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March 17, 2009

**COURT URGED TO LIMIT DAMAGE AWARDS
BASED ON FEAR OF DEVELOPING CANCER**
(CSX Transportation, Inc. v. Hensley, No. 08-1034)

The Washington Legal Foundation (WLF) yesterday urged the U.S. Supreme Court to review (and ultimately overturn) a Tennessee court decision that upheld a \$5,000,000 judgment for a retired railroad worker who fears that his past exposure to asbestos may cause him to develop cancer in the future.

In a brief urging the Supreme Court to grant review in *CSX Transportation, Inc. v. Hensley*, WLF argued that emotional distress damages based on a fear of developing cancer should only be available in cases in which the alleged fear is demonstrated to be "genuine and serious." WLF noted that no such limitation was imposed in this case; instead, the jury was granted unlimited discretion to award the plaintiff any damages it deemed appropriate for the emotional distress the plaintiff claimed to have endured.

"As more and more major corporations are being driven into bankruptcy by asbestos litigation liabilities, one must question the priorities of a tort system that awards millions of dollars in damages to those who claim to fear developing cancer yet are unlikely ever to do so," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Corporate funds to compensate those with asbestos-related injuries are rapidly dissipating, and there may well be inadequate funds available to compensate those likely to develop mesothelioma and other fatal asbestos-related cancers in the years to come. One way to preserve funds for the truly injured is to restrict the award of damages for unverifiable emotional distress claims," Samp said.

The plaintiff is Thurston Hensley, a 69-year-old man who worked for many years as an electrician for CSX Transportation, a major railroad. He alleges that during the course of his employment, CSX negligently exposed him to asbestos and that the exposures caused him to contract a mild form of asbestosis, a lung disorder characterized by diminution of lung function. He also claims that he now fears that he may develop cancer; those who have been exposed to asbestos have a somewhat greater risk of developing cancer than those who have not.

Because Hensley works for a railroad, his work-related disability claims are covered under a federal statute known as FELA, rather than under the workers'

compensation laws applicable to most employees. The U.S. Supreme Court is tasked with establishing rules for recovering damages in FELA cases.

The Court has issued a series of rulings over the past 15 years regarding recovery of emotional distress damages in FELA cases. The upshot of those rulings is that emotional distress damages are not available in FELA cases to workers who have not suffered a physical injury (with the exception that recovery is permissible under the "zone of danger" test -- that is, if the emotional distress arose because the uninjured plaintiff was actually placed in danger of physical injury by the defendant's negligence). But in its 2003 *Norfolk & Western v. Ayers* decision, the Court voted 5-4 to permit the award of emotional distress damages, including damages based on fear of cancer, to FELA plaintiffs who suffered some type of physical injury. *Ayers* made clear, however, that trivial fear-of-cancer claims (*i.e.*, claims based on "general concerns" about one's future health) are not recoverable; rather, recovery is limited to cases in which the fear is determined to be "genuine and serious."

In this case, the trial court refused to instruct the jury that fear-of-cancer damages are so limited, and the jury returned a \$5,000,000 verdict after the plaintiff's lawyer based much of his pitch for damages on a claim that the plaintiff feared that he might develop cancer. The Tennessee Court of Appeals affirmed the verdict, stating that "genuine and serious fear" jury instructions should *not* be given in FELA cases. In its brief urging the Supreme Court to review the case, WLF argued that the Tennessee decision is directly at odds with *Ayers* and threatens to eliminate all effective checks on the size of emotional distress damages in asbestos liability cases. Noting that punitive damages are not available in FELA cases, WLF stated that unless effective controls are imposed on the award of fear-of-cancer damages, juries in FELA cases who wish to "punish" the defendant might be attempted to use such awards as a substitute for awarding punitive damages.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and state courts in cases raising tort reform issues.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.