# 2008-CA-01831

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ROBERT W. KENNEDY** — **APPELLANT**

**VS.** — **CASE NO. 2008-CA-01831**

**ILLINOIS CENTRAL RAILROAD COMPANY** — **APPELLEE**

**ON APPEAL FROM THE CIRCUIT COURT OF PIKE COUNTY, MISSISSIPPI**

**HONORABLE MICHAEL M. TAYLOR, CIRCUIT JUDGE**

## BRIEF OF APPELLEE

Of Counsel to Appellee:

Glenn F. Beckham, Esq. [redacted]
Lonnie D. Bailey, Esq. (M[redacted]
UPSHAW, WILLIAMS, BIGGERS,
BECKHAM & RIDDICK, LLP
309 Fulton Street
Post Office Drawer 8230
Greenwood, Mississippi 38935-8230
Telephone: (662) 455-1613
Fax: (662) 455-7884

## ORAL ARGUMENT NOT REQUESTED

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ROBERT W. KENNEDY** **APPELLANT**

**VS.** **CASE NO. 2008-CA-01831**

**ILLINOIS CENTRAL RAILROAD COMPANY** **APPELLEE**

## CERTIFICATE OF INTERESTED PARTIES

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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

a. William S. Guy, Esq.; C. E. Sorey, II, Esq., counsel for Appellant;

b. Timothy W. Porter, Esq., John T. Givens, Esq., Porter & Malouf, P.A., counsel for Appellant;

c. Wayne Dowdy, Esq., Dowdy & Cockerham, counsel for Appellant;

d. Glenn F. Beckham, Esq. and Lonnie D. Bailey, Esq., Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Appellee;

e. Mr. Robert W. Kennedy, Appellant; and

f. Illinois Central Railroad Company, Appellee.

Dated this the 3rd day of August, 2009.

Lonnie D. Bailey

## STATEMENT REGARDING ORAL ARGUMENT

Illinois Central submits that the facts and legal arguments are adequately presented in the briefs and records such that the decisional process would not be significantly aided by oral argument. If, however, the Court determines that oral argument will be helpful, Illinois Central welcomes the opportunity to attend and participate.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

## CONSTITUTIONS, STATUTES AND RULES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT W. KENNEDY — APPELLANT

V. — CAUSE NO.: 2008-CA-01831

ILLINOIS CENTRAL RAILROAD COMPANY — APPELLEE

# BRIEF OF APPELLEE

## I. INTRODUCTION

This case involves a claim of negligence under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, *et. seq.* Robert Kennedy, a retired employee of Illinois Central Railroad Company ("Illinois Central") claimed that he was exposed to asbestos during his employment as a carman with Illinois Central and that he contracted asbestosis as a result.

After five days of trial during which both parties offered all of their evidence, including expert testimony, the trial court directed a verdict at the close of the evidence in favor of Illinois Central. The only issue raised on this appeal by Kennedy is whether the trial court erred in directing the verdict and entering a judgment of dismissal. After hearing all of the evidence, the trial court found, correctly, that the evidence, when considered in the light most favorable to Kennedy, did not create a triable issue of fact for jury resolution. The trial court found that there was no evidence on which a rational jury could base an award of damages to Mr. Kennedy for any injury resulting from exposure to asbestos. When the record is considered under the appropriate standard of review, the conclusion is inescapable that the trial court was correct to direct a verdict in favor of Illinois Central.

## II. STATEMENT OF THE ISSUE

Whether the trial court was correct in finding that Kennedy had failed to offer any evidence which would allow a reasonable jury to find that he was injured as a result of exposure to asbestos.

## III. STATEMENT OF THE CASE

### A. Nature of the Case.

The case below, filed by Kennedy pursuant to the FELA, involved allegations of negligence against Illinois Central for failure to provide Kennedy with a safe place to work and to warn of the danger of asbestos exposure. Complaint, R. 8-17.[1] After extensive discovery and motion practice, the case was tried beginning in August, 2008, before a jury in the Circuit Court of Pike County. After five days of trial, both sides rested their case. Tr. 699, 722. The trial court directed a verdict for Illinois Central finding that there was no fact issue to submit to the jury on the damage element of a negligence claim because plaintiff had failed to offer any evidence on which a jury could rationally base an award of damages. A.R.E. 1-9 (tab 1); Tr. 723-731. Subsequently, the trial court entered a Judgment on Motion for Directed Verdict. A.R.E. 10 (tab 2),[2] R. 1692. The only issue before the Court on this appeal is whether the trial court erred when it found that the evidence, when considered in the light most favorable to plaintiff, did not make out a fact issue on the element of damage which required jury resolution.

