] This paragraph is "reminiscent of Alice's Wonderland: everything seemingly is, yet apparently isn't, simultaneously." Alan Greenspan, *Antitrust*, *in* CAPITALISM: THE UNKNOWN IDEAL 63 (1967). Greenspan retired on January 30, 2006, after 18 years as chairman of the Federal Reserve Board.

[21] *Release*, *supra* note 18, at 1-3 (emphasis omitted).

[22] *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62 (1952) ("Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. Their validity is but one of the many interrelated questions that must constantly be determined in these [FELA] cases according to a uniform federal law." (internal citation omitted)); *see also Ratliff v. Norfolk S. Ry. Co.*, No. 34156, 2009 W.Va. LEXIS 15, at *13-14 (W. Va. Mar. 12, 2009) (acknowledging that a determination of the validity of a release under the FELA "must be founded upon federal law").

[23] *See Sea-Land Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000) (stating that "cases involving the validity of releases under FELA are fact-driven"); *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 698 (3d Cir. 1998) (noting that the "[Supreme] Court's decisions rejecting *(footnote continued)*

the Act are to "look to FELA itself, its purposes and background, and the construction [the Supreme Court has] given it over the years."[25]

The parties have examined and cited numerous cases.[26] NS essentially argues that a rule followed by the Third and Eleventh Circuits, which was first articulated by the Third Circuit in *Wicker v. CONRAIL* expresses the formula that this court should employ to solve the question at issue in this case.[27] The executor argues for adherence to a bright-line test formulated by the Sixth Circuit in *Babbitt v. Norfolk & Western Railway Co.*[28] I will return below to the *Wicker* and *Babbitt* tests.

Judges decide discrete cases. Recognizing "that every case is unique, [we] know that we cannot simply incorporate some formula and make our task a mechanical one."[29] "[E]ach case must sit on its own bottom."[30] In this context,

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general releases as bars to subsequent claims have been fact-driven, and consequently do not provide a generally applicable rule of law").

[24] *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *see also Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) ("The Act is not to be narrowed by refined reasoning. . . . It is to be construed liberally to fulfill the purposes for which it was enacted . . . ." (citation omitted)).

[25] *Gottshall*, 512 U.S. at 541 (citations omitted).

[26] *See, e.g.*, *Sea-Land Serv.*, 231 F.3d 848; *Wicker v. Conrail*, 142 F.3d 690 (3d Cir. 1998), cert. denied *sub nom. Conrail v. Wicker*, 525 U.S. 1012 (1998); *Babbitt v. Norfolk & W. Ry. Co.*, 104 F.3d 89 (6th Cir. 1997); *Anderson v. A.C. & S.*, 797 N.E.2d 537 (Ohio App. 2003); *Davison v. Norfolk S. Ry. Co.*, CL02-36, 2003 Va. Cir. LEXIS 72 (Roanoke City Cir. Ct. June 6, 2003) (Dorsey, J.).

[27] *Wicker*, 142 F.3d at 700-01; *see also Sea-Land Serv.*, 231 F. 3d at 852 (following the Third Circuit's holding in *Wicker*).

[28] *Babbitt*, 104 F.3d at 93.

[29] *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., concurring).

it bears repeating that "cases involving the validity of releases under FELA are fact-driven."[31]

The FELA was enacted in 1908,

> to shift part of the human overhead of doing business from employees to their employers. To further [the Act's] humanitarian purposes, Congress did away with several common law tort defenses that had effectively barred recovery by injured workers. [T]he FELA abolished the fellow servant rule; rejected the doctrine of contributory negligence in favor of . . . comparative negligence; prohibited employers from exempting themselves from [the] FELA through contract; and, in a 1939 amendment, abolished the assumption of risk defense.[32]

The provision that prohibits railroads from contractually exempting themselves from the FELA is § 5: "Any contract . . . or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by [the FELA], shall to that extent be void."[33]

For the first four decades after the FELA was enacted, courts and commentators discussed the breadth of § 5, and whether it effectively

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[30] *Ex parte State Farm Mut. Auto Ins. Co.*, 386 So. 2d 1133, 1137 (Ala. 1980) (internal quotation marks and citations omitted); *accord Johnson v. United Parcel Serv.*, 616 F.2d 161, 163 (5th Cir. 1980). Alternatively, "Each case stands on its own bottom." *United States ex rel. Adams v. Ragen*, 172 F.2d 693, 696 (7th Cir. 1949)(Minton, J.)(written the year that Justice Minton became a member of the Supreme Court).

