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

BRIEF OF APPELLANT

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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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r. Beneficiaries of Clifton David Travis (spouse, Mary Frances Travis is also deceased). Travis previously resided at South Fulton, TN

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TABLE OF CONTENTS

Certificate of Interested Persons ..... i-iv

Table of Contents ..... v-vi

Table of Cases and Authorities ..... vii-viii

BRIEF OF APPELLANTS

I. Statement of Issues 1

II. Statement of the Case 2

A. Nature of Case 2-3

B. Course of Proceedings and Disposition in the Trial Court 4-21

III. Summary of the Argument 22-26

IV. Argument of Issues on Appeal 26

A. No Settlement Argument Exists with Respect to Any of the Remaining Claims 26

1. Subsequent Events and Documents in the Record Demonstrate the Absence of a Settlement Agreement Applicable to the Remaining Claims 26-34

B. The Trial Court Erred in Ignoring Uncontradicted Facts Which Excluded Certain Plaintiffs From the Settlement Procedure 34

1. The Existence of Prior Releases 34
2. The Exclusion of Trial Group III Plaintiffs 34-35
3. Certain Plaintiffs Never Complied with the Settlement Procedure 35

C. The Claims of the Remaining Plaintiffs Must Be Remanded, Severed, and Dismissed 35

1. The Claims of the Remaining Plaintiffs Have Been Misjoined and Filed in an Improper Venue and Forum 35-44

2. "Law of the Case" Doctrine is not Applicable to the Claims of the Remaining Plaintiffs 44-48

V. Conclusion 48

Certificate of Service 50

Appendix . . . . . A

TABLE OF AUTHORITIES

3M Company v. Hinton, 910 So.2d 526 (Miss. 2005) 35, 40, 42-43

Anderton v. Business Aircraft, Inc., 650 So.2d 473 (Miss. 1995) 33

Brewer v. Browning, 76 So.267, 115 Miss. 358 (1917) 45

Canadian National/Illinois Central v. Smith, 926 So.2d 839 (Miss. 2006) 20, 26, 41-43, 47

Crossfield Products Corporation v. Irby, 910 So.2d 498 (Miss. 2005) 39-40

Culbert v. Johnson & Johnson, 833 So.2d 550 (Miss. 2004) 38

Dockins v. Allred, 849 So.2d 151 (Miss. 2003) 29

Edwards v. Wurster Oil Company, Inc., 688 So.2d 772 (Miss. 1997) 33

Estate of Davis v. Davis, 832 So.2d 534 (Miss. 2001) 32-33

Florida Gas Exploration Company v. Searcy, 385 So.2d 1293 (Miss. 1980) 44

Harold's Auto Parts v. Mangialardi, 889 So.2d 493 (Miss. 2004) 35, 37, 40, 42

Illinois Central Railroad Company v. Adams, 922 So.2d 787 (Miss. 2006) 37

Illinois Central Railroad Company v. Gregory, 219 So.2d 829 (Miss. 2005) 14, 19, 26, 35, 40-43, 45

Illinois Central Railroad Company v. McDaniel, 951 So.2d 523 (Miss. 2006) 33

Illinois Central Railroad Company v. Travis, 808 So.2d 928 (Miss. 2002) 12, 24, 40, 44-46, 48

In Re Estate of Richardson, 903 So.2d 51 (Miss. 2005) 29

Janssen Pharmaceutica v. Armond, 866 So.2d 1092 (Miss. 2004) 14, 15, 26, 36-37, 39

Kirk v. Pope, _____ So.2d _____, 2007 WL 4260123 (Miss. 2007) 29

Mauck v. Columbus Hotel Company, 741 So.2d 259 (Miss. 1999) 44

Miss. Life Insurance Company v. Baker, 905 So.2d 1179 (Miss. 2005) 39, 45

Purdue Pharma v. Heffner, 904 So.2d 100 (Miss. 2004) 38

Simpson v. State Farm Fire and Casualty, 564 So.2d 1374 (Miss. 1990) 46

State Farm Insurance v. Murriel, 904 So.2d 112 (Miss. 2004) 39

TGX Intrastate Pipeline v. Grossnickle, 716 So.2d 991 (Miss. 1997) 46

Wilner v. White, 929 So.2d 343 (Miss. 2004) 44

Wyeth-Ayerst Laboratories v. Caldwell, 905 So.2d 1205 (Miss. 2005) 39, 45

Other Authorities:

Rule 20, M.R.C.P. 37-39, 41

Rule 82(c), M.R.C.P. 36

BRIEF OF APPELLANT

I.

STATEMENT OF ISSUES

STATEMENT OF ISSUES ON APPEAL BY ILLINOIS CENTRAL RAILROAD COMPANY

COMES NOW the Defendant, Illinois Central Railroad Company and submits the following issues for purposes of appeal:

A. Whether the trial court erred when it granted Plaintiffs' Motion to Enforce Settlement Agreement.

B. Whether the trial court erred in making findings of disputed fact in connection with Plaintiffs' Motion to Enforce Settlement Agreement.

C. Whether the trial court erred in its Finding of Fact and Conclusions of Law filed in support of its Order Granting Plaintiffs' Motion to Enforce Settlement Agreement.

D. Whether the trial court erred when it denied Defendant's Motion to Dismiss the Claims of the Remaining Plaintiffs.

E. Whether the trial court erred in making findings of disputed fact when denying Defendant's Motion to Dismiss the Claims of the Remaining Plaintiffs.

F. Whether the trial court erred in its Findings of Fact and Conclusions of Law filed in support of its Order Denying Defendant's Motion to Dismiss the Claims of the Remaining Plaintiffs.

II.

STATEMENT OF THE CASE[1]

A.

NATURE OF CASE

The Amended Complaint filed in this cause in 1999 asserted claims for 99 plaintiffs who were former employees of Defendant Illinois Central Railroad Company. This Amended Complaint sought recovery from Illinois Central under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, et. seq. The Amended Complaint alleged that these plaintiffs were required to work "around asbestos, asbestos-containing products, and other fibrogenic, carcinogenic, noxious and deleterious dusts, fumes, and mists" and "had developed occupational lung disease, loss of lung function, asbestosis, mesothelioma, lung cancer, and asbestos-related pleural disease and death." (R.79-109; R.E. 5).

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 Central could then elect to pay and settle the claims of certain plaintiffs on a case-by-case basis. Utilizing this process, all but 18 claims in this case have been settled. However, there has been no "meeting of the minds" or settlement agreement applicable to the remaining claims in this case. The correspondence in the Record, as well as the conduct

---

[1]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.

of the parties since June 2001, confirm that the remaining claims have not been settled.

Throughout the litigation, Illinois Central has filed motions, amended motions and supplementations seeking severance and dismissal of the claims of these plaintiffs based on their improper joinder, improper venue, and *forum non-conveniens*. Illinois Central contends that the complaints, discovery responses, and pulmonary questionnaires provided by these plaintiffs establish that their claims have been improperly joined and have been filed in an improper venue and in an inconvenient forum.

Ultimately, the trial court granted the Plaintiffs' Motion to Enforce the alleged settlement agreement and denied Illinois Central's Motion to Dismiss the claims of the remaining plaintiffs based upon improper joinder, improper venue, and *forum non-conveniens*.

Therefore, while this case originally asserted injury and death claims under the FELA on behalf of multiple plaintiffs, it now presents to this Court issues involving whether a contract for settlement exists with respect to each of the claims of the 18 remaining plaintiffs, and whether or not the claims of the remaining plaintiffs have been improperly joined and/or filed in an improper venue, and should therefore be severed and dismissed.

B.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT[2]

In order for the court to reach a fair decision, a detailed chronology of the relevant events is necessary:

1998

On October 9, 1998, Plaintiffs Richard Aldridge and 71 other plaintiffs filed their multi-plaintiff Complaint in the Circuit Court of Marshall County (R. 1-20).

1999

Illinois Central subsequently filed a motion to dismiss these 72 claims due to improper venue, improper joinder, and *forum non-conveniens* in February of 1999. (R. 38-39).

Several months later in April, plaintiffs amended the Complaint for the purpose of adding additional plaintiffs. (R. 79-102; R.E. 5).

On June 22, 1999, plaintiffs filed a Motion for Case Management Order pertaining only to a particular trial group that had been arbitrarily selected from the 99 plaintiffs by plaintiffs' counsel. (R. 104-105).

2000

Discovery ensued over the next several months in advance of a July 24, 2000 trial date which had been scheduled for the first group of plaintiffs. In February of 2000, Illinois Central moved for a continuance of the July, 2000 trial setting based on plaintiffs' failure

---

[2]This Court may find the description of proceedings in the trial court to be more extensive than usual. However, the length of this section is due to the volume of the Record, the number of the years this multi-plaintiff case has been pending in the trial court, and most importantly, due to the crucial role these events play in demonstrating the absence of any settlement agreement applicable to the claims of the plaintiffs remaining in this case.

to cooperate in discovery and other issues. (R. 357-63). The parties continued to engage in written discovery, primarily concerning the opinions of expert witnesses.

After Illinois Central received discovery responses from some of those persons designated for trial as part of the multi-plaintiff initial trial, Illinois Central filed a Motion to Dismiss Plaintiffs Travis and Dean only, since interrogatory responses revealed that they had not worked in Mississippi and did not live in Mississippi. (R. 292-300; R.E. 6). On May 12, 2000, the trial court entered an order denying Illinois Central's Motion to Dismiss the claims of Travis and Dean based on improper venue, improper joinder, and *forum non-conveniens*. (R. 750). Two weeks later, the trial court entered an order denying Illinois Central's Motion for Continuance. (R. 751).

