2007-CA-00087

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2007-CA-00087

ILLINOIS CENTRAL RAILROAD COMPANY — APPELLANT

V.

RICHARD ALDRIDGE, ET AL — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY

REPLY BRIEF OF APPELLANT

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SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
OFFICE OF THE CLERK

ILLINOIS CENTRAL RAILROAD COMPANY — APPELLANT

V. — CASE NO. 2007-CA-00087

RICHARD ALDRIDGE, ET AL — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

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c. Samuel Boddie
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d. Paskle D. Bowman
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e. Mary Louise Brower, on behalf of the beneficiaries of
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f. George F. Bruch
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g. Curtis K. Craven
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q. Billy L. Stanfill
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r. Beneficiaries of Clifton David Travis (spouse, Mary Frances Travis is also deceased). Travis previously resided at South Fulton, TN

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[1]In Appellant's Initial Brief, John H. Harper was erroneously listed as John H. "Parker."

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REPLY BRIEF OF APPELLANT

I.

"REVISED" STATEMENT OF ISSUES ON APPEAL

Illinois Central documented in its initial brief how Plaintiffs' inconsistent actions, which were diametrically opposed to any assertion that all of the cases had been "settled", confirmed that there had been no binding settlement of any of the remaining claims. Now, almost 2 years after having submitted Findings of Fact and Conclusions of Law (R. 3943-58) to the trial court that was entered in this case, Plaintiffs' counsel has reversed course once again.

Plaintiffs now concede that the claims of the Plaintiffs with cancer claims had not been settled. Plaintiffs now contend that only Plaintiffs alleging asbestosis or pleural plaques have settled their claims. This reversal supports the conclusion as a matter of law based on undisputed fact that there has been no settlement as to any of the remaining plaintiffs.

Incredibly, Plaintiffs now admit that the Findings of Fact and Conclusions of Law Plaintiffs submitted to the trial court contained errors of law and fact as to the numerous remaining cancer plaintiffs, despite allowing the entry of this Order by the trial court to stand for almost 2 years. Plaintiffs' counsel had a duty to promptly advise the trial court, and failing that, to advise this Court long before the filing of Appellees' Brief, that the trial court's final Order was in error. (See Rules 3.1 and 3.3, M.R.P.C. regarding a lawyer's duty concerning the representation of material facts and law to any tribunal). They did nothing.

Now, based upon the Brief of Appellees, several of the issues raised on appeal by Illinois Central are no longer issues for adjudication by this Court.

A. "Whether the Trial Court erred when it granted Plaintiffs' Motion to Enforce

the Settlement Agreement" is no longer an issue. Plaintiffs have conceded that the trial court erred when it entered the Order adjudicating that all of the remaining claims had been settled. Similarly, "whether the trial court erred in its Finding of Fact and Conclusions of Law" is also no longer a question for this Court. Plaintiffs have conceded in Appellee's Brief that the trial court erred when signing the very documents prepared by Plaintiffs' counsel.

Based upon the concessions in the Brief of Appellees, the following issues remain for the Court's adjudication:

A. Whether there exists an enforceable settlement agreement between Illinois Central and those Plaintiffs who did not assert claims for cancer in the lower court; and

B. Following remand, whether the claims of the remaining plaintiffs must be severed and dismissed; and

C. The application of the doctrine of judicial estoppel to the claims of certain Plaintiffs.

II.

"REVISED" STATEMENT OF THE CASE[2]

After settling many of these claims, counsel for the parties exchanged written correspondence in June of 2001 and in February of 2002 which Plaintiffs contend (and the trial court ultimately found) constituted an agreement to settle all of the claims remaining in this case. The Record establishes, however, that the correspondence merely put in place a procedure whereby Plaintiffs could submit information to Illinois Central, and Illinois

[2]References in this brief should be construed as follows: R.=Circuit Clerk's Record; T.=Court Reporter's transcript; R.E.=Appellant's Record Excerpts; Ex.=Citations to Hearing Exhibits.

Central could then elect to pay and settle the claims of certain plaintiffs on a case-by-case basis. Utilizing this process, all but eighteen claims in this case have been settled. However, as to the eighteen remaining claims, there has been no "meeting of the minds" constituting a settlement agreement. The correspondence in the Record and the conduct of the parties and the events since June 2001, confirm that the remaining claims have not been settled.

Illinois Central asserted in its initial brief that there had been no "meeting of the minds" or settlement agreement applicable to any of the eighteen claims remaining in this case. Now, remarkably, the Plaintiffs have conceded that as for those persons who asserted cancer claims in the lower court, indeed there was no "meeting of the minds." (See Appellee's brief at pp. 15-16). However, in an effort to avoid the severance and dismissal of the several claims due to misjoinder, improper venue, and improper forum, Plaintiffs have reversed course once again by engaging in yet another flip-flop of their positions.

In the trial court and at the time of oral argument which preceded the final Order entered by the trial court on September 30, 2005, Plaintiffs Blagg, Brower, Cooper, Greer, Travis, Robinson, Harper, Parton and Bruch asserted cancer claims. Now, after having conceded that these cancer claims have not been "settled," Plaintiffs attempt to move the cancer claims of Plaintiffs Robinson, Harper, Parton and Bruch into the "asbestosis and plaque columns."[3]

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[3]Plaintiffs attempt to make this move by use of footnote no. 9 on p. 22 of Appellee's Brief. Even this footnote contains an error. In addition to Harper, Parton, and Bruch, Plaintiff Lloyd Robinson also asserted a claim for cancer in the lower court. (R.E. 13, 14, 15; R. 2491-92; 3137; 3139-40). Now these Plaintiffs attempt to magically transform their claims into asbestosis and pleural plaque claims so as to avoid dismissal due to misjoinder, improper venue, and improper forum.

This is no more than an attempt to play "fast and loose" with the judicial process. But this attempted re-invention of the claims of colon cancer claimants Bruch, Harper, Parton and Robinson is not surprising in light of other events in this case, and is somewhat less shocking than the failure of Plaintiffs' counsel to take any action to correct an admittedly erroneous ruling by the trial court for over a 2 year period which, if ultimately enforced, would have resulted in the payment of hundreds of thousands of dollars.