[31] *See-Land Serv.*, 231 F. 3d at 852.

[32] *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003) (second alteration added) (internal quotation marks and citations omitted).

[33] 45 U.S.C. § 55 (2006).

prohibited FELA plaintiffs from signing releases.[34] The Supreme Court answered that question in 1948, in *Callen v. Pennsylvania Railroad Co.*[35] "It is obvious," the Court said, "that a release is not a device to exempt from liability but is a means of compromising a claimed liability. . . . Congress has not said that parties may not settle their claims without litigation."[36]

2. The "Separate Disease Rule" and When the Right to Sue Arises

The Supreme Court decided *Norfolk & Western Railway Co. v. Ayers* in 2003.[37] Ayers, as will be seen:

- stands for these proposition that a railroader who is diagnosed with mesothelioma has a right to sue at the time of that diagnosis, notwithstanding settlement of an earlier suit for injuries caused by the same asbestosis exposure — even if fear of mesothelioma was one of the injuries identified in the earlier suit;
- explicitly approves of suits like the asbestosis suit that Wade filed and settled in this court; and
- teaches that an asbestosis-sufferer has no right to sue for or claim damages from mesothelioma until receiving a mesothelioma diagnosis.

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[34] *Cf. Wicker*, 142 F.3d at 696 for a brief summary of cases "establish[ing] the boundaries of § 5."

[35] 332 U.S. 625 (1948).

[36] *Id.* at 631; *see also Boyd v. Grand Trunk W.R. Co.,* 338 U.S. 263, 266 (1949) (*Callen* "distinguished a full compromise enabling the parties to settle their dispute without litigation, which we held did not contravene the Act, from a device which obstructs the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause."). *Cf. Duncan v. Thompson*, 315 U.S. 1 (1942) (holding that § 5 invalidated a contract whereby the employee agreed to repay a $600 advance before bringing suit against the railroad); *Phila., Balt. & Wash. R.R. Co. v. Schubert*, 224 U.S. 603 (1912) (holding that § 5 invalidated a contract whereby the employee agreed not to sue if he collected benefits under the railroad's relief fund).

[37] 538 U.S. 135.

Ayers was an FELA suit brought by former railroad workers who had asbestosis, but not mesothelioma. They sought pain-and-suffering damages for (among other things) the mental anguish that came from increased fear of developing cancer.[38] Over the railroad's objection, the trial court instructed the jury that the plaintiffs could recover damages for "a reasonable fear of cancer that [was] related to proven physical injury from asbestos."[39] The Supreme Court affirmed, stressing the "undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestosis-related cancer."[40]

The relevant black-letter holding of *Ayers* is that a railroad employee who has been diagnosed with asbestosis, but not with cancer, can nonetheless recover pain-and-suffering damages under the FELA for "genuine and serious" fear of cancer.[41]

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[38] *Id.* at 142.

[39] *Id.* at 143.

[40] *Id.* at 154. The Supreme Court quite literally affirmed the trial court. The case was before the Court on certiorari to the Circuit Court of Kanawha County, West Virginia. The Supreme Court of Appeals of West Virginia had denied discretionary review. *Id.* at 135.

[41] *Id.* at 157; *accord, CSX Transp., Inc. v. Hensley*, 556 U. S. ____, (2009) (No. 08-1034, Decided June 1, 2009); *see also Sea-Land Servs. v. Gaudet,* 414 U.S. 573, 582 (1974); *Mellon v. Goodyear*, 227 U.S. 335, 345 (1948). Another black-letter holding in *Ayers* is irrelevant to the issues before this court in this case. The Justices unanimously held that the FELA does not provide for apportionment of damages among railroad causes and nonrailroad causes. An injured worker can recover from the railroad for all of his damages, leaving the railroad to seek contribution from other potential tortfeasors. *Id.* at 159 – 166.

In reaching that decision, the Court explicitly approved of asbestosis suits like the one Wade filed and settled in this court. Moreover, the Justices unmistakably acknowledged that an FELA plaintiff who has recovered for job-related asbestosis can maintain, and recover in, a second suit for later-developing mesothelioma caused by the same asbestos exposure.[42]

It is important to note that, although four Justices dissented from the Court's holding on fear-of-cancer damages, all nine members of the Court joined opinions effectively establishing that the "separate disease rule" is the rule-of-decision in FELA mesothelioma cases.[43] That rule, as Justice Kennedy explained in the principal dissent, "allows a person who has recovered for injuries resulting from asbestosis to bring a new lawsuit — notwithstanding the traditional common-law proscription against splitting a cause of action — if cancer develops."[44]

For this explanation, Justice Kennedy cited the opinion written by then-Judge Ruth Bader Ginsburg for the Court of Appeals for the District of

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[42] *See id.* at 152 n.12.