On May 26, 2000, Illinois Central filed a Petition for Interlocutory Appeal and Stay based on the denial of its motion to dismiss regarding only Plaintiff Travis. (R. 757-58). Travis was a member of the 10-person trial group arbitrarily designated by plaintiffs' counsel for trial as part of Trial Group I.[3] (R. 789).

On June 23, 2000, the trial court entered an order confirming July 24, 2000 as the trial date for the Trial Group I Plaintiffs. (R. 771). On July 10, 2000, the plaintiffs moved to withdraw Plaintiff Travis from Trial Group I based on the allegation that Mrs. Mary Travis was ill. (Plaintiff Clifton Travis was deceased). (R. 787). In preparation for the July 24, 2000 trial date, the parties filed various pre-trial motions, motions *in limine*, and motions to bar various expert testimony.

This Court entered an order on July 19, 2000, granting Illinois Central's interlocutory

---

[3]Other members of Trial Group I preferentially selected by plaintiffs' counsel were: Brown, Dean, Edwards, Gurner, House, Marshall, Mitchell, Pounders, and Robertson. None of the plaintiffs remaining in this action were accorded the privilege of having their claims adjudicated in the first trial group.

appeal with regard to the trial court's denial of Illinois Central's Motion to Dismiss the claim of Plaintiff Travis and stayed the action in the trial court as to Plaintiff Travis only, pending a resolution of the merits of the Petition for Interlocutory Appeal. (R. 1433; R.E. 7).

Prior to or on the July 24 trial date, the parties settled the claims of those plaintiffs remaining in Trial Group I.

On August 10, the trial court signed an order setting March 26, 2001, September 10, 2001, and March 25, 2002 as future trial dates for multiple groups of plaintiffs that would be arbitrarily selected by plaintiffs' counsel. (R. 1435; R.E. 8). Plaintiffs' counsel arbitrarily designated 30 plaintiffs for the trial of Trial Group II scheduled for March 26, 2001.[4] (R. 1484-85).

This Court granted Illinois Central's Petition for Interlocutory Appeal on October 10, regarding the claim of Plaintiff Travis and directed that its previously-ordered stay of trial court action with regard to Travis' claim only would remain in effect. (R. 1487).

2001

During the following months the parties engaged in written discovery and filed voluminous motions *in limine* and pre-trial motions in advance of the scheduled March 26, 2001 trial date for Trial Group II. Subsequently, the claims of 18 of the 30 plaintiffs in Trial Group II were settled and the claims of the other Plaintiffs in Trial Group II were continued. (See letter confirming settlement at R. 3671).

Prior to May, 2001, plaintiffs' counsel arbitrarily designated 8 plaintiffs to comprise Trial Group III with their trial scheduled for September 10, 2001. Those plaintiffs were:

---

[4]Of the plaintiffs remaining in this cause, only the claims of Plaintiffs Bruch, Farris, Harper, Robinson, and Travis were preferentially selected by plaintiffs' counsel to be a part of Trial Group II.

Greer, Harper, Parton, Robinson, Myrick, Cox, Bruch, and Travis.[5] (R. 2491-2498; R.E. 9). On May 14, Illinois Central's counsel wrote plaintiffs' counsel requesting discovery and deposition dates for the plaintiffs, particularly including Plaintiffs Parton, Robinson, Harper and Greer.[6] (R. 2495; R.E. 10).

Illinois Central's counsel Peters wrote a letter to plaintiffs' counsel Farese on May 29, 2001, indicating that "he had not heard from the client" concerning settlement discussions. This letter also concerned the next trial date for Trial Group III which was scheduled on September 10, 2001. Peters indicated that depositions and discovery responses were needed from several plaintiffs and updated discovery responses and medical reports were needed from other plaintiffs. (R. 3673-74; R.E. 11). This letter also reiterated the need to take depositions and receive discovery from Harper, Robinson, Parton, Greer, and Bruch (whose claims remain pending in this cause) in advance of the Trial Group III September 10, 2001 trial date.

On May 30, 2001, Farese faxed a letter to Peters discussing the need for discovery with regard to several claims and further indicated that Farese would discuss with other plaintiffs' counsel whether they could submit 30 additional cases for settlement consideration with a $2,500.00 reduction if those claims were settled prior to September 10, 2001. (R. 3675-76).

On June 5, 2001, Peters wrote Farese discussing discovery issues and advising that: "I have forwarded the information with respect to review of 30 additional cases to my

---

[5]Of the plaintiffs remaining in this cause, only the claims of Plaintiffs Bruch, Greer, Harper, Parton, Robinson, and Travis were preferentially selected by plaintiffs' counsel to comprise part of Trial Group III.

[6]The claims of all four of these plaintiffs presently remain pending.

client for review. I expect to hear from them shortly and will advise you upon same." (R. 3678).

On June 19, 2001, Attorney Andrekanic, counsel for Illinois Central, wrote a letter to plaintiffs' counsel to confirm the parties' agreement to settle the claims of the plaintiffs in a pending trial group in an unrelated case[7] and to confirm a procedure for submission of information on the remaining Aldridge plaintiffs (excluding those in Trial Group III) to Illinois Central for settlement consideration. The letter provided, in pertinent part:

> Following our discussions of the last several days, I agreed to memorialize the agreements that have been reached regarding the settlement of Trial Group I of Allen v. Illinois Central Railroad Company (another case) ... and for the procedure that we have agreed upon whereby the remaining Plaintiffs in Allen (another case) and the remaining Plaintiffs in Aldridge v. Illinois Central Railroad Company (excluding Trial Group III currently set for September 10, 2001[8]) can submit information to Illinois Central for purposes of processing a settlement.
>
> As part of the negotiating process to arrive at the settlement amounts in Allen Trial Group I (another case), both of you ... and the Illinois Central have agreed to establish a procedure whereby you will submit information to the Illinois Central regarding the remaining Plaintiffs in Allen v. Illinois Central and in Aldridge v. Illinois Central ... the Illinois Central will process and pay the properly submitted claims of those remaining Plaintiffs.
>
> As was agreed during negotiations, should the parties agree to settle the claims of those individuals identified in Aldridge Trial Group III ... any amounts paid by the Illinois Central in settlement of those claims will not be considered part of the limit established for claim processing in any given physical quarter.
>
> I understand that there needs to be some finalization as to the settlement amounts agreed to in Aldridge v. Illinois Central as to those remaining

---

[7]Robert Allen, et al v. Illinois Central Railroad Company, Jefferson County Circuit Court No. 2000-100.

[8]Therefore, this letter in its discussion did not apply to those plaintiffs who were part of Trial Group III at that time, including: Greer, Harper, Parton, Robinson, Bruch and Travis, whose claims remain pending at this time.

> Plaintiffs ... as soon as that remaining issue is resolved[9], the law offices of William S. Guy can choose to submit any combination of Plaintiffs from either Allen or Aldridge for claim processing.
>
> The parties have agreed that a particular Plaintiff's claim is not "settled" until such time as the information and documentation required by the Illinois Central for processing a claim ... has been presented for processing and the Illinois Central has confirmed with your office that a particular Plaintiff's claim has been settled and the claim has been paid.
>
> If the Illinois Central fails to complete a settlement as to any properly submitted claim, that claim shall proceed to trial as scheduled, upon application to the Court.
>
> Each Plaintiff will complete the Illinois Central pulmonary questionnaire ...
>
> The parties have also discussed that the Illinois Central will have the right to reject any claim ... that does not meet the documentation requirements ... and defer processing a claim, pending further negotiations with you, of a Plaintiff's claim where a question as to the claim being barred by reason of a statute of limitations issue, being barred by reason of a prior release, failure to establish a claimant as an employee of Illinois Central ... the Illinois Central will identify those claims where a question has arisen regarding compliance with the statute of limitations, the existence of a previous release which has been executed by the Plaintiff, or the failure to establish a claimant as an employee of the Illinois Central or a legal predecessor. The parties will engage in further negotiations concerning 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. Should an unforseen circumstance arise that neither party currently anticipates, the parties will engage in further negotiations concerning disposition of the claim in an attempt to resolve that claim, failing which the claim will be set for trial upon application to the Court.

(Emphasis added.)

This letter (R. 3131-3137; R.E. 12) was approved by Plaintiffs' counsel.[10]

On July 5, 2001, Illinois Central filed a Motion to Continue the Trial which had been

---

[9]That issue was not resolved.

[10]This was one of three letters which served as the sole documentary evidence upon which the trial court based its ruling that a settlement agreement existed as to the claims of the plaintiffs remaining in this case. The other two letters are those dated February 1 and 6, 2002 which are discussed later herein.

scheduled for September 10, 2001 and also filed a Motion to Compel. (R. 2491-2493; R.E. 13). This Motion noted that 8 plaintiffs were designated for trial on September 10, 2001, but that Illinois Central was having trouble obtaining necessary discovery responses and depositions.

An agreed order was entered on July 23, reducing the Trial Group III for the September 10, 2001 trial date to three plaintiffs: Myrick, Cox and Beal. This order preserved all issues raised in prior Motions. (R. 3680). In the following months, the parties conducted expert discovery and filed pretrial motions.

On July 24, 2001, Plaintiffs' counsel Farese faxed a letter to Peters confirming an agreement to mediate the claims of Myrick, Cox, and Beal. The mediation took place on August 10, 2001. During that mediation, Illinois Central offered to settle remaining claims with a discount as suggested earlier by plaintiffs' counsel in their letter of May 30, 2001, but plaintiffs' counsel's refused to discount any of the asbestosis or plaque claims. No further settlement discussions took place until 2002. (See R. 3641, paragraph 8 and R. 3644).