Plaintiffs now tell this Court that their submission of this Order with its erroneous findings of fact and conclusion of law was merely "unintentional." Evidently, Plaintiffs are taking the position that their failure to advise either the trial court or this Court, or defense counsel of the admitted error was simply "unintentional." (See Plaintiffs' Brief at 15). Plaintiffs' counsel has not explained and cannot explain how such acts and inactions constitute mere unintentional or inadvertence. Clearly, the submission of Plaintiffs' proposed Findings of Fact and Conclusions of Law and the Order as well as the inaction of Plaintiffs' counsel over a period of 2 years was simply an attempt to unfairly hoodwink the trial court, and then use the monetary gravity of the trial court's opinion to increase Plaintiffs' bargaining power with the hopes that Illinois Central would "roll-over" and settle these claims. Plaintiffs' counsel knew when it prepared its proposed Order and Findings of Fact and Conclusions of Law for submission to the trial court, that it was false and contrary to the record and the positions previously taken by Plaintiffs in oral argument before the trial court.[4] Evidently, this Order and Findings of Fact and Conclusions of Law

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[4]The Order and findings of fact and conclusions of law submitted by plaintiffs were adopted verbatim by the trial court. The actions of counsel and the outcome below lend great force to this court's oft-stated standard of review that: "Where the [trial court sitting without a jury] adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, this court analyses such findings with greater care and the evidence is subjected to heightened scrutiny." In re Estate of Grubbs, 753 So.2d 1043, 1046 (Miss. 2000). Such heightened scrutiny is appropriate

were submitted by Plaintiffs' counsel simply because they could.

III.

SUMMARY OF THE ARGUMENT

There has been no "meeting of the minds" or settlement agreement with regard to the claims of the non-cancer plaintiffs. This is demonstrated forcefully by **the sequence of events that transpired after February 6, 2002**, including the setting of cases for trial by the Plaintiffs, the attendance of subsequent hearings without advising the trial court that all cases had been settled, engaging in mediation with regard to some of the remaining claims, and the assertion by Plaintiffs of positions contrary to the existence of any settlement agreement.

The trial court also ignored the express language contained in the letter of June 19, 2001 to the effect that a claim is not settled "until paid," and, that if a claim is not settled under the procedure, it should be scheduled for trial. Of course, that is exactly what the plaintiffs did with respect to several of the remaining claims.

Since there was no "settlement agreement" the trial court erred in refusing to sever and dismiss the claims of the remaining Plaintiffs, all of whom were misjoined and all of whom asserted claims in an improper venue and forum.

The Amended Complaint did not allege the specific times when each plaintiff was alleged to have been exposed to asbestos or any other "deleterious dusts, fumes or mists," nor did the Amended Complaint allege the locations of any such exposures. The Amended Complaint also failed to identify the specific disease or injury suffered by any particular plaintiff. It did not delineate any distinct litigable event connecting the claim of any

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here, particularly in light of the now-admitted errors in that Order.

particular plaintiff to the claim of any other plaintiff. It did not allege sufficient information to establish venue in Marshall County for any of the remaining Plaintiffs. Accordingly, all of the claims of the remaining Plaintiffs, including those Plaintiffs who assert claims for asbestosis and pleural plaques, must be severed and dismissed following remand to the trial court. Appellee's Brief does not even attempt to contend that these claims have been properly joined, venued, or filed in a proper forum.

Those several Plaintiffs[5] who have not participated in the settlement procedure to any degree by submitting a sworn pulmonary questionnaire or sworn discovery responses should also be remanded, severed and dismissed for the additional reason of their failure to submit the information required under the settlement procedure for over six years.

Additionally, the settlement procedure is not even applicable to the claims of several Plaintiffs who previously signed releases. The claims of those remaining Plaintiffs within Trial Group III were specifically excluded from the settlement procedure and several Plaintiffs, as noted above, have either refused or neglected to participate in the settlement procedure.

There is no "distinct litigable event" connecting the claims of any of these Plaintiffs and therefore they have been improperly joined. There is no evidence that any one or more of them sustained injurious exposure in Marshall County, and therefore the venue of this action is improper. Several of these Plaintiffs did not present evidence that they sustained injurious exposures while working for Illinois Central anywhere within the State of Mississippi, and therefore their claims have been filed in an improper forum under the doctrine of *forum non-conveniens*. Pursuant to Janssen Pharmaceutica v. Armond, 866

[5]Boddie, Farris and Blagg.

So.2d 1092 (Miss. 2004), Illinois Central Railroad Company v. Gregory, 912 So.2d 829 (Miss. 2005) and Canadian National/Illinois Central Railroad Company v. Smith, 926 So.2d 839 (Miss. 2006), this Court should remand the claims of the remaining Plaintiffs and direct that their claims be severed and dismissed without prejudice due to misjoinder, improper venue, and *forum non-conveniens*.

IV.

ARGUMENT

A. NO SETTLEMENT AGREEMENT EXISTS WITH RESPECT TO THE REMAINING NON-CANCER CLAIMS.

1. Subsequent Events and Documents in the Record Demonstrate the Absence of a Settlement Agreement Applicable to the Remaining Non-Cancer Claims.

Plaintiffs assert that "**by February of 2002**, the parties had reached agreement as to the amounts that would be paid to the Aldridge Plaintiffs with the non-malignant claims of asbestosis and pleural plaques." (Plaintiffs' Brief, p. 5). **If that were true, a binding settlement agreement existed in February of 2002, and there would be no need for further action concerning those claims in the trial court.** However, while Illinois Central elected to pay numerous claims under the settlement procedure, events that occurred subsequent to February of 2002 demonstrate that the parties did not contemplate that these letters relied on by Plaintiffs and the trial court constituted an enforceable settlement agreement. Rather, the letters clearly provided that the claim of a particular plaintiff is not settled until paid, and that any plaintiff's claim could be set for trial at anytime.