[43] *See Ayers*, 538 U.S. at 152 n.12; *id* at 174 (Kennedy, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices O'Connor and Breyer joined Justice Kennedy's opinion, and dissented from the fear-of-cancer portion of the Court's judgment.

[44] *Id.* at 174 (Kennedy, J., concurring in part and dissenting in part) (citing *Wilson*, 684 F.2d at 120-21 (D.C. Cir. 1982).

Columbia Circuit in *Wilson v. Johns Manville.*[45] Justice Ginsburg wrote the majority opinion in *Ayers*.

In their *Ayers* opinions, both Justice Ginsburg and Justice Kennedy discussed the separate disease rule; both relied on *Wilson* in this discussion.[46] The issue in *Wilson* (as Justice Ginsburg phrased it) was "whether manifestation of any asbestos-related disease (in this case, asbestosis) triggers the running of the statute of limitations on all separate, distinct, and later-manifested diseases (here, malignant mesothelioma, an extremely lethal form of cancer) engendered by the same asbestos exposure."[47]

Answering that question in the negative, then-Judge Ginsburg explained that "the time to commence litigation does not begin to run on a separate and distinct disease until that disease becomes manifest."[48]

It seems to this court clear that the nine Justices of the Supreme Court, joining in two separate opinions in *Ayers*, adopted Justice's Ginsburg's *Wilson* formulation.

This is consistent with what would happen "[i]n a common law setting," as explained in a 1989 opinion of the Supreme Court of Virginia.[49] "Unless

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[45] 684 F.2d 111.

[46] *Ayers*, 538 U.S. at 152 n.12 (majority opinion); *id* at 174 (Kennedy, J., concurring in part and dissenting in part).

[47] *Wilson*, 684 F.2d at 112.

[48] *Id.*

otherwise provided by statute, traditional statutes of limitations begin to run, not when a wrongful act is done, but when injury or damage results from it and the cause of action has thus ripened into a right of action. In that traditional setting . . . a typical common-law plaintiff's right to sue does not accrue until he has sustained injury."[50]

It is clear, then, that when Wade signed the release and settled his asbestosis suit against NW, he had no right to sue NW for mesothelioma. The "time to commence litigation," in Justice Ginsburg's phrase, had not yet arrived.[51]

At about the same time that *Ayers* was decided, Judge Charles N. Dorsey of this circuit analyzed the language of a release in another FELA case.[52] In his opinion letter, he referred to a maxim that he noted might not ordinarily be considered in construing a release,

> but has been cited by a federal court seeking to ascertain the scope of a release in an FELA case. "[A] tired yet valid maxim of the property law is that one cannot sell what one does not own. By extension, if one does not have a right, he may not exchange consideration for his ability to assert that right."[53]

[49] *Roller v. Basic Constr. Co.*, 238 Va. 321, 327, 384 S.E. 2d 323, 326 (1989).

[50] *Id.*, 238 Va. at 327-28.

[51] *Wilson,* 684 F.2d at 112.

[52] *Davison v. Norfolk S. Ry. Co.*, CL02-36, 2003 Va. Cir. LEXIS 72 (Roanoke City Cir. Ct. June 6, 2003) (Dorsey, J.).

[53] *Id.* at *7 (second alteration in original) (quoting *Brophy v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 855 F. Supp. 213, 216 (S.D. Ohio 1994)).

Justice Ginsburg's analysis of the time to commence litigation and of the separate disease rule is one side of a coin; this maxim is the other side of the same coin.

The discussion of the separate disease rule in *Ayers* was at the heart of the Court's rationale for decision; it was not *dicta*.[54] The issue that divided the majority, for whom Justice Ginsburg spoke, and the dissenters, who joined Justice Kennedy's opinion, was whether the separate disease rule, alone, sufficiently protected the persons for whose benefit the FELA was enacted.[55]

3. The Language of the Release

Releases are contracts and therefore (as the Supreme Court said in another context) "must be construed like any other contracts: by their terms and consistent with the intent of the parties."[56] "[W]here the words of a . . . contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded."[57] "In construing the terms of contracts that are governed by federal common law, we are guided by common-sense canons of

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[54] Even if it were *dicta*, *dicta* from the nine Justices of the Supreme Court would be persuasive. *Cf. United States v. Shear*, 825 F.2d 783, 786 (4th Cir. 1987) ("Moreover, appellant ignores the persuasive *dicta* . . . in which the Supreme Court suggested . . . .").