On August 18, 2001, Illinois Central moved to dismiss Plaintiff Claude Beal based on *forum non-conveniens* since he never lived or worked in Mississippi. (R. 2648-52). On August 29, 2001, Illinois Central filed a Motion for Continuance from the September 10, 2001 trial date since the claims of Plaintiffs Cox and Beal had settled and because of plaintiffs' delinquent designation of experts and their failure to provide expert deposition dates. An Agreed Order was subsequently entered rescheduling the trial for the claim of Plaintiff Myrick on April 8, 2002. (R. 2786). The claim of Myrick was subsequently settled.

2002

On February 1, 2002, Farese faxed a letter to Peters:

I shall attempt to set forth our understanding of the status of the cases. You has (have) suggested that we continue the April trial date. I have (sic) spoke with the Court Administrator ... she has advised that the following dates are available: June 3, June 24, July 8 and July 15. 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.

They (Plaintiffs' other counsel) are working diligently to get all the questionnaires completed. By February 28, 2002, they hope to have at least half of them to you; the other half will be to you no later than April 1, 2002. It is my understanding that we have agreed to settle all the pleural plaque cases for _____ each and all the asbestosis cases for _____ each.[11] It seems to me that we should go ahead and settle all those cases in the second quarter of the year.

As for the remaining cases, we have two lung cancer cases (Greer and Travis) and four colon cancer cases (Bruch, Robinson, Parton and Harper).[12] It would appear reasonable and consistent to settle each of the lung cancer cases for _____. ... I would suggest that we discuss the settlement of that case (Travis) for that same amount, conditioned upon a favorable decision on the appeal.

You mentioned that we would have to negotiate the colon cancer cases, but you thought a figure somewhere between _____ and _____ 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.3137-38; R.E. 14).[13]

Five days later, on February 6, 2002, Attorney Peters replied:

I am in receipt of your fax of February 1. With respect to the pleural plaques and asbestosis cases, we have agreed to process 30 of those claims and pay them _____ and _____ respectively unless defenses as outlined in our letter of last year apply. With respect to the remaining 33 ... we agreed to pay $_____ and $_____ each, subject to the

---

[11]This allegation by Plaintiff's counsel was not correct as shown by the letter of February 6, 2002.

[12]The claims of Plaintiffs Greer, Travis, Bruch, Robinson, Parton and Harper also remain pending at this time.

[13]This letter along with the letters of June 19, 2001 and February 6 letter discussed below were the only documents submitted by plaintiffs and relied on by the trial court in ruling that a settlement agreement existed with regard to the remaining claims.

same defenses, but that payment would have to be deferred until September. Our client wanted a discount for paying early. I do not know whether my client's position on this matter persists, and it seems to me that at least with respect to the negotiations in the Allen case (another case) that it may not. I will speak to my client to confirm their position on these remaining 33 claims and let you know next week.

With respect to the other 6 claims, I would first address the two lung cancer claims. I understand that we do have a history in that the Robertson case was settled for $_____, but as I advised, that number was much higher than Illinois Central would have been willing to pay in that jurisdiction, but because that client was difficult and others were not, we were able to reach an accord. I note that we have had discussions with regard to Travis at a much lower number, although those discussions concerned dismissing the appeal as part of the settlement. I agree that we can negotiate and/or mediate the claims to see if they can be resolved. We have been able to resolve such claims in the past.

With respect to the colon cancer cases, I would agree with your assessment. I would note, however, that just as with other claims, there may be statute of limitations issues as to the onset of colon cancer. My recollection is that Bruch's colon case cancer claim is timely. I do not know that Robinson, Parton and Harper have filed timely claims, but I will attempt to review the medical we have obtained to see if there is any information on that issue. ... ... I think the trial dates you were able to obtain are somewhat optimistic. My best guess at what would be left to be tried would be disputed release/statute plaque or asbestotics, or the lung/colon cancer plaintiffs. I would prefer to exercise maximum effort to settle the cases as opposed to preparing them for trial. .... I would suggest an early September date, or something after November." (R. 3139-40; R.E. 15).

(Emphasis added.)

Many of the remaining cases were settled after February 6, 2002 on a case-by-case basis, following receipt of documentary information from some of the plaintiffs. The fact that these cases were settled on a case-by-case basis and not part of a global settlement agreement is confirmed by subsequent events and by the actions of plaintiffs' counsel.

* * * *

On February 28, 2002, this Court issued its Opinion in the case of Illinois Central Railroad Company v. Travis, 808 So.2d 928 (Miss. 2002) which held that the claim of

Plaintiff Travis had not been misjoined, filed in an improper venue, or filed in an improper forum.

2003

On May 6, 2003, Plaintiffs' counsel, in a letter, stated:

> We have several lung cancer cases pending in the Aldridge group ... we will recommend to our Aldridge clients a $550,000.00 lung cancer settlement value (sic)... I look forward to hearing from you on this matter. (R. 3682; R.E. 16).

Illinois Central rejected that demand. (R. 3641, 3644). (Obviously, if all remaining claims had been settled by the three letters in 2001 and 2002, plaintiffs' counsel had no reason to write this letter.)

On October 2, 2003, in a discussion among counsel for all parties, plaintiffs' counsel asked if they needed to set the remaining claims for trial. Plaintiffs' counsel was advised by Attorney Peters that Illinois Central would continue to evaluate cases, but that plaintiffs could set any cases for trial. (R. 3641-42, 3644).

2004

Three months later on January 26, 2004, plaintiffs' counsel wrote a letter delivering a suggested order (R. 2854-55; R.E. 17) proposing to schedule the claims of Plaintiffs Brower, Cooper, Greer and Travis for trial on May 17, 2004. On February 19, 2004, the proposed order was signed setting the claims of Brower, Cooper, Greer and Travis for trial.[14] (R. 2925; R.E. 18). (There would be no reason for this letter and order if all claims had been settled two years earlier as Plaintiffs contend).

Between the time of plaintiffs' counsel's January letter and prior to the entry of an order scheduling these four claims for trial on February 9, 2004, Illinois Central filed a

[14]The claims of these plaintiffs remain pending at this time.

Motion to Dismiss or Transfer the claims of Plaintiffs Brower, Cooper, Greer, and Travis due to improper venue, misjoinder, and *forum non-conveniens*, a motion that the trial court designate the claims for trial rather than allowing them to be arbitrarily designated by plaintiffs' counsel, and an objection to the trial setting. (R. 2841-2917; R.E. 19). At that point in time, the claims of 25 plaintiffs remained unresolved. Illinois Central also brought to the trial court's attention the fact that this Court had accepted several Petitions for Interlocutory Appeals involving improper venue and improper joinder issues, including the case of Illinois Central v. Gregory, (ultimately decided at 219 So.2d 829 (Miss. 2005), which was a multi-plaintiff FELA asbestos action. (R. 2846).

* * * *

On February 19, 2004, Janssen Pharmaceutica v. Armond, 866 So.2d 1092 (Miss. 2004) is issued by this Court, holding, in pertinent part, that a "distinct litigable event" must exist in order to support the joinder of the claims of multiple plaintiffs.

* * * *

Plaintiffs' counsel refused to rescind the order scheduling the trial of the claims of Brower, Cooper, Greer and Travis. On March 15, Illinois Central filed a Motion to Set Aside the Order and for Continuance (R. 2921-24) since Illinois Central had objected to the trial date and had filed other appropriate motions. On April 8, Illinois Central filed a Notice of Motion Hearing for its numerous pending motions including its motions on the joinder, venue and forum issues and noticed a hearing for April 19, 2004. (R. 2934-36).

On April 15, 2004, plaintiffs moved to reschedule the hearing. The plaintiffs also reversed their earlier position and agreed to reschedule the May 17, 2004 trial date for the claims of Brower, Greer, Cooper and Travis. (R. 2937). On April 20, 2004, Illinois Central filed a Motion for an Independent Determination of Identity of the Judge Assigned to

Motions and Trial due to alleged judge-shopping conduct by plaintiffs' counsel. (R. 2943-2974).[15]

On April 22, 2004, Illinois Central filed a supplementation of its pending motions on the joinder, venue, and forum Issues, and brought this Court's recent decision in Janssen Pharmaceutica, Inc. v. Armond, 866 So.2d 1092 (Miss. 2004) to the attention of the trial court. (R. 2975).

On May 3, 2004, Illinois Central propounded written discovery seeking information on other claims, lawsuits, and settlements by the remaining plaintiffs.

On May 17, 2004, the trial court entered an Order noting that several motions are pending and scheduled a hearing on May 29, 2004 "in order to advise the Court of the status of the matter" and "in order to enter a Scheduling Order for final resolution either on Motions or trial." The trial court noted that it is "of the opinion that this matter should be ready for final disposition, either on Motions or trial." (R. 3011; R.E. 20). Obviously, the trial court had not been advised at this point in time that the claims of all of the remaining Plaintiffs had been "settled".

Just a few days prior to the hearing, plaintiffs responded to Illinois Central's motion on the venue, joinder and forum issues only by citing this Court's opinion in Travis, *supra*, and arguing for application of the "law of the case" doctrine. Plaintiffs did not take the position in this response that the claims of the remaining plaintiffs had been "settled." (R. 3012-14; R.E. 21).

At the May 29, 2004, hearing, the trial court initially commented: "What I want to

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[15]The transcript of the hearing held on May 29, 2004 reveals that this judicial district does not follow the Rule of Circuit Court Practice applicable to the random assignment of Judges in multi-judge districts, Rule 1.05A, U.R.C.C.P.. (See Transcript of May 29, 2004 hearing, R.E. 22, at T.-2).

consider is setting up a Scheduling Order where we will know when we can bring this case to trial ..." (5/29/04 T. 2; R.E. 22).