If those letters in June of 2001 and February of 2002 constituted an enforceable settlement agreement, the following events would not have occurred:

a. On October 2, 2003, upon inquiry from Plaintiffs' counsel, defense counsel advised Plaintiffs' counsel that Illinois Central would continue to evaluate cases (under the

settlement procedure), but that the Plaintiffs could set any cases for trial. (R. 3641-42, 3644).

b. Just three months later on January 26, 2004, Plaintiffs' counsel suggested a Scheduling Order establishing a trial date in May, 2004 for the claims of four cancer plaintiffs. (R. 2854-55; R.E. 17). Obviously this was done in accord with the settlement procedure which provided for trial in the event that claims are not "settled". Subsequently, Plaintiffs' counsel obtained a trial setting of May, 2004 for the trial of these four remaining claims. (R. 2920; R.E. 18).

c. On May 17, 2004, the trial court entered an order scheduling a hearing on May 29, 2004 **for the purpose of advising the trial court of the status of the matter.** (R. 3011; R.E. 20). The trial court's Order (R.E. 20; R. 3011) ordered all parties "to be ... prepared to inform the Court of the status of this cause, and to be prepared to enter an Agreed Scheduling Order for the final resolution of this matter, either on Motions now pending or by trial." As of May, 2004, (over 2 years after Plaintiffs contend that an enforceable settlement was reached), the trial court obviously had not been made aware of any "settlement agreement" applicable to the remaining claims. Why not?

d. At the May 29, 2004 hearing Plaintiffs' counsel did not advise the trial court that any of the remaining claims, whether cancer or non-cancer, had been settled pursuant to some enforceable settlement agreement. (R.E. 22). Why not?

e. Plaintiffs responded to Illinois Central's motion seeking dismissal on the improper venue, misjoinder and forum issues without advising the trial court and without making any contention that the claims of the remaining plaintiffs had been settled and that these issues were, thereby, rendered moot. (R. 3012-14; R.E. 21). Why not?

f. At the hearing on May 29, 2004, Illinois Central pointed out that many of the 22

Plaintiffs whose claims remained pending at that time had not responded to Illinois Central's interrogatories and requests for documents. Plaintiffs' counsel agreed to provide discovery responses on **all of the remaining plaintiffs** by July 5, 2004 (See Transcript of May 29, 2004 hearing at pp. 3, 12-13, 16-19; R.E. 22). Why, if there was a "settlement agreement?"

g. In June, 2004, Plaintiffs filed a Motion for Protective Order concerning a certain portion of Illinois Central's written discovery. This Motion for Protective Order did not assert that the claims of the remaining Plaintiffs had been settled. If the non-cancer claims had been settled, there would be no need for the discovery or this Motion for Protective Order. (R. 3077-79; R.E. 26). Why not?

h. Approximately ten months after the final hearing in this matter on September 30, 2005, Plaintiffs submitted their proposed Findings of Facts and Conclusions of Law (R. 3945-54) to the trial court, changing their position once again and arguing that all of the remaining claims had been settled, including the cancer claims.

These events and course of conduct belie any conclusion that by February, 2002, a binding settlement agreement was in place. The actions of the parties in continuing to litigate discovery issues, joinder and venue issues and trial setting issues demonstrate that the letters of January, 2001 and February, 2002, did not dispose of the case or settle the remaining non-cancer claims, but rather constituted only a procedure by which Plaintiffs' claims could be submitted for settlement consideration.

In addition to these events, the trial court ignored the clear provisions of those documents relied on for the proposition that a settlement agreement existed with regard to the remaining claims in several material respects:

a. The letter of June 19, 2001 from Illinois Central's counsel established a

"procedure for the submission of information to facilitate settlements", not a formal settlement agreement. This letter noted that the settlement amounts applicable to the remaining Aldridge plaintiffs had not been "finalized". This same letter noted:

> The parties have agreed that a particular plaintiff's claim is not "settled" until ... the Illinois Central has confirmed with your office that a particular plaintiff's claim has been settled and the claim has been paid.

No enforceable settlement agreement was contemplated with regard to the claim of any of the remaining Plaintiffs. The remedy for failing to have settled a claim was "that the claim shall proceed to trial as scheduled, upon application to the Court." (R. 3131-37; R.E. 12).

Plaintiffs make the disingenuous argument (Appellees' Brief, p. 11) that the language in the June 19, 2001 letter that a claim is not settled until paid is only to accommodate the provision that a plaintiff's diagnosis can change prior to payment. Yet, the "not settled until paid" paragraph of the letter serves a greater purpose - - to identify a point in time when a particular claim crosses the line from being processed to being settled. Under the procedure outlined in the June 19 letter to be settled requires: (a) all documents and information has been presented, (b) Illinois Central has confirmed with plaintiff's counsel that the particular claim has been settled, and (c) that the claim has been paid. Accommodation of the "change in diagnosis" provision is but one purpose of the paragraph at issue.

b. In addition to the subsequent conduct of Plaintiffs' counsel in setting cases for trial, the February 1, 2002 faxed letter from Attorney Farese echoes these provisions of the June 19, 2001 letter by seeking trial dates for those claims that did not settle under the procedure, noting that:

> It is important to our clients, because of their ages and because of the length

> of time their cases have been on file, that we agree to a date to reschedule the trial. We must have a date in case we have to try any of the remaining cases...

c. The faxed letter of February 6, 2002 from Attorney Peters only agreed to "process" a number of pleural plaque and asbestosis claims and further confirmed that there had been no agreement regarding the settlement amount of those claims with regard to a discount for paying early.[6] (R. 3139-40; R.E. 15).

d. Attorney Peters' fax of February 6, 2002 agreed that Illinois Central would only "process" 30 claims and noted with respect to 33 other claims, that Illinois Central still wanted a discount "for paying early." Peters advised that he would discuss this issue with his client, Illinois Central.

e. Peters' fax of February 6, 2002 suggests the "exercise of maximum effort to settle cases as opposed to preparing them for trial" and suggested September or November for the next trial date. (R. 3139-40; R.E. 15).

f. Peters' letter of February 6, further indicates that with respect to 33 other asbestosis and plaque claims, Attorney Peters had no authority and would discuss the matter with Illinois Central. Peters subsequently contacted Plaintiffs' counsel and advised that Illinois Central insisted on a discount regarding the payment of those other 33 claims. That offer was rejected by Plaintiffs. (R.E. 29, 31; R. 3639, T-9/30/05, p. 16, 23-24).

