No. 34156 Freda Marlene Ratliff, as Executrix of the Estate of Sparrell Ratliff v. Norfolk Southern Railway Company

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SUPREME COURT OF APPEALS
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Benjamin, Chief Justice, concurring:

While I concur in the result of the majority that summary judgment was not appropriate herein, I write separately because I believe the standard as set forth in the majority opinion for a settlement between an employee and an employer to be enforceable is far more rigid than that which is actually necessary under the Federal Employee Liability Act ("FELA"). I agree with my colleagues that a *general* release of future employment-related claims in connection with a voluntary separation program is precluded under FELA. 45 U.S.C. § 5. With respect to a *specific* release, however, I disagree with my colleagues, on what constitutes a proper controversy between an employee and an employer such that the parties may be found to be settling the type of specific claim which is permissible under FELA.

The majority opinion would require that a bargained-for settlement be for a "known claim of *a specific injury*." This standard is far too restrictive of the rights of employees and employers to engage in good faith and intelligent attempts through settlement to structure with predictability their future affairs. Furthermore, I find no precedent in law for so restrictive of a standard. It should not be the purpose of this Court to limit the freedom of parties to engage in bona fide, intelligent resolutions of controversies which may exist

between them. Rather, this Court should instead encourage parties who wish to end their relationship with some measure of certainty and finality to do so, so long as it is done in a knowing and intelligent manner and it is done within whatever statutory constraints may apply. In that way, the bargained-for settlement may be said to be a "fair" bargain and thus meet the needs of a remedial system such as FELA while also ensuring the maximum freedom of parties to structure their personal affairs.

The standard which best accommodates a remedial program's need for protection of an employee with the public interest in one's freedom to knowingly structure present and future affairs is a standard which requires that the bargained-for settlement to be of a "known claim of *a specific risk of harm*" (rather than of a "known risk of a specific injury"). Both standards require a knowing appreciation of the controversy being settled. However, the majority's standard may be read to preclude the ability of an employee to settle anything other than a specific manifestation of a present injury. This majority standard is a far more rigid reading of FELA than that required – one that I hope will hereafter be interpreted by this Court to also incorporate "risks of harm."

Adoption of a "known claim of a specific risk of harm" standard fully comports with the requirement that there be a specific "controversy" to be settled. *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, at 631, 68 S.Ct. 296, 298-99 (1948). Further, it more than adequately accommodates *both Babbitt v. Norfolk & Western Railway Co.*, 104 F.3d 89(6th Cir. 1997),

and *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3d Cir. 1998). Indeed, adoption of a "known claim of a specific risk of harm" standard fully embraces *Wicker*'s acknowledgment that an employee and employer may want an immediate and permanent settlement to their relationship despite the lack of a present specific injury. 142 F.3d at 700-01. The key consideration for adequacy of a settlement under FELA is the comprehension by the parties to the settlement of the employee's future risk of harm and the employer's potential liability to the employee for such. One need not have a current manifestation of specific injury to be able to appreciate that one may have a future risk of harm from something which happened presently or in the past. One should therefore not be limited to acting only if and when the worst actually comes to pass.