At this hearing Illinois Central informed the trial court that many of the remaining 22 plaintiffs had not responded to discovery, including three of the four plaintiffs who had been scheduled for trial: Brower, Cooper, and Greer. (5/29/04 T. 4-5; R.E. 22). Defense counsel also listed the numerous other motions that were pending for adjudication by the trial court. (5/29/04 T. 5-6; R.E. 22). After an explanation of the pending motions, the trial court inquired as to whether or not plaintiffs' counsel was prepared to argue those motions. Plaintiffs' counsel advised the Court: "Your Honor, I came here summonsed by the Court Order just for a status conference. I'm not prepared today." (5/29/04 T. 10; R.E. 22).

Plaintiffs' counsel did not suggest to the trial court at this hearing that any binding settlement agreement existed as a result of the then - 2-year-old correspondence dating back to 2001 and 2002. Subsequently, plaintiffs' counsel suggested to the trial court that he would be amenable to responding to discovery on all 22 remaining claims on a date convenient to counsel for all parties. (5/29/04 T. 12; R.E. 22). Ultimately, plaintiffs' counsel agreed to provide discovery responses on all the remaining plaintiffs by July 5, 2004 and the trial court scheduled a hearing on all pending Motions for August 6, 2004.[16] (5/29/04 T. 18-19; R.E. 22). At no time during this Saturday hearing was the trial court ever advised that any one or more of the remaining claims had been "settled."

On June 1, 2004, Illinois Central filed a Motion to Dismiss the claims of Plaintiffs Blagg, Buckley, Douglas, Hubbard, Bowman, Carruthers, and Craven based on the

[16]Subsequently, the date for that hearing was changed to August 11, 2004.

existence of prior releases. (R. 3028-3064).[17]

On June 9, 2004, the plaintiffs filed a Motion for Protective Order concerning Illinois Central's written discovery which requested information on other claims, suits, and settlements (R. 3077-79; R.E. 26), and subsequently noticed a hearing on that motion for August 11, 2004. This Motion for Protective Order did not assert a need for protection because all of the remaining claims had been "settled."

On June 18, Illinois Central filed a Suggestion of Death relating to the claims of Brower, Greer and Travis. (R. 3097-99). On July 30, 2004, a couple of weeks in advance of the scheduled August 11 hearing date, Illinois Central filed a motion to continue that hearing, pointing out that at the May 29 hearing it was established that the vast majority of the 22 remaining plaintiffs had not responded to discovery, that the trial court had directed that after such responses were filed it would schedule another hearing and status conference; that plaintiffs had promised to file the responses by July 5 (and later by July 15); and, that as of July 30, 40% of the remaining plaintiffs had not responded at all to Illinois Central's discovery. (R. 3103-3106). The trial court later entered an order continuing the August 11 hearing for resetting at a later date. (R. 3124).

On August 18, 2004, plaintiffs filed a Re-Notice of their Motion for Protective Order, setting it for hearing on September 8, 2004. (R. 3125-3126).

In evidently what had to be a "eureka" moment, plaintiffs suddenly determined on August 26, 2004, more than three years after the correspondence of 2001 and 2002, that a settlement agreement purportedly existed regarding all of the remaining claims and filed a Motion to Enforce the Settlement Agreement and a Motion to Stay the adjudication of

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[17]Over a year later, plaintiffs voluntarily dismissed the claims of Buckley, Hubbard, Douglas and Carruthers. The claims of Blagg, Bowman, and Craven are still as pending.

Illinois Central's pending motions. (R. 3128-3130). Plaintiffs claimed in this motion that the letters previously discussed (June 19, 2001, February 1, 2002 and February 6, 2002 - see pp. 8-13 herein) were the documents that constituted the "Settlement Agreement." (R. 3131-40; R.E. 27).

On September 2, 2004, plaintiffs responded to Illinois Central's Motion for Leave to File a Third Party Complaint. In this response, no assertion was made that all remaining claims had been "settled." (R. 3144-47).

2005

In January, 2005, following a conference with the Court Administrator, a hearing was scheduled for all pending motions for March 17, 2005.

On March 8, 2005, Illinois Central filed an Amended Motion to Sever and Dismiss or Transfer the Claims of All Remaining Plaintiffs based upon Improper Venue, Misjoinder, and *Forum Non-Conveniens*. (R. 3181-90; R.E. 28). This amended motion was filed because Illinois Central had received additional pulmonary questionnaires and discovery responses from other remaining plaintiffs and because this Court had recently issued numerous decisions on venue, joinder and forum issues. Pursuant to those decisions, the discovery responses, and other documents produced by the plaintiffs, Illinois Central asserted that the claims of all of the remaining plaintiffs should be dismissed or transferred.

On March 15, 2005 Illinois Central also filed its opposition to Plaintiffs' Motion to Enforce the Settlement Agreement. (R. 3638-43; R.E. 29). (The argument in opposition to this Motion is discussed in subsequent sections of this brief).

The hearing that had been scheduled for March 17 was canceled due to the illness of a relative of plaintiffs' counsel.

On May 2, Illinois Central again supplemented its motion on the joinder, venue, and

forum issues (R. 3684-88; R.E. 30) to advise the trial court of this Court's March 17, 2005 decision in Illinois Central Railroad Company v. Gregory, 912 So.2d 829 (Miss. 2005). That opinion established that the other recently-decided cases on misjoinder and improper venue issues applied to asbestos cases, to FELA cases, and to cases in which there was only one Defendant.

On September 15, the trial court entered an order scheduling a hearing on all pending motions for September 30, 2005. (R. 3699).

At this hearing, plaintiffs again reversed course and took a position contrary to their Motion to Enforce. Plaintiffs' counsel did not argue that all of the remaining 18 plaintiffs had been "settled"; rather, plaintiffs argued that only the asbestosis and pleural plaque cases had been settled, not the cancer cases. (9/30/05 T. 3-4; R.E. 31). After advising the trial court that 18 claims would remain in this case following plaintiffs' agreed dismissal of 4 of the 22 remaining claims, leaving 18 claims for adjudication, plaintiffs' counsel advised the trial court:

> There are 8 of those remaining 18 that appear to be ... asbestos related cancer cases. There are 10 that are asbestos related asbestosis cases or pleural plaque cases. Now the reason that I offered this is we have a Motion that and I think your Motion (Illinois Central's Motion to Dismiss) is absolutely proper to address the 8 (cancer) cases. I think there is no question that the Judge is going to have to make a decision (on Illinois Central's Motion to Dismiss) on the 8 cancer related cases. We take the position that 10 of the 18 remaining cases have already been settled in terms of the Settlement Agreement that was reached back in '02. ..." (9/30/05 T. 4; R.E. 31).

(Emphasis added).

The trial court directed both parties to submit proposed findings of fact and conclusions of law. (9/30/05 T. 34; R.E. 31). Pursuant to the trial court's directives, several weeks later on November 7, 2005, Illinois Central filed an Index of Exhibits, its proposed

Findings of Fact and Conclusions of Law, and a proposed Order granting its Motion to Sever and Dismiss and Denying Plaintiffs' Motion to Enforce. (R. 3705-3811).

Approximately five weeks after this hearing, the plaintiffs submitted a Brief in Support of their Motion to Enforce Settlement Agreement by letter dated November 4, 2005. Consistent with the oral argument made by Plaintiffs' counsel at the September 30 hearing, this brief argued that the trial court should enforce the alleged settlement agreement only as to those ten plaintiffs who allegedly had plaques or asbestosis: Anderson, Boddie, Bowman, Crain, Craven, Farris, Joyner, Mayer, Parton, and Stanfill. Plaintiffs did not contend in this brief that any settlement agreement existed with respect to the other eight plaintiffs who allegedly had cancer: Blagg, Brower, Bruch, Cooper, Greer, Harper, Robinson, and Travis. (See Excerpts from Brief at Appendix A).

For reasons unknown to Illinois Central, plaintiffs did not submit any proposed findings of fact and conclusions of law to the trial court during the remainder of 2005 or during the first six months of 2006.

2006

On February 23, 2006, this Court rendered its decision in Canadian National/Illinois Central v. Smith, 926 So.2d 839 (Miss. 2006) which held that when multi-plaintiff claims have been filed in an improper venue or have been misjoined, those claims should be dismissed, rather than transferred to another Mississippi venue. On May 18, 2006, Illinois Central filed an Amended Motion to Dismiss to bring this decision to the attention of the trial court. In this amendment, Illinois Central pointed out that the proper disposition of the remaining claims is dismissal, and not transfer. (R. 3812-3815). Illinois Central also submitted an amended proposed order to the trial court.

* * * *

On July 26, 2006, plaintiffs filed a response to Illinois Central's Amended Motion to Dismiss contending that the 2002 Travis decision constituted "the law of the case," and that Travis precluded the application of more recent Mississippi Supreme Court Opinions on joinder and venue issues.

Finally, on July 28, 2006 (R. 3943), 10 months after the last and final hearing before the trial court on May 29, 2005, plaintiffs submitted to the trial court their proposed findings of fact and conclusions of law (R. 3945-56) and a proposed order (R. 3957-58) granting their Motion to Enforce and denying Illinois Central's Motion to Dismiss. Incredibly, once again the plaintiffs changed their position and argued through their submission of this proposed order and proposed findings of fact and conclusions that all claims had been settled, including the eight cancer claims, and not just the ten remaining asbestosis and pleural plaque claims.