No enforceable settlement agreement exists with regard to the remaining asbestosis

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[6]The trial court's acceptance of Plaintiffs' assertion that these letters constitute a settlement agreement with regard to pleural plaque and asbestosis cases is erroneous. Attorney Farese's letter of February 1, 2002 attempts to confirm settlement of claims of those types, the reply letter of February 6, 2002 confirms that Illinois Central only agreed to "process" under the settlement procedure 30 of those claims. The trial court erroneously ruled that the letter to which Peters referred was the letter of June 19, 2001 when, in fact, Peters was referring to a different letter dated March 8, 2001. (R. 3645-46).

and pleural plaque claims. Subsequent to the mediation of 3 claims in August of 2001, settlement of the remaining claims was considered on a case-by-case basis, resulting in the settlement of many claims. The faxed letters of February 1, 2002 and February 6, 2002 clearly establish that no agreement had been reached regarding the settlement value of any claims. These letters specifically contemplate further negotiations or mediations, and should those efforts fail, trials of those claims. As noted earlier, over a year after these letters were written, plaintiffs' counsel continued to make demands or recommendations concerning the settlement amounts of claims and made efforts to set claims for trial.

Under Mississippi law, settlement agreements are treated as contracts. In order to be enforceable, settlement agreements must contain an offer, an acceptance, and consideration. Estate of Davis v. Davis, 832 So.2d 534, 536-37 (Miss. 2001). "Consideration and a **meeting of the minds** between competent contracting parties are the essential elements of a valid, binding agreement." Davis at 537. This Court observed in Davis, that there "cannot be a meeting of the minds until the offeree accepts the provisions and terms set out by the offer." Davis at 537, *citing* Edwards v. Wurster Oil Company, Inc., 688 So.2d 772, 775 (Miss. 1997), and Anderton v. Business Aircraft, Inc., 650 So.2d 473, 476 (Miss. 1995) (stating that the failure to communicate acceptance of an offer is fatal to creation of a valid contract).

These events and these documents establish that the parties understood that there had not been an agreement as to the settlement values of any of the remaining claims. The letter of June 19, 2001 specifically provides:

> as soon as that remaining issue is resolved, the law offices of William S. Guy can choose to submit any combination of Plaintiffs from either *Allen* or *Aldridge* for claims processing...

That remaining issue was never resolved. However, even to the extent that the

June 19, 2001 letter constituted an agreed procedure for the effectuation of settlements, that agreement specifically provided that no claim is considered settled until "the claim has been paid." The letter further provides that the parties would "engage in further negotiations concerning disposition of any such claim in attempt to resolve the claim," and that if the parties did not agree, the claim would be set for trial upon application to the court. Clearly, no motion to enforce a settlement agreement was contemplated by these letters when applied to this case; rather the letters contemplated that a claim was not settled "until paid" and that if settlement and payment was not obtained, a trial was the exclusive remedy contemplated by the procedure.

Unlike the situation in Illinois Cent. R.Co. v. McDaniel, 951 So.2d 523 (Miss. 2006), Illinois Central did not agree that the trial court in this case could act as an ultimate fact-finder of disputed facts.

> **"However, to the extent that the Court considers Plaintiffs' Motion to Enforce, the Plaintiffs have failed to establish that the facts surrounding their Motion to Enforce are undisputed so as to justify a ruling by the Court as a matter of law."** Alternatively, the undisputed facts in this case demonstrate that the Court should, if it finds it necessary, enter summary judgment pursuant to Rule 56, M.R.C.P., in favor of Illinois Central on Plaintiffs' Motion to Enforce or otherwise deny that Motion." (R. 3972).

In a footnote to this quotation, Illinois Central stated: "Illinois Central does not consent to a determination of disputed facts by the Court, but only consents to determinations of law based on undisputed facts." While the documents in this Record establish that there was no enforceable settlement agreement as to any of the remaining claims, to the extent that the trial court acted as a fact finder in making inferences or resolving conflicting facts in these documents or elsewhere in the Record, the trial court

exceeded its authority.[7]

Plaintiffs assert in their brief that "Illinois Central has waived any objection to the Trial Court Judge making findings of fact ... a review of the record shows that Illinois Central ... never voiced any such objection." (Appellee's Brief at pp. 7-8). Illinois Central never voiced any objection to the trial court making findings of undisputed facts which a trial court is always empowered to do. Illinois Central has not waived its objection to the trial court making findings concerning disputed fact. Even though Plaintiffs' Brief asserts that Illinois Central never objected, Plaintiffs then admit that Illinois Central did object to the trial court making findings of disputed fact. Since Illinois Central objected at the trial court level, Illinois Central has not waived anything.

In any event, the undisputed facts consisting of the contents of the correspondence and the sequence of events described in Illinois Central's briefs demonstrate as a matter of uncontradicted fact that no binding enforceable settlement agreement was reached with respect to the non-cancer Plaintiffs.

B. THE TRIAL COURT ERRED IN IGNORING UNCONTRADICTED FACTS WHICH EXCLUDED CERTAIN PLAINTIFFS FROM THE SETTLEMENT PROCEDURE.

1. The Existence Of Prior Releases.

The claims of remaining Plaintiffs Blagg, Bowman, and Craven, must be severed and dismissed since no settlement agreement could possibly be applicable to their claims. The letter of June 19, 2001 provided that:

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[7]In the proposed Order Illinois Central submitted to the trial court on August 22, 2006 following the final hearing in this matter, Illinois Central proposed that the trial court's Order state: "Even if these claims had been properly joined and filed in a proper venue, this Court does not believe that the Motion is well-taken since this Court has not been presented with evidence establishing as a matter of uncontradicted fact, and thus as a matter of law, that there has been any meeting of the minds as to the settlement of any one or more of the claims of the remaining Plaintiffs." (R. 3994-95)

> The Illinois Central would identify those claims where a question has arisen regarding ... **the existence** of a previous release which has been executed by the Plaintiff, ... the parties will engage in further negotiations concerning the dispositions of any such claim in an attempt to resolve the claim, **failing which the claim will be set for trial upon application to the Court.**

With regard to the claims of Plaintiffs Blagg, Bowman and Craven, Illinois Central has identified the existence of a previous release. (R. 3028-3032; 3059-3062; 3069-3074; R.E. 23, 24, 25). Therefore, the claims of Blagg, Bowman, and Craven must be remanded, severed, and dismissed. As noted in Illinois Central's initial brief, the existence of a previous release executed by any of the remaining plaintiffs precludes application of the settlement procedure and any claim that a binding settlement agreement exists between those plaintiffs and Illinois Central.