---

[1]In this brief, references to the record are as follows: "R.____" refers to the Clerk's papers; "Tr.____" refers to the court reporter's transcript of the trial; "R.E.____" refers to appellant's record experts; "A.R.E._____" refers to appellees's record experts; and "Ex.____" refers to the exhibits offered at trial.

[2]Despite the mandate of M.R.A.P. 30(a)(2), Appellant Kennedy failed to include the Judgment on Motion for Directed Verdict in Appellant's Record Excerpts. Appellant also failed to include a true copy of the trial court docket in the record excerpts as required by M.R.A.P. 30(a)(1).

## B. The Course of the Proceedings and Disposition in the Court Below.

*Robert Kennedy v. Illinois Central Railroad Company*, Civil Action No. 06-274-PCT, was filed in the Circuit Court of Pike County, Mississippi, on August 31, 2006. R. 8-17. Kennedy charged under the FELA that Illinois Central was guilty of negligence in *inter alia*, failing to provide Kennedy with a safe place to work and failing to warn Kennedy of the hazards of asbestos exposure. *Id.* On September 29, 2006, Illinois Central answered the Complaint. R. 31-37. Illinois Central denied the essential allegations of negligence and requested the trial court to dismiss the Complaint. *Id.* After extensive discovery and motion practice, the trial commenced before a jury in Pike County on August 25, 2008. On August 29, 2008, after five days of trial in which both sides offered their entire case, including testimony of expert witnesses, both sides rested. Tr. 699, 722.

On that same day, Illinois Central moved the trial court to enter a directed verdict of dismissal arguing that the evidence, when viewed in the light most favorable to Kennedy, did not establish a *prima facia* case of negligence and, thus, there was no issue to submit to the jury. Tr. 704-706. Finding that there was no evidence in the record that Mr. Kennedy had been damaged by exposure to asbestos which would provide a rational basis to support a jury award of damages, the trial court directed a verdict in favor of Illinois Central. A.R.E. 1-9 (tab 1); Tr. 723-731.

## C. Statement of Relevant Facts.

In August of 1948, Kennedy went to work for Illinois Central as a carman apprentice. Tr. 187-88. During his career with Illinois Central, Kennedy also worked as a carman (Tr. 189), a member of a wrecker crew (Tr. 193) and a welder (Tr. 199-200). Mr. Kennedy retired from railroad service in 1992. Tr. 230.

Throughout his railroad career, Mr. Kennedy was a cigarette smoker. He began smoking as

early as 1948. Tr. 267. At times he smoked as many as three packs of cigarettes per day. Tr. 269. In 1992, Mr. Kennedy decided to quit smoking with the use of nicotine patches. Tr. 231.

In 1994, Mr. Kennedy began experiencing shortness of breath. Tr. 231. His primary care physician referred him to Dr. Robert Middleton, a pulmonologist from McComb, Mississippi. *Id.* Dr. Middleton diagnosed Mr. Kennedy with emphysema. *Id.* Mr. Kennedy has been followed by Dr. Middleton for his emphysema continuously up through and including the time of trial. Tr. 248-9. Dr. Middleton has never diagnosed Mr. Kennedy with an asbestos-related disease. Tr. 250-51.

In 2003, Mr. Kennedy was referred to Jackson pulmonologist Dr. Barry Whites by his attorneys. Tr. 510-12. Based on one visit, Dr. Whites confirmed Dr. Middleton's diagnosis of emphysema and also reached an impression of asbestosis. R.E. 1, Ex. P-85. Dr. Whites saw Mr. Kennedy again in 2007 with a similar impression. R.E. 4, Ex. P-86.

Kennedy filed the instant lawsuit on August 31, 2006. After discovery and motion practice, the case was tried before a jury beginning August 25, 2008. At trial, Kennedy and Dr. Whites testified, among others.[3] Tr. 186-271, Tr. 443-525. Kennedy also called Dr. Arnold Brody, a molecular biologist, to testify as an expert. Ex. C.[4]

Mr. Kennedy testified at great length about his career as an Illinois Central employee, his smoking history and his treatment for emphysema and other non-pulmonary medical issues. Tr. 186-271. Mr. Kennedy did not, however, testify that he was injured or damaged as a result of asbestos

---

[3]Kennedy also called James R. Millette, Ph.D. (Tr. 288-335), an expert in materials testing and Michael J. Ellenbecker, Ph.D. (Tr. 338-439), an industrial hygienist. Neither provided testimony that is relevant to the issue on appeal.