On August 23, 2006, Illinois Central filed a Rebuttal Response in Support of its Motion to Dismiss the Remaining Claims and submitted another proposed order. (R. 3959-3998). At that point in time, 10 months after the last hearing and two years after the 2004 hearing, Illinois Central had still not received either a pulmonary questionnaire or discovery responses from Plaintiffs Blagg, Boddie, or Farris. Illinois Central also pointed out that it had not consented to any determination of disputed facts by the trial court. (R. 3973).

On December 11, 2006, approximately a year and 3 months after the last hearing on this matter, the trial court filed its Order (R. 3999-4000; R.E. 3) denying Illinois Central's motion to dismiss and granting plaintiffs' motion to enforce on December 11, 2006. The trial court also elected to sign and file the Findings of Fact and Conclusions of Law (R. 4001-4011; R.E. 4) that had been submitted by plaintiffs' counsel in July of 2006.

On January 5, 2007, Illinois Central filed its Notice of Appeal. (R. 4012).

III.

SUMMARY OF THE ARGUMENT

Contrary to plaintiffs' position and the Order entered by the trial court, there has been no "meeting of the minds" or settlement agreement with regard to the claims of the 18 plaintiffs remaining in this action. The evidence cited by the trial court in ruling that a settlement agreement exists with regard to all of the claims of the remaining plaintiffs are three letters exchanged between counsel for the plaintiffs and the defendant: June 19, 2001, February 1, 2002, and February 6, 2002. Rather than confirming the existence of an agreement, these letters and other documents, as well as the sequence of events shown in the Record establish that there was no settlement agreement with regard to the claims of the remaining plaintiffs.

The sequence of events that transpired after February 6, 2002, included 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 completely contradictory positions taken by plaintiffs' counsel with regard to the existence of any settlement agreement and its alleged application to the remaining claims.

For instance, plaintiffs filed a motion to enforce, contending that all claims had been settled; but later, at the hearing on September 30, 2005, contended that of the 18 claims remaining in this case at that time, only 10 of those claims were subject to an alleged settlement agreement which the trial court was asked to enforce. Those 10 claims involved plaintiffs who had injuries consisting of alleged asbestosis or alleged pleural plaques. Plaintiffs did not, as of the time of the hearing in September, 2005, contend that the other 8 claimants, who had allegedly developed cancer, were settled by the alleged settlement

agreement.

However, in response to Illinois Central's Amended Motion to Dismiss the Claims of the Remaining Plaintiffs that was filed in May of 2006, in their proposed Findings of Fact and Conclusions of Law submitted to the trial court, plaintiffs reversed their course and contended that the claims of all of the remaining plaintiffs were "settled." Plaintiffs should be judicially estopped from taking this position and the trial court erred in accepting plaintiffs' sudden reversal.

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 misjoined plaintiffs which were filed in an improper venue. The Amended Complaint filed in this cause in 1999 asserted claims for 99 plaintiffs. The Amended Complaint alleged the years in which each plaintiff was employed by Illinois Central as well as the craft or job performed by each plaintiff while working for Illinois Central. These plaintiffs alleged work in a multitude of crafts and in various ranges of years from the 1930's through the 1990's. (R. 79-102; R.E. 5).

The Amended Complaint did not, however, 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 particular plaintiff to the claim of any other plaintiff. It did not

allege sufficient information so as to establish venue in Marshall County for any of the remaining plaintiffs.

The claims of Mary Travis, representative of decedent Clifton Travis, and the claims of several other plaintiffs were scheduled for trial on July 24, 2000. Subsequent to receipt of that trial setting, Illinois Central moved this Court to dismiss Travis' claim due to improper venue, improper joinder, and/or based on the doctrine of *forum non-conveniens*. Subsequent to the trial court's denial of those motions, Illinois Central filed a Petition for an Interlocutory Appeal in this Court which resulted in this Court's opinion in Illinois Central Railroad Company v. Travis, 808 So.2d 928 (Miss. 2002). This opinion held that the trial court had not erred in denying Illinois Central's Motions on the improper venue, misjoinder and *forum non-conveniens* issues, but only with regard to the claim of Plaintiff Travis.

Before the Mississippi Supreme Court's rendered its opinion in Travis, some plaintiffs submitted sworn pulmonary questionnaires and other materials to Illinois Central under a procedure whereby Illinois Central could decide to offer to pay the claims of particular plaintiffs. And, indeed, many of the remaining claims were paid and settled by the parties under this procedure. Other claims were voluntarily dismissed.

Subsequent to the Travis decision, plaintiffs continued to submit sworn pulmonary questionnaires which provided Illinois Central information concerning the claims of other plaintiffs. Additionally, several plaintiffs answered Illinois Central's interrogatories such that, as of this date, Illinois Central has received either a sworn pulmonary questionnaire or sworn discovery responses providing at least some additional information on the claims of all remaining plaintiffs except Plaintiffs Blagg, Boddie, and Farris. These sworn discovery responses and pulmonary questionnaires provided information about the alleged work locations of these plaintiffs and their alleged places of injurious exposure that had not

been provided in the Amended Complaint.

Accordingly, with its motion on the venue, joinder, and forum issues, Illinois Central filed these discovery responses and/or sworn pulmonary questionnaires. (R. 3191-3582; Excerpts at R.E. Vol II). They demonstrate that the following plaintiffs claimed to have worked for Illinois Central in the State of Mississippi, but do not establish any claims of injurious exposure that occurred in Marshall County, Mississippi - the present venue of this case: Muriel Anderson, George Bruch, John Harper, Roosevelt Joyner, Charles Mayer, Elwood Parton, Lloyd Robinson, and Billy Stanfill. These sworn documents also demonstrate that the following plaintiffs do not allege injurious exposures while working for Illinois Central anywhere within the State of Mississippi: Paskle Bowman, Hugh Brower, Curtis Craven, Jack Cooper, George Crain, Jack Greer, and Clifton Travis (by Mary Travis).

Plaintiffs have not submitted any sworn pulmonary questionnaire or any responses to discovery regarding the claims of Billy Blagg, Samuel Boddie, or Lawrence Farris, even though the trial court, following a hearing on May 29, 2004, ordered all of the plaintiffs remaining at that time to respond to the discovery propounded by Illinois Central. Plaintiffs agreed to do so; but as of this date, these three plaintiffs have still not responded to that discovery, nor have they produced a pulmonary questionnaire.

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 the remaining plaintiffs 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*. The claims of the remaining

plaintiffs have not been settled. Pursuant to Janssen Pharmaceutica v. Armond, 866 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 ANY OF THE REMAINING CLAIMS.

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

The documents cited by the Court in its order, the documents relied upon by the plaintiffs, as well as other documents and letters in this Record establish that the parties had engaged in a procedure for the submission of information to Illinois Central whereby claims could be settled, but these documents did not constitute a binding settlement agreement with respect to any of the claims remaining in this case. Events that occurred following the dates of these documents (June, 2001 and February, 2002) demonstrate that the parties were able to settle numerous cases, but those events further demonstrate that the parties did not contemplate that these letters constituted an enforceable settlement agreement. Rather, the documents 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 a formal settlement agreement, the following events would not have occurred:

a. Following the letter of June 19, 2001, the parties continued discovery efforts

and engaged in mediation efforts with respect to Plaintiffs Myrick, Cox and Beal. (Beal asserted a claim for asbestosis).

b. At the mediation on August 10, 2001 of these three claims, Illinois Central offered to settle the remaining claims with a discount, but plaintiffs' counsel refused to discount any of the asbestosis or plaque claims.

c. On May 6, 2003, after the three letters discussed above were exchanged between the parties, plaintiffs' counsel wrote a letter advising that they would recommend to their remaining lung cancer plaintiffs in this case a particular value for the settlement of lung cancer claims. (R. 3682; R.E. 16). That demand was rejected by Illinois Central.

d. 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).

e. 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 act 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).

f. 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). AT this time, the trial court had not been made

aware of any "settlement agreement with regard to the remaining claims."

g. At the subsequent hearing on May 29, 2004, plaintiffs' counsel did not advise the trial court that the remaining claims had been settled pursuant to some purported settlement agreement. (R.E. 22).

h. Plaintiffs responded to Illinois Central's motion seeking dismissal on the improper venue, misjoinder and forum issues without advising the trial court that the claims of the remaining plaintiffs had been settled and that these issues were, thereby, rendered moot. (R. 3012-14; R.E. 21).

i. 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 at the May 29, 2004 hearing (see Transcript of May 29, 2004 hearing at pp. 3, 12-13, 16-19; R.E. 22).

j. 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 as grounds for the motion any claim that the claims of the remaining plaintiffs had been settled. (R. 3077-79; R.E. 26).

k. On August 26, 2004, plaintiffs filed their Motion to Enforce the alleged settlement agreement contending that it applied to all of the remaining claims. (R.E. 27). However, when a hearing was finally held on this motion on September 30, 2005, plaintiffs took the position that of the 18 cases remaining, only the asbestosis and pleural plaque cases had been settled, and that the 8 cancer claims had not been settled. (9/30/05 T. 3-4; R.E. 31).

l. Additionally, at this final hearing, plaintiffs agreed that the trial court would have to address Illinois Central's Motion to Dismiss (due to improper venue, misjoinder and *forum non-conveniens*) with regard to the claims of the 8 remaining cancer plaintiffs. (9/30/05 T. 3-4; R.E. 31).

m. Approximately 10 months after the final hearing in this matter, 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 8 cancer claims.

