
NORFOLK & WESTERN RAILWAY *v.* AYERS,
538 U.S. 135 (2003)

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*Norfolk & Western Railway v. Ayers*¹ would not make the list of any Supreme Court scholar's top twenty (or one hundred) opinions authored by Justice Ruth Bader Ginsburg during her twenty terms on the Court. But her opinion for the Court in that 2003 case speaks volumes about the kind of Justice she is, and the profound difference her voice has made on the Court.

Norfolk was not on first, second, or third glance a case anyone would have supposed warranted Supreme Court review. The case arose under the Federal Employers Liability Act² (FELA) and neither of the questions presented by the petition for certiorari was remotely certworthy, especially given the absence of any written opinion, published or unpublished, by a lower court on either issue. A state trial judge had denied, without written opinion, Norfolk & Western Railway's objections to two jury instructions and declined to adopt Norfolk's proposed jury instructions. In the first instruction, the judge allowed the jury to award the plaintiffs for their reasonable fear of cancer but only as that fear related to their suffering from asbestosis. The second instruction allowed for joint and several liability.³

The jury awarded \$5,810,606 in total damages for all six plaintiffs,⁴ but without any suggestion that any of that award was for fear of cancer rather than just for the serious, debilitating asbestosis from which all six were admittedly suffering. Norfolk's appeals in West Virginia state court produced no written opinion. There was no intermediate state appellate court and the state supreme court denied discretionary review.⁵ In short, the lower court record consisted of nothing more than a bare-bones general jury verdict for a relatively inconsequential amount. No meaningful precedent of any kind had been made, in legal or practical effect.

Yet, not only did the Court defy conventional wisdom by granting review in the first instance, but the Court then incongruously affirmed rather than reversed the lower court judgment. Where, as in *Norfolk*,

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¹ 538 U.S. 135 (2003).

² 45 U.S.C. §§ 51–60 (2006).

³ See *Norfolk*, 538 U.S. at 143.

⁴ See Joint Appendix at 621, *Norfolk*, 538 U.S. 135 (No. 01-693).

⁵ *Norfolk*, 538 U.S. at 144.

the Court grants review in a plainly uncertworthy case, it does so almost always for one reason: to reverse a judgment the Justices believe to be lacking any possible merit, typically on a summary basis without full briefing and oral argument. But in *Norfolk*, the Court instead granted plenary review and then affirmed on the merits.

In an opinion authored by Justice Ginsburg, the Court first ruled that the state trial judge had acted reasonably in declining to grant the defense counsel's request that the plaintiffs not be allowed to recover damages based on reasonable fear of cancer related to their asbestosis. The majority reasoned that the jury instruction was reasonable and entirely consistent with long-standing common law tort doctrine because, as expressly instructed, the plaintiffs' emotional distress injuries were limited to those parasitic to a physical injury (asbestosis).⁶ The trial judge therefore had not, contrary to settled tort doctrine (and Supreme Court FELA precedent), permitted a "stand-alone" claim for emotional distress injuries. On the second issue, the Court ruled unanimously that FELA expressly provides for joint and several liability, and therefore Norfolk was liable for all the damages even though certain plaintiffs may have been exposed to asbestos fibers in other workplaces as well.⁷

Neither of the Court's rulings established significant new precedent. For most readers of the opinion, its most intriguing aspect was likely the unusual breakdown of Justices on the first issue and the contrasting unanimity on the second. Justice Ginsburg's majority opinion on the fear-of-cancer issue was joined by Justices Stevens, Scalia, Souter, and Thomas. The oddity of the split provides at most the basis for an amusing question for a Supreme Court trivia contest: the only common denominator for those in dissent (Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer) is that they, unlike any of the Justices in the majority, attended Stanford University for either law school or their undergraduate education.

What makes the case so revealing of Justice Ginsburg, however, are neither the rulings themselves nor the unusual vote lineups of the Justices. What is instead most remarkable is the final word of the Court's opinion — "affirmed" — because the Court's actual opinion on the fear-of-cancer issue could instead have readily supported a reversal on that ground.

Embedded in the Court's ruling on the threshold fear-of-cancer issue was the Court's express qualification that "it is incumbent upon [the plaintiff] . . . to prove that his alleged fear is genuine and seri-

⁶ *Id.* at 145–48.