[4]Arnold Brody testified by video deposition. A transcript of his testimony was marked Exhibit "C" for identification.

exposure. Moreover, Mr. Kennedy did not offer any testimony or documentary evidence of economic loss, such as medical bills or lost income, as a result of asbestos exposure. Mr. Kennedy did not complain of physical pain or suffering as a result of asbestos exposure. Mr. Kennedy did not testify that he would incur any future medical expenses or economic losses as a result of asbestos exposure. Indeed, Mr. Kennedy testified that, despite his advanced age[5] and his end-stage emphysema,[6] he remains able to carry out the day-to-day activities of life:

> Q. Mr. Kennedy, what would you do on a typical day now during the week or weekends?
>
> A. I try to keep my yard mowed?
>
> Q. And how do you do that?
>
> A. I got a riding mower, and I can ride the riding mower and -- if it doesn't get stuck. If it gets stuck, I'm in trouble. And I help my wife take care of my daughter, my handicapped daughter. And that's about all. I eat, try to hunt something to eat. But as far as working goes, I can't even get all my yard work done. I've got a chainsaw that needs to be used, but if I crank my chainsaw, I haven't got enough wind left to use it. And I bought me a electric weedeater and -- because I can't crank my weedeater and then use it. So I do what I can.
>
> Q. Do you still try to get around town?
>
> A. Oh, yeah. Yeah, I go to the grocery store, go shopping, go everywhere.

Tr. 233. Mr. Kennedy testified that he no longer quail hunts or fishes and doesn't garden as much as he used to since he developed breathing problems. *Id.*

---

[5]At the time of trial Mr. Kennedy was nearly 78 years of age. He was born on September 18, 1930. R.E. 1, Ex. P-85 (DOB 9/18/30).

[6]Dr. Whites testified that Mr. Kennedy had severe end-stage emphysema which is "as bad as it gets." Tr. 903. Another of Kennedy's witnesses, Dr. Brody, agreed that a patient with end-stage emphysema cannot get much sicker before he dies. Ex. C, page 99:10-22.

Mr. Kennedy called Dr. Barry Whites to testify as an expert witness in the areas of pulmonology and diagnosis of lung diseases including asbestos-related diseases.[7] Tr. 450. Dr. Whites testified that he saw Mr. Kennedy twice before trial -- once in 2003 and again in 2007 -- at the request of Mr. Kennedy's counsel.[8] Tr. 510-12.

Dr. Whites testified that on the basis of an abnormal chest x-ray,[9] the presence of bilateral velcro vales heard in Kennedy's chest,[10] a history of exposure provided by Kennedy,[11] and abnormal pulmonary function studies, he concluded that Mr. Kennedy had asbestosis when he saw Mr. Kennedy in 2003. Dr. Whites testified that he saw Mr. Kennedy again in 2007. Tr. 486. Dr. Whites reviewed a second chest x-ray taken in 2007 which was essentially unchanged.

Contrary to the several unsupported assertions in the Brief of Appellants, Dr. Whites did not testify that Kennedy's exposure to asbestos injured Mr. Kennedy, had an effect on his breathing or

---

[7]Dr. Whites candidly admitted that he is not an expert on the subject of the amount of asbestos that must be inhaled in order to produce asbestosis in a person. Tr. 451.

[8]Dr. Whites testified that the diagnosis of asbestosis is more of a legal issue than a medical issue. Tr. 461.

[9]Dr. Whites is not a NIOSH certified B-reader. He attempted to obtain certification but failed the examination. Tr. 470. A NIOSH certified B-reader is a physician who has taken a course of study in how to read chest x-rays for the presence of pneumoconiosis, and has taken and passed an examination administered by NIOSH and the American College of Radiology. Tr. 539-41. Dr. Whites conceded that a board-certified radiologist and NIOSH certified B-reader is "absolutely" more qualified than he to interpret chest x-rays for the presence of pneumoconiosis. Tr. 505.

[10]Dr. Whites agreed with Dr. William Frazier that velcro rales in a patient with asbestosis are always present -- they do not come and go or disappear. Tr. 518. The evidence established without contradiction that Kennedy's rales would appear and disappear, consistent with his long standing congestive heart failure, not asbestosis. Tr. 518-520, 649-653.

[11]Dr. Whites acknowledged that patients lie about exposure and "try to sometimes get benefits they're not entitled to." Tr. 462.

that Mr. Kennedy suffers as a result of asbestosis.[12] Brief of Appellant at 10-11.

Dr. Whites also admitted, given Mr. Kennedy's lengthy smoking history and past medical history, that he could not say, to a reasonable degree of medical probability, that Mr. Kennedy would not have the same breathing problems even if he had never worked for Illinois Central. A.R.E. 11-12 (tab 3); Tr. 521-22.