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, ____ So.2d ____, 2007 WL 4260123, ¶ 31 (Miss. 2007). This is exactly what plaintiffs did on submission of their proposed Findings of Fact and Conclusions of Law (R. 3945-54) which were adopted verbatim by the trial court. (R.E. 4). The trial court erred in endorsing plaintiffs' legally-prohibited and factually unsupported reversal of course.

This course of conduct belies any conclusion that by February, 2002, a binding settlement agreement had been reached between the parties. The actions of the parties in continuing to litigate discovery issues, joinder and venue issues and trial setting issues demonstrates clearly that the letters of January, 2001 and February, 2002, did not dispose

of the case, but rather constituted only a procedure by which plaintiffs' claims could be submitted for settlement consideration.

In addition to these events, the very documents relied upon by the trial court for the proposition that a settlement agreement existed with regard to the remaining claims ignored the clear provisions of those documents 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).

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 four additional 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 agreed 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 letter of plaintiffs' counsel of February 1, 2002 establishes that no agreement whatsoever had been reached regarding settlement amounts for the remaining cancer claims and suggested mediation or further negotiation, and, if those efforts were not successful, a trial of those claims. (R. 3137-38; R.E. 14).

d. 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.[18] (R. 3139-40; R.E. 15).

e. Echoing the content of Attorney Farese's letter of February 1, Peters' letter of February 6, 2002, established that no agreement had been made with regard to the cancer claims and suggests negotiation or mediation of those claims.

f. 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.

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[18]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. While 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).

With regard to the cancer claims, Peters agreed that negotiation or mediation of those claims were an option if they could not be resolved. 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).

g. 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. Therefore, there has was no agreement with regard to the payment of the remaining asbestotic 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. None of the remaining cancer claims were settled following that date. 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 several of those 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. The Supreme 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 agreement or 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 formal settlement was contemplated by these letters; 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 only 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 finder

of fact. 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.

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, 2002 provided that:

> 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, their claims must be remanded, severed, and dismissed.

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 8 Plaintiffs including 6 of the plaintiffs remaining in this case: Greer, Harper, Parton, Robinson, Bruch and Travis. (R. 3673-74).

Therefore, their claims must be remanded, severed and dismissed.

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, Boddie, and Farris never supplied any pulmonary questionnaire or any response to Illinois Central's discovery. Mysteriously these three plaintiffs failed to submit the required documents even though plaintiffs' counsel agreed to supply such documents by 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 attempt compliance with the settlement procedure. These circumstances applicable to the claims of Blagg, Boddie, and Farris as well as application of the pleading requirements of Mangialardi, Hinton and Gregory, *infra*, mandate the remand, severance and dismissal of their claims.

C. THE CLAIMS OF THE 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.

At the request of plaintiffs' counsel, the trial court entered an order on February 19, 2004 scheduling the claims of Plaintiffs Brower, Cooper, Greer and Travis for a trial.[19]

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[19]This was a point in time over two years after the correspondence in February of 2002 which served as the basis for the trial court's erroneous conclusion that all of the remaining claims had been "settled." Obviously, they had not been settled if plaintiffs' (continued...)

(R.E. 18). After receiving plaintiffs' correspondence indicating their desire to set the claims of these four plaintiffs for trial, Illinois Central filed a motion on the venue, joinder, and forum issues, pointing out that the four plaintiffs that had been designated by plaintiffs' counsel as trial group plaintiffs (Brower, Cooper, Greer, and Travis), should be dismissed due to improper venue because they did not reside in Marshall County and their respective causes of action did not accrue in Marshall County. Further, the claims of these Plaintiffs had been misjoined due to their varying work activities, varying crafts, different work locations, and differing medical histories. And finally, the claims of these four plaintiffs were filed in an improper venue and forum since they lived and worked for Illinois Central (and therefore were allegedly exposed to asbestos) in the states of Kentucky and Tennessee. Illinois Central additionally argued that Rule 82(c), M.R.C.P., should not be interpreted to allow joinder of unrelated claims by piggy-backing onto the claims of other plaintiffs and advised the trial court that the Mississippi Supreme Court was about to address all of these issues in numerous interlocutory appeals pending before the Court (as of February, 2004).

Illinois Central also filed a later supplementation in April of 2004 for the purpose of citing this Court's new decision in Janssen Pharmaceutica v. Armond, 866 So.2d 1092 (Miss. 2002), which required that in any multi-plaintiff case, each plaintiff must be connected with every other joined party by the same "distinct litigable event". Illinois Central also set forth that other trial courts were beginning to require that each plaintiff asserting a cause of action in a multi-plaintiff case have his or her own independent basis for venue. That is, each and every plaintiff must demonstrate that (within the context of the

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[19](...continued)
counsel were seeking a trial setting.

railroad venue statute applicable to this case) he either lived in the particular county (in this case, Marshall), or have been exposed in the county of venue.[20]

Several months later in August, 2004, this Court issued its opinion in Harold's Auto Parts, Inc. v. Mangialardi, 889 So.2d 493 (Miss. 2004), which involved a multi-plaintiff complaint. The Complaint did not identify the product to which each of the numerous plaintiffs were exposed, the manufacturer of any particular product, the time when the exposure occurred or the location of the alleged exposure of each plaintiff.[21] This Court criticized the complaint filed in that action, stating that the missing information was "core information" and that the disclosure of that information was required to have been included in the complaint. The Court directed the severance of the claim of each plaintiff and required information within 45 days so that the trial court could determine the identity of the appropriate court to which each claim should be transferred. This Court noted in Mangialardi that the complaint in that case was filed over 3 years prior to its opinion rendered in October of 2004, or at some point in time in the year 2001.

At the time of Illinois Central's filing of this supplementation in April 2004, the majority of the plaintiffs remaining in this case had not responded to Illinois Central's initial set of interrogatories and requests for documents propounded over four years prior to that time. This motion on the joinder/venue/forum issues was noticed for hearing for May 29, 2004; however, when the trial court was advised that numerous plaintiffs had not

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[20]Shortly after the Janssen decision, the Court amended Rule 20, M.R.C.P., to delete the phrase in the Official Comments to Rule 20 which had allowed "unlimited joinder at the pleadings stage."

[21]Compliance with the pleading requirements of Mangialardi and venue/joinder requirements in a well-pleaded complaint are prerequisites to any action by the trial court. See Illinois Central Railroad Company v. Adams, 922 So.2d 787, 791 (Miss. 2006).

responded to discovery, the trial court directed that all discovery be answered by all remaining plaintiffs and the trial court did not rule on the joinder/venue/forum motion.[22] (R.E. 22). On April 15, 2004, Plaintiffs moved to reschedule the May 17, 2004 trial date for the claims of Travis, Greer, Brower, and Cooper. (R. 2937).[23]

Subsequent to May 2004, Illinois Central received responses to its written discovery as well as pulmonary questionnaires from other plaintiffs. About that point in time, this Court began to issue numerous decisions following Armond and Mangialardi, *supra*, which impacted the venue, joinder and forum issues before the trial Court:

Purdue Pharma, et al v. Heffner, 904 So.2d 100 (Miss. 2004) emphasized that Armond, *supra*, did not permit joinder of multiple plaintiffs unless their claims arise out of the same transaction. Purdue emphasized that there must be an "occurrence common to them all" and that simply taking the same prescription drug did not supply the plaintiffs with "the same transaction or occurrence" required by Rule 20, M.R.C.P.

In Culbert, et al v. Johnson & Johnson, 883 So.2d 550 (Miss. 2004), after finding that multiple Plaintiffs did not meet the requirements of Rule 20 for joinder, and after directing the transfer of the claims of all but two plaintiffs, this Court then found that the two remaining Jefferson County Plaintiffs, Malone and Davis, "do not meet the same transaction or occurrence test established by this Court in Armond." This Court instructed the Circuit Court of Jefferson County to sever those two claims for separate trials. This ruling was issued even though Plaintiffs Malone and Davis had consumed the same

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[22]Significantly, at this May 2005 hearing, no mention was made by plaintiffs' counsel to the trial court to the effect that all remaining claims had been settled based on events that had occurred over two years earlier. It was clearly plaintiffs' position at that time that the remaining claims had not been settled.

[23]This pleading would not have been filed if the claims had been "settled."

allegedly dangerous drug - Propulsid.

In State Farm Insurance v. Murriel, et al, 904 So.2d 112 (Miss. 2004), this Court severed the claims of multiple plaintiffs even though they had simply sued State Farm Insurance and its employees who were essentially one defendant. The Court emphasized that "other than being subject to State Farm's general policies and procedures, the Plaintiffs did not share a single transaction or occurrence or series of transactions or occurrences. There is no distinct litigable event linking the parties." Murriel at 115.

In January, 2005, in Wyeth-Ayerst Laboratories, et al v. Caldwell, 905 So.2d 1205 (Miss. 2005), a case involving the claims of multiple Plaintiffs against drug manufacturers and prescribing physicians, this Court specifically abrogated several of its prior opinions which had allowed unlimited joinder at the pleadings stage including Illinois Central R.R. v. Travis. The fact that the plaintiffs in Caldwell were all alleging injuries stemming from the same product did not demonstrate the occurrence of "a distinct litigable event" so as to connect the claims of any two plaintiffs such that joinder of any of those claims in one lawsuit was permissible.

Also in 2005, in Mississippi Life Insurance Company v. Baker, 905 So.2d 1179 (Miss. 2005), another multi-plaintiff suit filed against a credit life insurance company and others, this Court noted that Janssen Pharmaceutica v. Armond had been decided even before the amendment of the Official Comments to Rule 20 and that joinder was improper since the claimants had different medical histories, alleged different injuries at different times and had ingested different amounts of the drug over different periods of time. Baker at 1184. The claims of the numerous plaintiffs were severed since their claims were not connected by any distinct litigable event.