[55] *See Ayers*, 538 U.S. at 152-57; *id* at 174-77 (Kennedy, J., concurring in part and dissenting in part).

[56] *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31 (2004) (contracts of carriage).

[57] *Id.* at 32 (quoting *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823)).

contract interpretation."[58] "And the rule of construction should not be overlooked that general words in a release are to be limited and restrained to the particular words in the recital."[59]

In his pleadings, it will be recalled, Wade did not claim that he had, nor did he seek damages for, mesothelioma or any other kind of cancer. The release recited, several times in several ways, that the parties were settling the "conflicting claims and assertions *as set forth [i]n the lawsuit*," including claims for "pulmonary-respiratory occupational diseases and/or other *known* injuries, physical, mental or financial" that Wade "suffered" — a past-tense verb — or that were (also in the past tense) "incurred by" Wade.[60] The release recited the settlement of "all claims against any of the [NW] entities *arising out of matters alleged in the complaint* under any Federal or State statute, rule or regulation or any collective bargaining agreement or employee protective condition, including without limitation, any claim under The Americans With Disabilities Act or any State discrimination law."[61]

No common-sense reading of the unambiguous language of this release — no reading of the release in which the prefatory general language is restricted

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[58] *Davison v. Norfolk S. Ry. Co.*, CL02-36, 2003 Va. Cir. LEXIS 72, at *4 (Roanoke City Cir. Ct. June 6, 2003) (Dorsey, J.) (internal quotation marks omitted) (quoting *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995)).

[59] *Texas & Pac. Ry. Co. v. Dashiell*, 198 U.S. 521, 527 (1905).

[60] *Release*, *supra* note 18, at 1 (emphasis added).

[61] *Id.* at 3 (emphasis added).

to the particular words in the recital — supports the conclusion that the $6,500 NW paid Wade was in settlement of anything more than his claim for damages from asbestosis, the disease that (at least according to his expert) he had. In Judge Dorsey's words, any other "construction flies in the face of established contract interpretation and requires excessive mental gymnastics to ignore the context of the language involved."[62]

4. The "Controversy" Requirement

In *Wicker v. CONRAIL*,[63] the Third Circuit case that NS urges me to follow, the Court explained that the language of the Supreme Court's 1948 *Callen* decision "is clear."

> Releases are not *per se* invalid under FELA. Although the Court did not explain what will qualify as a "compromise [of] a claimed liability" it did say that parties may settle "where controversies exist as to whether there is liability, and if so for how much." The explicit requirement is that a controversy must exist.[64]

Since Article III, Section 2 of the Constitution limits federal court jurisdiction to actual "cases" or "controversies," the words "cases" and "controversies" have well-established meanings:

> By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection of enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or

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[62] *Davison*, 2003 Va. Cir. LEXIS 72, at * 9.

[63] 142 F.3d 690 (3d Cir. 1998).

[64] *Id.* at 699 (alteration in original).

> contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy.[65]

"The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature."[66] Here, the "controversy" that was resolved by the release that Wade signed with NW was framed by the pleading that he filed in his asbestosis suit — claims for damages caused by a separate disease, not by mesothelioma.

5. The Wicker and Babbitt Cases

NS, it will be recalled, argues that this court should employ the rule followed by the Third and Eleventh Circuits, and first articulated in *Wicker v. CONRAIL*: that an employee may release a railroad from liability for known risks, as well as known injuries, if they are in controversy during the settlement.[67] Wade counters that the proper rule was adopted by the Sixth Circuit in *Babbitt v. Norfolk & Western*: that a release is valid only if it "reflect[s] a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee

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[65] *Smith v. Adams*, 130 U.S. 167, 173-74 (1889).

[66] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 237 (1937) (quoting *In re Pac. Ry. Comm'n*, 32 F. 241, 255 (Field, Circuit Justice, N.D. Cal. 1887)).

[67] *Wicker*, 142 F.3d at 700-01; *see also Sea-Land Serv.*, 231 F. 3d at 852 (following the Third Circuit's holding in *Wicker*).

might have arising from injuries known or unknown by him."[68]

The analytical path that I have followed in this case has not required me to choose between the *Wicker* and the *Babbitt* approaches. *Babbitt* was decided in 1996; *Wicker,* in 1997; and *Ayers* in 2003. *Ayers,* in my view, altered the landscape. I am also of the opinion, however, that neither the *Wicker* nor the *Babbitt* approach would lead to NS's plea in bar being sustained. I will forego the temptation to set out the facts of each case, and thereby lengthen an already long opinion letter.