Plaintiffs appear to have confused the factual circumstances in this Record with the facts and Record in Illinois Central Railroad Company v. McDaniel, 951 So.2d 523 (Miss. 2006). In that case Illinois Central agreed that the trial court could act as a finder adjudicating disputed facts. Illinois Central also agreed that the trial court could adjudicate and rule upon whether certain prior releases had a preclusive effect on pending claims. No such agreement was made by Illinois Central in this case. No such ruling was made by the trial court in this case on the effect any of these releases.

Illinois Central identified prior releases executed by Plaintiffs Blagg[8], Bowman, and Craven, and therefore no binding settlement agreement exists with respect to their claims. Rather than conceding that the existence of releases executed by Bowman and Craven preclude any application of the settlement procedure to their claims, Plaintiffs devoted a

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[8]Blagg is a cancer Plaintiff, and therefore Plaintiffs have now admitted that no settlement agreement exists with respect to his claim. Therefore, his claim, along with other the claims of other cancer Plaintiffs must be remanded, severed, and dismissed.

significant portion of their brief (see Section C at pp. 17-21) asserting a legal argument as to whether or not those prior releases precluded the claims of Bowman and Craven in this lawsuit. That argument is not properly before this Court since the trial court never ruled and was never asked to rule on any preclusive effect of the prior releases on the claims of Bowman and Craven in this suit.[9] Educational Placement Services v. Wilson, 487 So.2d 1316, 1320 (Miss. 1986) (appellate court's right to review actions of trial court and should not undertake review of matter that was not first presented to and decided by trial court); Charles Morgan Const. Co. v. City of Starkville, 909 So.2d 1145, 1148 (Miss. App. 2005) (same).

2. The Exclusion of Trial Group III Plaintiffs.

The letter of June 19, 2001 from Illinois Central's counsel to plaintiffs' counsel memorialized the:

> ... procedure that we have agreed upon whereby ... the remaining Plaintiffs in Aldridge v. Illinois Central Railroad Company **(excluding Trial Group III currently set for September 10, 2001)** can submit information for purposes of processing a settlement.

This letter excluded Trial Group III which consisted of eight plaintiffs including six of the plaintiffs remaining in this case: Greer, Harper, Parton, Robinson, Bruch and Travis. (R. 3673-74).

Of the eighteen remaining Plaintiffs in this lawsuit, six of these remaining Plaintiffs were in Trial Group III at the time of the June 19, 2001 letter. Those Trial Group III

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[9]While Illinois Central filed Motions as to the preclusive effect of these releases, the trial court was never asked to rule on these issues. At the last hearing, Illinois Central advised the trial court, that it had "other motions" that "are not proper (for consideration) until the Court severs them." (R. 31, p. 33). Clearly this trial court should not rule on these Motions. Rather they should be ruled upon by a subsequent Court of proper venue and jurisdiction, once these claims are remanded, severed, dismissed, and re-filed in a Court of proper venue, forum, and jurisdiction.

Plaintiffs were: Greer, Harper, Parton, Robinson, Bruch, and Travis. (See letter of May 29, 2001 at R. 3673-74). All six of those Plaintiffs were cancer plaintiffs.[10]

In an attempt to avoid severance and dismissal, Plaintiffs now contend that none of these six plaintiffs were in Trial Group III, pointing to the Order filed on July 24, 2001 saying that the Trial Group consisted only of Myrick, Cox and Beal. (S.R.E. 52). However, note the dates of these events. The letter of June 19, 2001 could not possibly have been referring to some subsequent events concerning the identity of the Plaintiffs in Trial Group III, but rather had to refer to those persons who were understood to be within Trial Group III as of June 19, 2001. Those plaintiffs included those six listed above. That these six plaintiffs were included within Trial Group III at the time of the June 19, 2001 letter is confirmed by reference to their inclusion in this trial group in Illinois Central's Motion to Continue that was not filed until July 5, 2001. (R. 2491-93).

The claims of still-pending Plaintiffs Greer, Harper, Parton, Robinson, Bruch and Travis were clearly considered part of Trial Group III at the time of the letter of June 19, 2001, and therefore were not part of any settlement procedure.

Therefore, the claims of these six Plaintiffs must be remanded, severed and dismissed.

In another amazing "flip-flop", now for the first time on appeal to this Court, Plaintiffs contend that Bruch, Harper, Parton and Robinson are no longer "cancer" plaintiffs, but have been, with the waive of a magic pen in a footnote, transformed into plaintiffs claiming personal injuries consisting of asbestosis or pleural plaques. This is obviously an unfair

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[10]Even though Plaintiffs have now admitted that the claims of the cancer Plaintiffs have not been settled, this issue remains due to Plaintiffs' attempted re-invention of Plaintiffs Bruch, Harper, Parton, and Robinson as non-cancer Plaintiffs.

effort to avoid severance and dismissal of the claims for these Plaintiffs.

3. Certain Plaintiffs Never Complied With the Settlement Procedure.

The settlement process contemplated that all of the remaining Plaintiffs would submit information to the Illinois Central in the form of responses to pulmonary questionnaires or responses to Illinois Central's written discovery. Plaintiffs Blagg[11], Boddie, and Farris never supplied any pulmonary questionnaire or any response to Illinois Central's discovery. Mysteriously, these three Plaintiffs failed to submit the documents even though Plaintiffs' counsel agreed to supply such documents by allegedly agreeing to the terms in the letter of June 19, 2001. Even though the trial court ordered the remaining plaintiffs to respond to Illinois Central's discovery at the hearing held on May 29, 2004, and even though Plaintiffs' counsel agreed to provide discovery responses for all of the remaining plaintiffs by July 5, 2004 at the May 29, 2004 hearing, over 3 ½ years have passed since that hearing. Yet, these three Plaintiffs have yet to even attempt compliance with the settlement procedure.