In February of 2005, the Court decided Crossfield Products Corporation v. Irby, 910

So.2d 498 (Miss. 2005), a suit involving the claims of multiple shipyard employees against the manufacturers of asbestos products. Even though each plaintiff had a common workplace, Ingall's Shipyard, their employment was at different dates and times and for varying lengths of time. Their employment involved different jobs, and each plaintiff had a different medical history. Therefore, this Court affirmed its holding in Armond and ordered that the claims of each plaintiff be severed into a separate cases. This result ensued even though each plaintiff claimed exposure to a single toxic substance - asbestos.

In February, 2005, this Court decided 3M Company v. Hinton, 910 So.2d 526 (Miss. 2005) which expanded the prior holding in Mangialardi to also require that any complaint attempting to join the claims of multiple plaintiffs state the particular injury sustained by each such plaintiff.[24]

On the same day that the Hinton opinion was rendered, this Court issued its opinion in Illinois Central Railroad Company v. Gregory, 912 So.2d 829 (Miss. 2005). As with the case at bar, Gregory, was a multi-plaintiff case by present and former employees of Illinois Central Railroad Company who lived at various places, worked in various crafts and at various locations, and who were employed by Illinois Central at various points in time. As with the case at bar, the plaintiffs in Gregory sought recovery under the Federal Employers' Liability Act due to alleged asbestos exposure. The Court held that "due to the recent development in our Rule 20 jurisprudence, Travis (Illinois Central Railroad Company v. Travis), would likely not be decided in the same way today...". The Court noted in Gregory that it had amended Rule 20 because the Court was attempting "to craft rules for fair and

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[24]Though aware of Hinton and the numerous other opinions discussed in this section, plaintiffs made no effort to bring their complaint into compliance with those opinions.

efficient court administration" and was making efforts "to provide a reasonably fair forum for all parties." Gregory at 834. This Court stated that under the Official Comments to Rule 20, the claims of several parties must be connected by "the same litigable event." The Court agreed with Illinois Central's position that venue would be proper for only those plaintiffs who resided in Tunica County (the venue of that action) at the time their alleged cause of action accrued, or whose cause of action arose in Tunica County. Therefore, in addition to severing the claims of each plaintiff from the claim of Plaintiff Gregory (who resided in Tunica County), the Court directed the trial court to transfer to proper venues the claims of those Plaintiffs who could properly venue their claims in other Mississippi counties.[25] The Court ordered the dismissal of those out-of-state plaintiffs with no connection to Mississippi, noting that "Mississippi has no real interest in trying the out-of-state plaintiffs' claims against an out-of-state defendant." Id. at 837.

Gregory confirmed that the previous joinder cases decided by the Court in 2004 applied to asbestos cases, to FELA cases, and to cases in which there is only one Defendant. Gregory also added to the mandates of Mangialardi and Hinton, requiring that in multi-plaintiff complaints, the complaint must specify "the distinct litigable event" common to all of the joined plaintiffs.

The complaint in Gregory, as well as the complaints filed in the other cases discussed above, were filed in the trial courts prior to the Mississippi Supreme Court's decision in Janssen Pharmaceutica v. Armond and prior to the amendment of the Official Comments to Rule 20, M.R.C.P. Nevertheless, those decisions and the amendment of the Official Comments to Rule 20 have been applied to pending claims in cases such as the

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[25]This directive was subsequently amended by Canadian National/Illinois Central Railroad Company v. Smith, 926 So.2d 839, 845 (Miss. 2006).

one presently before the Court.

In 2006, this Court clarified its previous holdings regarding instructions to trial courts for the disposition of multi-plaintiff cases wherein plaintiffs had been misjoined, had filed claims in improper venues, or where pleadings failed to comply with the requirements of Mangialardi. In Canadian National/Illinois Central Railroad Company v. Smith, 926 So.2d 839, 845 (Miss. 2006), the Court held that:

> Where Plaintiffs are misjoined and severance is required, we hold that the better rule - and the one we adopt today - is for the trial court to...sever and dismiss all misjoined Plaintiffs who lack proper venue in the forum court, allowing each severed Plaintiff to file a new Complaint in an appropriate venue selected by that Plaintiff.[26]

Plaintiffs' discovery responses and pulmonary questionnaires (R. 3191-3442; See Excerpts of those documents relating to the remaining Plaintiffs at R.E. Vol. II) established that the claims of these plaintiffs have been improperly filed in Marshall County and have been improperly joined in one lawsuit.[27] Accordingly, Illinois Central subsequently filed an amended motion seeking not only the dismissal or transfer of the claims of the trial group plaintiffs designated by plaintiffs' counsel in 2004 (Brower, Cooper, Greer, and Travis), but also the dismissal of the claims of all remaining plaintiffs.

The discovery responses and pulmonary questionnaires established that none of the remaining plaintiffs lived in Marshall County at the time of any alleged exposure, and that none of them worked or were exposed in Marshall County. The discovery responses,

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[26]The Court in Smith gave other instructions regarding plaintiffs who have been properly joined and/or who are properly before the trial court. Those situations are not applicable to those plaintiffs who remain in this cause.

[27]While no discovery responses or pulmonary questionnaires have been received by Illinois Central with respect to the claims of Blagg, Boddie, and Farris, the Amended Complaint (R.E. 5) with regard to those plaintiffs fails to meet the pleading requirements of Mangialardi, Hinton, and Gregory.

questionnaires, as well as 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. Under these circumstances, there is no "distinct litigable event" connecting any of these plaintiffs with another plaintiff.

The claims of all remaining plaintiffs have been improperly joined and venued in Marshall County. The claims of the remaining plaintiffs who lived and/or were allegedly exposed to asbestos while working for Illinois Central at locations outside of Mississippi must also be severed and dismissed.

Severance of these claims is mandated by this Court's decisions in 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 the remaining claims is mandated by Canadian National/Illinois Central Railroad Company v. Smith, 926 So.2d 839 (Miss. 2006).

Pursuant to the instructions to trial courts as articulated in Smith, this Court must remand this matter, directing the trial court to sever and dismiss all of the remaining claims in this cause without prejudice to the rights of these plaintiffs to file amended complaints in other appropriate jurisdictions and venues.

In spite of the voluminous length of this Record, and even though Illinois Central filed numerous supplemental and amended motions on the improper venue and misjoinder issues, Plaintiffs have never made any effort to distinguish the holdings of the numerous decisions by this Court over the last several years on the issues of misjoinder and improper venue, nor have they attempted to meet the requirements that pleadings comply with the mandates of Mangialardi, Hinton, and Gregory. Plaintiffs have made no effort to claim that these plaintiffs are properly joined or that their claims are properly venued in Marshall

County. Plaintiffs' sole position concerning misjoinder and improper venue, one that was ultimately adopted by the trial court, is that the trial court and this Court are irrevocably bound by this Court's 2002 decision in Illinois Central Railroad Company v. Travis, 808 So.2d 928 (2002) pursuant to the "law of the case" doctrine. As will be discussed in the following section of this brief, all of the exceptions to the application of the "law of the case" doctrine are applicable to the claims of the plaintiffs remaining in this case.

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

While Plaintiffs take the position that Illinois Central Railroad Company v. Travis, 808 So.2d 928 (Miss. 2002) is "the law of the case" and binding on this Court, in Mauck v. Columbus Hotel Company, 741 So.2d 259 (Miss. 1999), this Court stated that the "law of the case" doctrine is not a principal of substantive law. Mauck at 268. (Emphasis supplied). In any event, the Travis decision has been abrogated by this Court and exceptions regarding the application of the law of the case doctrine apply to the claims of the remaining plaintiffs as will be discussed below.

Exceptions to the application of the law of the case doctrine include whether there has been any change in the facts of the case and whether there has been any intervening changes in the law. Additionally, in Wilner v. White, 929 So.2d 343 (Miss. 2004), this Court held that the "law of the case" doctrine should not be applied when there are obvious and significant errors in an earlier decision that create an injustice, which would include intervening changes in the law. Wilner, para. 6, *citing,* Florida Gas Exploration Company v. Searcy, 385 So.2d 1293, 1295 (Miss. 1980). (Emphasis supplied).

In an earlier case dealing with the "law of the case" doctrine, this Court held that even in the absence of a change of law or a change of facts, this Court is not bound to

follow an earlier opinion simply under the "law of the case" doctrine, noting that it may correct a former decision where it is wrong:

> We do not think, however that this rule is so fixed and binding upon the Court that it may not depart from its former decision on a subsequent appeal if the former decision in its judgment after mature consideration is erroneous and wrongful and would lead to unjust results.

Brewer v. Browning, 76 So. 267, 269, 115 Miss. 358 (1917). (Emphasis supplied).

The "law of the case" doctrine is not a rule of law, but rather a rule of practice which ordinarily would prevent re-adjudication of issues already decided. However, exceptions to the application of this rule of practice include any change in the law (Wilner) and this doctrine should not be applied where the earlier decision was erroneous and would lead to unjust results. See, Wilner, *supra*, and Brewer, *supra.*

Since 2002, the Travis decision has been abrogated by this Court in numerous cases which clarified pleading, joinder and venue requirements. See Illinois Central R.R. Co. v. Gregory, 912 So.2d 829, 831 (Miss. 2005); Wyeth-Ayerst Laboratories v. Caldwell, 905 So.2d 1205, 1208 (Miss. 2005); MS Life Ins. Co. v. Baker, 905 So.2d 1179, 1184 (Miss. 2005). These changes in the law, particularly changes to effectuate the fair and efficient court administration and the achieval of just results[28] render the "law of the case" doctrine and this Court's 2002 decision in Travis irrelevant to the claims of the remaining Plaintiffs.