The Third Circuit in *Wicker* focused (as discussed above) on the "controversy" requirement.[69] Whether or not Wade could have released NW for hypothetical future damages caused by mesothelioma not then diagnosed — as the *Wicker* opinion may say he could have — he did not do so; those damages were not in controversy during the settlement, nor raised by the pleadings, nor released in the writing. The *Wicker* court, it should also be noted, found that the releases before it were not valid under § 5.[70] Though the *Wicker* Court scorned boilerplate, the release that Wade signed is full of it.[71]

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[68] *Babbitt,* 104 F.3d at 93.

[69] *Wicker,* 142 F. 3d at 696-97

[70] *Id.* at 700-01.

[71] *Id.* ("But we are wary of making the validity of the release turn on the writing alone because of the ease in writing detailed boiler plate agreements. . . . For this reason we think the written release should not be conclusive . . . .a release may be strong, but not conclusive evidence of the parties' intent. . . . Furthermore, where a release merely details a laundry list
(footnote continued)

I cannot say that I am persuaded that the Supreme Court will follow in all FELA cases the bright-line rule adopted by the Sixth Circuit in *Babbitt.*[72] Whether or not that is so, the case that the late James Buford Wade settled was — as discussed above — distinctly not one in which he and the railroad entered into "a bargained-for settlement of a known claim for [existing mesothelioma]."[73]

CONCLUSION

For the reasons set forth above, the court will overrule NS's Plea in Bar, preserving its objections to this ruling for all of the reasons stated by counsel, orally and in writing. This ruling moots the executor's Motion to Strike the Plea in Bar.

I appreciate the outstanding briefing and argument on both sides of this case, as well as the collegiality, professionalism and patience exhibited by all counsel.

Will Messrs. Brahm, Allen, and McKowen please prepare and tender a duly-endorsed order consistent with and incorporating this opinion letter, and preserving all objections. The order should provide for the defendant to file

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of diseases or hazards, the employee may attack that release as boiler plate, not reflecting his or her intent.")

[72] *Babbitt v. Norfolk & W. Ry. Co.*, 104 F.3d 89 (6th Cir. 1997); *see Wicker*, 142 F. 3d at 700 ("it is entirely conceivable that both employee and employer could fully comprehend future risks and future liabilities and, for different reasons, want an immediate and permanent settlement.")

[73] *Id* at 93.

such responsive pleadings as it may be advised within 21 days after the entry of the order — or whatever other amount of time Mr. Jennings wishes to have.

A ruling in Norfolk Southern's favor would have been "dispositive of a material aspect of the proceeding currently pending before the court."[74] That is both the nature of a Plea in Bar and one of the criteria for seeking an interlocutory appeal under Code § 8.01-670.1. Will counsel please discuss whether an interlocutory appeal will be sought. Depending on the answer to that question, please confer about presenting an agreed-upon pretrial scheduling order, or scheduling a pretrial conference.

I send best regards to each of you.

Very truly yours,

Clifford R. Weckstein, Judge

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[74] *See* Code § 8.01-670.1.

RELEASE

1 For the sole consideration of **Six Thousand Five Hundred and no/100 Dollars**,
2 paid by Draft No. __________ receipt of which is hereby acknowledged, **James B.**
3 **Wade ("Releasor")**, S.S. #[redacted], does hereby RELEASE AND FOREVER
4 DISCHARGE **Norfolk and Western Railway Company ("Releasee")** and to the same
5 extent as if expressly named herein, their respective subsidiaries and affiliated
6 companies, their leased and operated lines, and the respective predecessors,
7 successors, assigns, lessors, officers, directors, agents and employees of the aforesaid
8 released parties, past and present, as well as their heirs and legal representatives, of
9 and from all liability for all claims or actions for pulmonary-respiratory occupational
10 diseases and/or other known injuries, physical, mental or financial, suffered or incurred
11 by the said **Releasor**, including, but not limited to: (a) medical, hospital and funeral
12 expenses, (b) pain and suffering, (c) loss of income, (d) increased risk of cancer, (e)
13 fear of cancer, (f) any and all forms of cancer, including mesothelioma (g) and all costs,
14 expenses and damages whatsoever, including all claims, debts, demands, actions, or
15 causes of action of any kind, in law or equity, which **Releasor** has or may have at
16 common law or by statute or by virtue of any action under the Federal Employers'
17 Liability Act and/or the Boiler Inspection Act, arising in any manner whatever, either
18 directly or indirectly, in whole or in part, arising out of:

19 **Exposure to toxic substances, including asbestos, silica,**
20 **sand, coal dust, work place dust and all other toxic**
21 **dusts, fibers, fumes, vapors, or mists used by Releasee**
22 **during Releasor's employment by Releasee.**

23 **Releasor** and **Releasee** desire to compromise and settle **ALL** their conflicting
24 claims and assertions as set forth n the lawsuit described herein.