Without claiming "inadvertence", "mistake", or any "unintentional" act, Plaintiffs concede that Plaintiffs Boddie and Farris have taken none of the steps required of them to participate in the settlement procedure over the last **6 ½ years**! As if that length of time were not sufficient, Plaintiffs have requested that this Court direct the trial court "to allow them a reasonable time to comply with the June 19, 2001 settlement agreement." (Appellee's Reply Brief, p. 23).[12]

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[11]Plaintiffs advised by letter dated August 24, 2004 that Blagg was asserting a claim for cancer. Plaintiffs have now conceded that Blagg's cancer claim and is not subject to any settlement procedure or agreement. Therefore, his claim must be remanded, severed, and dismissed.

[12] Do these Plaintiffs even know they have a claim or lawsuit? Plaintiff Boddie obviously didn't know about this lawsuit or anything about the 2001-2002 settlement of his claim since on June 2, 2004, he filed another lawsuit for occupational lung disease against Illinois Central. (See

Even without consideration of the misjoinder, improper venue, and improper/forum issues applicable to these plaintiffs, the pleading requirements of Mangialardi, Hinton, and Gregory[13] which were discussed at length in Illinois Central's initial brief mandate the remand, severance, and dismissal of the claims of Blagg, Boddie, and Farris.

C. THE CLAIMS OF ALL REMAINING PLAINTIFFS MUST BE REMANDED, SEVERED AND DISMISSED.

1. The Claims of the Remaining Plaintiffs Have Been Misjoined And Filed In An Improper Venue And Forum.

Illinois Central devoted a voluminous portion of its initial brief establishing that the claims of all remaining plaintiffs have been misjoined and filed in an improper venue and forum. Plaintiffs, in reply, have made no effort to distinguish the numerous venue, misjoinder, and forum cases decided by this Court in recent years. Plaintiffs do not point to any facts in the record supporting an argument that these claims have been properly joined, properly venued, or filed in a proper forum. Plaintiffs only devote one paragraph on page 23 of their Reply Brief to their position that the now-abrogated decision of Illinois Central Railroad Company v. Travis[14] remains the law of the case, and therefore Plaintiffs assert that regardless of whether these claims are misjoined or filed in an improper venue or forum, this Court must remand the remaining claims for trial in Marshall County. Such an assertion is incomprehensible given the clear and voluminous discussions of law in the voluminous misjoinder, venue, and forum cases decided by this Court since 2002.

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excerpts from copy of Complaint filed in Marshall County at App. A).

[13]Harold's Auto Parts v. Mangialardi, 889 So.2d 493 (Miss. 2004), 3M Company v. Hinton, 910 So.2d 526 (Miss. 2005), and Illinois Central Railroad Company v. Gregory, 219 So.2d 829 (Miss. 2005).

[14]808 So.2d 928 (Miss. 2002), overruled by Capital City Ins. Co. v. G.B. Boots Smith Corp., 889 So.2d 505 (Miss. 2004), abrogated by Wyeth-Ayerst Lab. v. Caldwell, 905 So.2d 1205 (Miss. 2005).

The complaints in Illinois Central v. Gregory, *supra*, as well as the complaints in the numerous other cases discussed in the misjoinder and improper venue cases decided by this Court in recent years have been applied to pending claims and those filed prior to the rendition of those opinions discussed in Illinois Central's initial brief. No exception applies here.

None of the remaining Plaintiffs lived in Marshall County at the time of any alleged exposure, and none of them worked or were exposed in Marshall County. The discovery responses, pulmonary questionnaires, and the Amended Complaint fail to establish or even allege that any of these Plaintiffs were connected with any other Plaintiff through any "distinct litigable event" as required for joinder. The claims of all remaining Plaintiffs have been improperly joined and venued in Marshall County. Severance of these claims is therefore mandated by Janssen Pharmaceutica v. Armond, 866 So.2d 1092 (Miss. 2004) and Illinois Central Railroad Company v. Gregory, 912 So.2d 829 (Miss. 2005). Dismissal of all of the remaining claims is mandated by Canadian National/Illinois Central Railroad Company v. Smith, 926 So.2d 839 (Miss. 2006).

2. "Law Of The Case" Doctrine Is Not Applicable To The Claims Of The Remaining Plaintiffs.

With five lines of argument in their brief (p. 23), Plaintiffs contend that this Court is irrevocably and inexplicably bound to its long-since abrogated decision in Illinois Central Railroad Company v. Travis.[15] Illinois Central discussed extensively the "law of the case" doctrine in its initial brief. All of the exceptions prohibiting application of the "law of the case" doctrine apply to the claims of the remaining Plaintiffs. The facts and parties

[15]808 So.2d 928 (Miss. 2002) overruled by Capital City Ins. Co. v. G.B. Boots Smith Corp., 889 So.2d 505 (Miss. 2004), abrogated by Wyeth-Ayerst Lab. v. Caldwell, 905 So.2d 1205 (Miss. 2005).

presently before this Court are different than those presented in the appeal of Travis. The law has changed since this Court's 2002 decision in Travis, and Travis has been abrogated by numerous decisions of this Court. Those decisions on the misjoinder, forum, and pleadings issues were rendered to prevent unjust results, to craft fair rules for the administration of justice and to provide fair forums for all parties.

The remaining Plaintiffs upon remand, severance, and dismissal, will simply have to re-file a proper complaint in a proper venue. Such a result is not unfairly prejudicial. On the other hand, Illinois Central Railroad Company would be unfairly and severely prejudiced by any application of the "law of the case" doctrine to enforce an abrogated law which arguably permitted the joinder of hundreds of claims in the same case and which would permit adjudication of misjoined claims in an improper venue based on a deficient complaint. Interestingly, Plaintiffs have not even presented and cannot present a logical, coherent articulation of facts or law supporting any application of the "law of the case" doctrine to the claims remaining in this case.