⁷ *Id.* at 162–66.

ous.”⁸ The problem for the plaintiffs was that the jury instructions in *Norfolk* required no such proof and the plaintiffs never purported to offer such proof. Just the opposite. The plaintiffs had instead argued at trial that no such threshold showing of objective significance was required to sustain the reasonable-fear-of-cancer jury instruction. The plaintiffs argued the same before the Court. The *Norfolk* majority further questioned the likely sufficiency of plaintiffs’ proof of a reasonable fear of cancer by describing the plaintiffs’ proof as “notably thin” and by acknowledging that the jury instruction “might well have succumbed to a straightforward sufficiency-of-the-evidence objection.”⁹

The Court, however, then stepped back from disturbing the verdict by characterizing the nature of Norfolk’s objections at trial as not embracing these particular infirmities. But the majority could have concluded otherwise. The Court could have readily ruled that Norfolk’s broader objections to the jury instruction fairly included the lesser claim that the proof must establish the severity of the fear and therefore the jury verdict could not be sustained.

The question is, why did the Court decline to insist on the fullest possible application of its opinion and to credit Norfolk’s broad objection. As counsel who represented the plaintiffs in this case, I think I know what drove Justice Ginsburg in crafting the Court’s opinion. Not anything I did as an advocate. Nor the kind of finer point of civil procedure that Justice Ginsburg indeed loves. It was because of the kind of Justice she is: how she thinks about the law, how she approaches cases before the Court, and how she is able to argue persuasively as an advocate within the Court just as she once did as an advocate before the Court.

Justice Ginsburg knows the Court’s cases are ultimately about people, their lives, and their livelihoods. The Justice, throughout her career, has been a true intellectual and champion of legal doctrine promoting social justice. But she also understands that the cases before the Court are far more than debates about abstract legal propositions. They are about people like Sally Reed in *Reed v. Reed*.¹⁰ About Lilly Ledbetter in *Ledbetter v. Goodyear Tire & Rubber Co.*¹¹ And about the young women who in August 1997 became the first female cadets at the Virginia Military Institute in the aftermath of the Court’s ruling in *United States v. Virginia*.¹² The Justice is well known for reminding her law clerks of the biblical command, “Justice, justice shall you pursue,”

⁸ *Id.* at 157.

⁹ *Id.* at 158.

¹⁰ 404 U.S. 71 (1971).

¹¹ 550 U.S. 618 (2007).

¹² 518 U.S. 515 (1996).

which she keeps on the wall of her chambers.¹³ And she never loses sight of the fundamentally human aspect of the Court's work.

In *Norfolk*, the Court affirmed the jury's verdict notwithstanding, rather than in light of, the full import of the Court's ruling because of its appreciation for what any other ruling would have meant in an immediate and concrete way for the six individual plaintiffs: Freeman Ayers, Carl Butler, Doyle Johnson, John Shirley, James Spangler, and Clifford Vance. These six individuals were suffering from asbestosis, a serious and progressive respiratory illness, and had been for decades. Because, moreover, the jury had issued its judgment as a general verdict, there was no way to know whether they had been awarded *all* or *none* of their total of \$5,810,606 damages based on their allegations of fear of cancer. Norfolk's concerns about the impact of the fear-of-cancer instruction on the total damages awarded by the jury were therefore potentially grounded only in theory rather than in reality.

But what was clear and not at all theoretical was what would have been the practical effect of a judicial remand for a new trial based on inadequate jury instructions: none of the six plaintiffs would have received any relief for their harm within a meaningful time frame, if ever, before they were no longer alive. When the Court ruled in March 2003, the plaintiffs were then 74, 70, 69, 73, 77, and 81 years old and each was in poor and deteriorating health. More than a decade had transpired since many had filed their original complaints. Anything other than a straightforward affirmance of the jury verdict would most likely have ended their case for all meaningful purposes.

The *Norfolk* opinion also reflects Justice Ginsburg's humility and modesty regarding the role of the Court itself. The ruling is respectful not only of the plaintiffs themselves, but also of the state court system, extending to the state trial judge, the individual members of the jury, and their verdict. Such a verdict warrants the Court's utmost respect and should not be disturbed merely because it could be, but only if it must be. The opinion is a sincere and genuine application of judicial restraint.

Justice Ginsburg crafted an opinion that allowed for a change in legal doctrine as needed to address the concerns of the Justices about excessive damage awards to victims of asbestosis. But quietly and carefully in a case far below the spotlight, she ensured that the Court's ruling remained kind, just, and respectful in its application to the parties before the Court. And also in its deference to the state court system.

That's a Justice pursuing justice in all respects.

¹³ *Ginsburg on Faith*, N.Y. TIMES (Oct. 19, 2004), <http://www.nytimes.com/2004/10/19/politics/19justice.html> (quoting *Deuteronomy* 16:20) (internal quotation marks omitted).