The law of the case is also not applicable when there have been changes in the

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[28]Notably, in Illinois Central Railroad Company v. Gregory, *supra*, the Court described its amendment of the Official Comments to Rule 20 and its Armond decision as "attempts to craft rules for fair and efficient court administration during a time of growing mass tort actions", to assure "the elimination of prejudice" to parties involved in mass tort actions, and "to provide a reasonably fair forum for all parties." Gregory 912 So.2d at 834. (Emphasis supplied).

facts. Plaintiffs relied in the trial court on TGX Intrastate Pipeline v. Grossnickle, 716 So.2d 991 (Miss. 1997). Grossnickle described the "law of the case" doctrine as:

> The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. Whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts. This principal expresses the practice of Courts generally to refuse to reopen what has previously been decided. It is founded on public policy in the interest of orderly and consistent judicial procedure.

TSX at 1019, *citing*, Simpson v. State Farm Fire & Casualty Company, 564 So.2d 1374, 1376 (Miss. 1990) (Emphasis supplied).

TGX had asserted that the law of the case doctrine prevented the Chancellor from assessing a lien. This argument was held to be without merit because the only issue decided in an earlier judgment was ownership of a particular interest, not the assessment of a lien. In Illinois Central Railroad Company v. Travis, the only issue decided by the Mississippi Supreme Court in Travis was whether or not Plaintiff Travis could be properly joined with numerous other plaintiffs in the Marshall County venue and whether or not the claim of Travis could be adjudicated in the Marshall County forum as this Court interpreted the law at that time. None of the plaintiffs whose claims remain in this cause other than Travis were even parties to the appeal in Illinois Central v. Travis. Grossnickle requires that a prior decision must be between the same parties in the same case. Therefore, the facts presently before the Court do not support application of the "law of the case" doctrine.

The trial court's opinion asserts that the remaining plaintiffs were prejudiced by their relinquishment of a trial date. This position is untenable based upon this Record. The claims of any other remaining plaintiffs could have been set for trial at any time since the Complaint was initially filed in 1998. The letters emphasized by the trial court in its order

specifically reference the right of all plaintiffs to have their claims set for trial.

If any disparity or prejudice exists with regard to the claims of those plaintiffs whose cases have been settled versus the claims of the remaining plaintiffs which have not been settled, such prejudice exists in the treatment of their claims by plaintiffs' counsel. For reasons unknown to Illinois Central, these plaintiffs were not selected by plaintiffs' counsel to be a part of Trial Group I back in 2000. The claims of Trial Group I were settled. Many of the claims of Trial Group II plaintiffs were settled. Similarly, the claims of many of the remaining plaintiffs were inexplicably excluded from Trial Group II, III and IV. Plaintiffs' counsel elected to engage in the settlement procedure whereby certain claims have been settled, while ignoring the rights of the plaintiffs remaining in this cause to have their cases adjudicated through a trial in a Court of proper venue and forum.

Plaintiffs will not be unfairly prejudiced by denial of their Motion to Enforce. Pursuant to Smith, *supra*, the statute of limitations has been tolled while their claims have been pending in this case,[29] and their claims will be dismissed without prejudice. They will simply be required to re-file a proper complaint in a proper venue where their claims will presumably receive a just and fair adjudication. 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. Enforcement of that abandoned law would permit the adjudication of misjoined claims in an improper venue based on a deficient complaint, a result which should not be allowed by this Court.

In summary, the facts and parties involved in Illinois Central's interlocutory appeal

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[29]See, Canadian National/Illinois Central v. Smith, 296 So.2d 839, 845 (Miss. 2006).

of the claim of Travis are not the same as the facts and parties presently pending before this Court on this appeal. The law has changed in that this Court's 2002 decision in Illinois Central v. Travis has been abrogated by several decisions of this Court. And finally, those decisions were rendered to prevent unjust results, to craft fair rules for the administration of justice, and to provide a fair forum for all parties. All of the exceptions prohibiting application of the "law of the case" doctrine are present in this Record.

V.

CONCLUSION

This Court should reverse the trial court's Order granting the Motion to Enforce and should remand this matter, directing the trial court to sever and then dismiss without prejudice the claims of all remaining Plaintiffs: Anderson, Bruch, Harper, Joyner, Mayer, Parton, Robinson, Stanfill, Bowman, Brower, Craven, Cooper, Crain, Greer, Travis, Blagg, Boddie, and Farris.

Respectfully submitted,

UPSHAW, WILLIAMS, BIGGERS,
BECKHAM & RIDDICK, LLP

BY: 

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Of Counsel to Defendant(s)

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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
Honorable C.E. Sorey, II
909 Delaware Avenue
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Honorable John Booth Farese
Farese Farese & Farese
122 Church Street
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Ashland, Mississippi 38603-0098

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

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November 4, 2005

Honorable Henry L. Lackey
Post Office Drawer T
Calhoun City, MS 38916

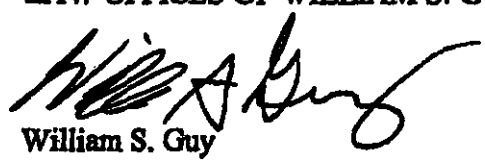
RE: Richard Aldridge, et al v. Illinois Central Railroad Company
Marshall County Circuit No.: M-98-328

Dear Judge Lackey:

Enclosed please find Plaintiff's Brief in Support of Plaintiff's Motion to Enforce Settlement Agreement. By copy of this letter we are also furnishing copies to all counsel of record.

Respectfully,

LAW OFFICES OF WILLIAM S. GUY



William S. Guy

WSG/jhd
Enclosures

xc: Glenn F. Beckham, Esq.
Edward Blackmon, Jr., Esq.
Thomas Peters, Esq.
John Booth Farese, Esq.

IN THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI

RICHARD ALDRIDGE, ET AL	PLAINTIFFS
VS.	CIVIL ACTION NO. M-98-328
ILLINOIS CENTRAL RAILROAD COMPANY	DEFENDANT

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT

COME NOW Plaintiffs, through counsel, and submit this their Brief In Support of Plaintiffs' Motion To Enforce Settlement Agreement and would show unto this Honorable Court the following:

1. This case (hereinafter sometimes referred to as "Aldridge") is a case filed under the Federal Employers' Liability Act, 45 U.S.C.§§51, et seq. ("FELA") alleging injuries and death due to exposure to asbestos, against Illinois Central Railroad Company ("ICRR").

2. Plaintiffs filed their Motion To Enforce Settlement Agreement And For Stay of Defendant's Motions on August 31, 2004. See copy attached hereto as Exhibit "A".

3. *Aldridge* consisted of 99 plaintiffs prior to settlements and dismissals which have now reduced the case to 18 currently pending cases, 10 asbestosis and/or pleural plaque cases and 8 asbestos related cancer cases.

4. Attached hereto as Composite Exhibit "B" is a payment time-line showing the dates and settlement amounts of 77 *Aldridge* plaintiffs, as well as supporting documentation evidencing payment of the settlement.[1]

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[1]The supporting documentation consists of either a copy of the settlement check or a copy of the letter transmitting the settlement check(s) from the Defendant's claim agent to Plaintiffs'

settlement must establish that there was a meeting of the minds. Warwick v. Matheney, 603 So.2d 330, 336 (Miss. 1992).

12. Here, the two facsimile communications between Mr. Peters and Mr. Farese, together with the payment by ICRR of 47 pleural plaque and asbestosis cases establishes that there was a meeting of the minds.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Court will enforce the settlement agreement reached between the parties and will order ICRR to pay Muriel Anderson, Samuel Boddie, Paskle Bowman, George Crain, Curtis Craven, Lawrence Farris, Roosevelt Joyner, Charles Mayer, Elwood Parton and Billy Stanfill in accordance with the settlement agreement reached between the parties.

Respectfully submitted,

RICHARD ALDRIDGE, et al, PLAINTIFFS

By _____
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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Ms. Betty Sephton
Mississippi Supreme Court Clerk
450 High Street
Jackson, Mississippi 39205

Re: **Illinois Central Railroad Company v. Richard Aldridge, et al**
Supreme Court Case No.: 2007-CA-00087

Dear Ms. Sephton:

As I discussed with you previously, upon my further review of the Brief of Appellant, which was filed on or about January 28, 2008 in the above-referenced appeal, I noticed that there were errors in the following sections of the Brief: the Certificate of Interested Persons, the Table of Contents, and the Table of Authorities.

Enclosed herewith please find an original and three (3) copies of the Brief of Appellant for substitution in the Court's file. These substituted copies contain a corrected Certificate of Interested Persons, a corrected Table of Contents, and a corrected Table of Authorities, to assist the Court in the determination of the issues raised in the Brief of Appellant.

There has been no change, whatsoever, to the form and content of the Brief from the first numbered page through numbered page 48.

I appreciate the Court's consideration of this matter, and I have enclosed one (1) extra copy along with a return envelope, postage prepaid, for return of a "filed" - stamped copy of this revised Brief. As always, if you should have any questions or should need anything further, please do not hesitate to contact me at 662-455-1613.

Lou Clark

Sincerely,

UPSHAW, WILLIAMS, BIGGERS,
BECKHAM & RIDDICK, LLP

Harris F. Powers, III

HFP/tsh
Enclosures
cc: William S. Guy, Esq.
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John Booth Farese, Esq.
Henry L. Lackey, Esq.
All Counsel of Record for Appellant Illinois Central Railroad Company