D. JUDICIAL ESTOPPEL PRECLUDES "FLIP-FLOPS" BY PLAINTIFFS BRUCH, HARPER, PARTON AND ROBINSON

Obviously recognizing that this Court should remand these claims and direct the trial court to sever and dismiss the Plaintiffs with cancer claims, with the wave of a magic pen, and the insertion of a one-line footnote (see footnote 9 on p. 22 of Appellee's brief), Plaintiffs seek to magically transform the claims of Bruch, Harper, and Parton from cancer claims into claims for asbestosis or pleural plaques, and thereby avoid severance and dismissal for these three Plaintiffs. Additionally, though not mentioned in the footnote, cancer plaintiff Lloyd Robinson seeks to avoid this result by the inclusion of his name in the

list of Plaintiffs (See Appellee's brief, p. 22) seeking recovery for asbestosis.[16]

When the claims of Plaintiffs Bruch, Harper, Parton, and Robinson were pending at the trial court level, they clearly asserted claims for colon cancer. When Plaintiffs filed their Motion to Enforce (the alleged Settlement Agreement), Plaintiffs clearly were asserting cancer claims on behalf of Bruch, Harper, Parton, and Robinson. Now, when Plaintiffs have been forced to acknowledge that the facts and law no longer support any contention that the cancer claims are subject to any claimed settlement, and for the first time while this case is at the appellate court level, they seek to construct a lifeboat. These Plaintiffs are judicially estopped from making such an artful move to abandon a sinking ship.

Mississippi law prohibits such a "flip-flop" by plaintiffs. "Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." Dockins v. Allred, 849 So.2d 151, 155 (Miss. 2003); In Re Estate of Richardson, 903 So.2d 51, 56 (Miss. 2005). This Court wrote recently that: "Judicial estoppel is designed to protect the judicial system and applies where 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" Kirk v. Pope, 973 So.2d 981, 991 (Miss. 2007.

While the letters pertaining to the settlement procedure acknowledged that a plaintiff's diagnosis could change due to the development of a malignancy or a progression from asbestosis (R.E. 12; 3133), the settlement procedure never contemplated that a plaintiff could change his claim if his diagnosis had not changed. The settlement procedure never contemplated that a plaintiff's diagnosis could miraculously "get better," and regress from a malignancy to a non-cancer claim.

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[16]Robinson asserted a claim for cancer in the trial court. See correspondence at R.E. 14, 15; R.3137; 3139-40).

Regarding these mysteriously cured cancer plaintiffs (Bruch, Harper, Parton and Robinson), the letter of February 1, 2002 not only confirms that these individuals only asserted claims for cancer, but echoes Illinois Central's position that no enforceable settlement agreement existed with respect to any of these claims, and that the only contemplated remedy for any failure to settle was a trial:

> As for the remaining cases, we have 2 lung cancer cases (Jack Greer and David Travis) and four colon cancer cases (George Bruch, Lloyd Robinson, Elwood Parton, and John Harper) ... You mentioned that we would have to negotiate the colon cancer cases, but you thought a figure ... would be in the ballpark. We could mediate them or try to negotiate a figure; then, **if we could not reach an agreement, we could try them.** (R.E. 14; R. 3137-38).

V.

CONCLUSION

Unintentional? Inadvertent? In an earlier case pending before this Court, counsel for these plaintiffs submitted numerous false affidavits and this Court accepted the explanation that the affidavits were false due to mere inadvertence.

Now, in this case, Plaintiffs' counsel submitted to the trial court judge a proposed Order and Findings of Fact and Conclusions of Law that Plaintiffs' counsel well knew was false and unsupported by law and evidence during its preparation and at the time of its submission to the trial court as to the claims of those Plaintiffs making claims for cancer. Even though this Order was filed in December of 2006, rather than advising the trial court judge that the Order was "inadvertently" or "unintentionally" erroneous and contrary to law and fact, Plaintiffs did nothing. Plaintiffs now tell this Court that the submission of this Order directing Illinois Central to pay all of the remaining claims, including the cancer claims was "purely unintentional" (Appellee's Brief, p. 15).

Why did they not make any effort to advise the trial court of its error prior to appeal

or this Court prior to the submission of the Brief of Appellees? Plaintiffs clearly wanted whatever ammunition and bargaining power the entry of that Order would give them until such time as they realized Illinois Central was not going to roll over and pay these claims.

Illinois Central respectfully submits that while Plaintiffs contend that the asbestosis and pleural plaque cases were settled by an agreement reached back in 2002, Plaintiffs did not "unintentionally or inadvertently" fail to seek an enforcement of this settlement for over 2 years when suddenly on August 26, 2004 they filed their Motion to Enforce. It was not an unintentional act or an inadvertent act by Plaintiffs' counsel when in May of 2004, Plaintiffs appeared before the trial court at a status conference and said nothing about all of the remaining claims having been settled back in 2002. It was not inadvertent or unintentional when, at that same hearing, Plaintiffs' counsel agreed to respond to discovery on all pending cases. And, it was not unintentional or inadvertent when Plaintiffs' counsel submitted to the trial court an Order directing Illinois Central to pay all of the remaining claims including the cancer claims. They did it simply because they could. They sought to maximize their bargaining power unfairly by capitalizing on whatever advantages may exist by the entry of the trial court's Order in the improper venue and forum, a venue and forum which Plaintiffs arbitrarily selected for the misjoinder of these numerous claims. Once the "unintentional" Order was filed by the trial court, they said nothing, but rather have sought to benefit by their silence, even though they knew, and have been forced now to admit, that the trial court's Order was clearly erroneous and contrary to fact and law.

Now, before this Court, Plaintiffs' attempt to have this Court approve their continued "shell-game" by moving the claims of some cancer Plaintiffs into the pleural plaque and asbestosis columns. While such a move should not cure those cancer plaintiffs from the fact that their claims have been misjoined and filed in an improper venue and forum, the

motive of these plaintiffs is evident.

This Court stated in Illinois Central Railroad Company v. Adams, 922 So.2d 787, 791 (Miss. 2006):

> The purpose of litigation is not to amass numerous Plaintiffs like so many lottery tickets, to increase the chances of winning; nor is it an exercise in tackling the entire backfield and shucking players until the one with the ball is found.

Eight years after the commencement of this litigation and years after this Court has rendered numerous opinions addressing misjoinder, improper venue and pleading requirements, Plaintiffs are still "shucking players" and "hiding the ball." This Court needs to blow a loud whistle and declare that the game is over.

This Court should reverse the trial court's Order, remand this matter, and direct the trial court to sever and dismiss without prejudice the claims of all remaining Plaintiffs, including the non-cancer plaintiffs. The remaining Plaintiffs: Anderson, Bruch, Harper, Joyner, Mayer, Parton, Robinson, Stanfill, Bowman, Bruch, Craven, Cooper, Crain, Greer, Travis, Blagg, Boddie, and Farris, will not be unfairly prejudiced and can promptly file and assert their claims against Illinois Central separately in proper jurisdictions, venues, and forums.