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Releasor understands that **Releasee** denies any and all liability and has entered into this settlement solely to buy its peace and to save the time and expense of defending litigation.

To induce **Releasee** to enter into this settlement, **Releasor** represents to **Releasee** that no person or insurance company has any right or has asserted any right of subrogation, under any policy of insurance or otherwise, including Medicare or Medicaid, on account of any medical, hospital, nursing, funeral, burial or other expense for or on account of **Releasor's** alleged claim or action, as aforesaid.

Releasor desires to pursue litigation against other possible defendants, including miners, millers or processors of asbestos fiber and/or manufacturers of asbestos containing products and does not intend that the consideration paid by **Releasee** for this settlement constitutes a complete satisfaction of all claims or actions which **Releasor** now has or may hereafter have against others.

Releasor shall indemnify and hold harmless **Releasee** (and its parents, subsidiaries and affiliates), and their respective officers, directors and employees and their respective successors and assigns from loss, liability, costs, attorney's fees or other expenses on account of any claim demand, action, cause of action or claim for loss of consortium which may be brought against any of them by **Releasor** or any other person or company asserting any independent or derivative claim or right, whether by law, contract, or otherwise, including without limitation, actions for contribution and/or indemnity, or claiming to be subrogated to **Releasor**, for or on account of the alleged injuries to or diseases of **Releasor** as aforesaid.

It is understood and agreed that while **Releasee** and **Releasor** are not aware of any unsatisfied liens held by the Railroad Retirement Board with respect to any alleged injuries or diseases or death covered by this Release, if any such liens exist or are asserted in the future by the Railroad Retirement Board with respect to such injuries or

Initial JEW

diseases, **Releasor** hereby agrees, as a further consideration and inducement for this compromise settlement, that **Releasor** shall hold harmless and reimburse **Releasee** for the amount of any such liens.

Releasor and his/her attorneys and **Releasee** and its attorneys agree to the extent allowed by law that this agreement, including but not limited to the financial consideration for entering into this agreement, shall remain confidential by and between **Releasor** and **Releasee** and said attorneys.

In making this Release, **Releasor** acknowledges that no promise or agreement has been made and this Release contains the entire agreement between the parties hereto and all of the terms of this Release are important parts of this contract and binding upon all parties.

In making this Release, **Releasor** acknowledges and represents that he/she is of sound mind, memory and understanding and further that he/she is, in all respects, competent to understand and enter into this Release and that he/she is not under any restraint or duress.

In making this Release, **Releasor** understands and agrees that this Release covers any and all claims against any of the **Releasee** entities arising out of matters alleged in the complaint under any Federal or State statute, rule or regulation or any collective bargaining agreement or employee protective condition, including without limitation, any claim under The Americans With Disabilities Act or any State discrimination law.

Releasor hereby declares that he/she has executed this Release on the advice and approval of counsel; that he/she knows and understands the contents hereof and signs the same as **Releasor's** own free act with full knowledge that the effect hereof shall be such so as to extinguish and **Releasor** hereby declares extinguished, now and forever, any and all such claims.

Initial ____

It is understood by **Releasor** that no promise of employment is either made or implied.

Releasor agrees to dismiss with prejudice, the parties to bear their own costs, the case of **James B. Wade v. Norfolk and Western Railway Company,** pending in the Circuit Court for the City of Roanoke, Virginia, Law No. 770CL96-001053.

James B Wade
Releasor

Taken, subscribed and affirmed before the undersigned Notary Public this 16th day of March, 2001.

Notary Public
My Commission Expires: 8/31/04

CERTIFICATE

I hereby certify that on the day and year above specified, I explained the forgoing Release to **Releasor**; that I explained to him/her the legal consequences of the execution and delivery of said Release and that he/she executed the same voluntarily and appeared to have full knowledge thereof.

Dated this ______ day of ____________________, 2001.

Attorney for Releasor

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