Respectfully submitted,

UPSHAW, WILLIAMS, BIGGERS,
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BY: 

GLENN F. BECKHAM, MBN [redacted]
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Certificate of Service

I, Glenn F. Beckham, of counsel to Defendant-Appellant, hereby certify that I have this day mailed with postage prepaid, a true and correct copy of the above and foregoing document unto:

Honorable William S. Guy
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Honorable Henry L. Lackey
Circuit Judge
208 North Main Street, Suite 102
Lackey Building
Post Office Drawer T
Calhoun City, Mississippi 38916

SO CERTIFIED, this the 17th day of June, 2008.

GLENN F. BECKHAM

IN THE CIRCUIT COURT OF MARSHAL COUNTY, MISSISSIPPI

HOMER BAKER; BOBBY BENSON; JIMMY BESINGER;
DONALD BISHOP; BOBBY BLACK; SAMUEL BODDIE;
RICHARD BOGGAN; LILTON BONNER; JOHNNIE BROOKS;
CHARLES CHAPUIS; JAMES COX; DON DANIEL;
HAROLD DAVIDSON; HERBERT DICKSON, JR.;
THOMAS DONALDSON; JOSEPH DUNN; PAUL DYKES;
EDDIE FARRIS; EARNEST HAYES; HORACE HUNTER;
HENRY JONES, JR.; WILLIAM LONG; DAVID MOORE;
PAUL MURPHY; ROY PIERCE; THOMAS POPE;
DENNIS ROBINSON; WILLIE ALBERT RUSH;
ARTHUR SMITH; WILSON STOVER; and
COLON SULLIVAN

PLAINTIFFS

vs. Civil Action Number M2004-219

ILLINOIS CENTRAL RAILROAD COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY
d/b/a Canadian National/Illinois Central Railroad Company,
ILLINOIS CENTRAL GULF RAILROAD COMPANY, and
CANADIAN NATIONAL RAILWAY COMPANY,
Individually and as Successors-in-Interest to the
Illinois Central Railroad Company,
the Gulf, Mobile & Ohio Railroad Company,
the Illinois Central Gulf Railroad Company,
and the Canadian National/Illinois Central Railroad Company, DEFENDANTS

COMPLAINT

COME NOW the Plaintiffs, by and through counsel, and bring this complaint against the Defendants, the ILLINOIS CENTRAL RAILROAD COMPANY, the ILLINOIS CENTRAL RAILROAD COMPANY d/b/a the Canadian National/Illinois Central Railroad Company, the ILLINOIS CENTRAL GULF RAILROAD COMPANY, and the CANADIAN NATIONAL RAILWAY COMPANY, Individually and as Successors-in-Interest to the

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Circuit Clerk, Marshall Co., D.C.
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Illinois Central Railroad Company, the Gulf, Mobile & Ohio Railroad Company, the Illinois Central Gulf Railroad Company, and the Canadian National/Illinois Central Railroad Company (hereinafter collectively referred to as "Defendant" or "Defendant Railroad"), and for cause of action would respectfully state as follows, to-wit:

PARTIES:

The Plaintiffs

1. Plaintiff HOMER BAKER (SS# 412-18-2583) is a resident of Walls, Mississippi, who worked for the Defendant Railroad and/or its predecessors from 1952 to 1986 as a fireman and engineer. He has been diagnosed with an occupational lung disease.

2. Plaintiff BOBBY BENSON (SS# 409-60-8289) is a resident of Bartlett, Tennessee, who worked for the Defendant Railroad and/or its predecessors from 1963 to 1991 as an operator and clerk. He has been diagnosed with an occupational lung disease.

3. Plaintiff JIMMY BESINGER (SS# 409-60-0532) is a resident of Memphis, Tennessee, who worked for the Defendant Railroad and/or its predecessors from 1965 to 2000 as a carman. He has been diagnosed with an occupational lung disease.

4. Plaintiff DONALD BISHOP (SS# 427-80-0247) is a resident of Oxford, Lafayette County, Mississippi, who worked for the Defendant Railroad and/or its predecessors from 1962 to 1985 as a carman. He has been diagnosed with an occupational lung disease.

5. Plaintiff BOBBY BLACK (SS# 426-84-3896) is a resident of Kosciusko, Mississippi, who worked for the Defendant Railroad and/or its predecessors from 1967 to 1991 as a brakeman. He has been diagnosed with an occupational lung disease.

6. Plaintiff SAMUEL BODDIE (SS# 409-32-5107) is a resident of Memphis, Tennessee, who worked for the Defendant Railroad and/or its predecessors from 1947 to 1987 as a carman. He has been diagnosed with an occupational lung disease.

7. Plaintiff RICHARD BOGGAN (SS# 413-66-8185) is a resident of Memphis, Tennessee, who worked for the Defendant Railroad and/or its predecessors from 1961 to 2002 as a carman. He has been diagnosed with an occupational lung disease.

8. Plaintiff LILTON BONNER (SS# 409-54-2501) is a resident of Memphis, Tennessee, who worked for the Defendant Railroad and/or its predecessors from 1952 to 1993 as a carman. He has been diagnosed with an occupational lung disease.

9. Plaintiff JOHNNIE BROOKS (SS# 409-32-5841) is a resident of Memphis, Tennessee, who worked for the Defendant Railroad and/or its predecessors from 1943 to 1950 and 1964 to 1981 as a machinist. He has been diagnosed with an occupational lung disease.

10. Plaintiff CHARLES CHAPUIS (SS# 457-70-6667) is a resident of Millington, Tennessee, who worked for the Defendant Railroad and/or its predecessors from 1967 to 2002 as a machinist. He has been diagnosed with an occupational lung disease.

this Court and to be determined by the trier of fact which is sufficient to fully compensate the Plaintiffs, individually and collectively, for their injuries, damages and losses, together with costs and all other relief permitted.

RESPECTFULLY SUBMITTED this, the 2nd day of June, 2004.

HOMER BAKER, *Et Al.*,
Plaintiffs

By: _____
JOHN BOOTH FARESE (MS #5136)
Attorney for Plaintiffs

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