Kennedy also called Arnold Brody, Ph.D., as an expert in lung biology and the pathogenesis of asbestos-induced lung disease. Ex. C, pg. 27. Dr. Brody gave an interesting,[13] theoretical dissertation on the mechanisms by which asbestos can cause injury in rats and humans. Ex. C. Dr. Brody did not, however, establish through his testimony that asbestosis constituted an injury to Kennedy's lungs or that asbestosis affected Kennedy's breathing, as averred in the Brief of

---

[12]It is telling that in each instance in the Brief of Appellant where Kennedy alleges that Dr. Whites testified that asbestos caused injury or damage to Mr. Kennedy, Appellant provides no record citation. For example, at page 10 Appellant argues that "Dr. Whites also testified about the effects asbestosis had on Mr. Kennedy's breathing." Yet, Appellant fails to provide any citation to the record to support this argument. Indeed, in the following sentence, Appellant suggests that severe airways obstruction (which Kennedy clearly has) is a "major symptom of asbestos related disease." This is a serious misrepresentation of science and Dr. Whites' testimony. What Dr. Whites actually testified to is that the major finding from the 2003 PFT is airflow obstruction as a result of severe emphysema. R.E. 19, Tr. 485. Dr. Whites went on to explain that asbestosis is typically a restrictive disease that may sometimes be accompanied by mild airflow obstruction, not the type of obstruction present in Kennedy as a result of his emphysema. Tr. 486.

[13]See *Brooks v. Stone Architecture, P.A.*, 934 So.2d 350, 355 (Miss. App. 2006) ("Although he [Dr. Brody] gave interesting testimony on the effects asbestos has on the human body, he did not testify that Appellants were likely to develop any asbestos-related diseases in the future, nor did he testify as to the rationality of their fears. In fact, Dr. Brody could not give any testimony relating to the Appellants because he did not know who the Appellants were, nor had he reviewed any materials relating in any way to them. All that he knew was that Appellants' counsel informed him that they had been exposed to asbestos. Accordingly, his testimony does not raise a question of material fact regarding the Appellants' claim.") Dr. Brody's testimony in the instant case was similarly general and non-specific.

Appellant, at page 13. The testimony from Dr. Brody relied on by Kennedy at page 12 of his brief for the proposition that a lung is damaged when it is exposed to asbestos was in response to questions about a photomicrograph of rat lung tissue on the molecular level. Ex. C, page 54, line 6-8. Dr. Brody went on to explain that the disease process of asbestosis may (or may not) ensue with continued, repeated exposure. Ex. C, page 55.

As in *Brooks*, Dr. Brody could not give any testimony to assist Kennedy to establish his claim because he knew nothing about Kennedy. He had never seen Mr. Kennedy. Ex. C, page 87. He never saw any of Mr. Kennedy's x-rays or CT scan. Ex. C, page 88. He did not know whether Mr. Kennedy was exposed to asbestos when Kennedy worked for Illinois Central. Ex. C, page 89. He had "no idea one way or the other whether Mr. Kennedy has been diagnosed with asbestosis or would meet the diagnostic criteria for asbestosis." Ex. C, page 102.

Illinois Central called John E. Parker, M.D., as an expert witness in the fields of internal medicine, pulmonary disease and the NIOSH/ILO B-reader program. Tr. 546. Dr. Parker is board certified in internal medicine, pulmonary diseases and is a NIOSH certified B-reader. Tr. 539. During his career, Dr. Parker has served as chief of the Examination Processing Branch of the Division of Respiratory Diseases for the National Institute for Occupational Safety & Health ("NIOSH") which was responsible for certifying x-ray readers for the coal miners program. Tr. 541-42. He also headed the Clinical Investigations Branch and the Epidemiology Investigations Branch of NIOSH which conducted research in lung diseases other than in coal miners, including silicosis and asbestosis. Tr. 542.

Dr. Parker read twelve chest x-rays of Kennedy ranging in date from 1989 through 2007, according to the ILO standards. He found no parenchymal abnormalities which would have

indicated the presence of asbestosis. Tr. 563. He also read a CT scan of Kennedy done in November 2001 which did not demonstrate parenchymal abnormalities consistent with asbestosis.[14] Tr. 563. Dr. Parker explained that a CT scan is superior to a chest x-ray because it allows a doctor "to recognize emphysema with more precision and ... to recognize pleural abnormalities with more precision and also to look at the parenchyma in ultra-fine detail." *Id.*

Unlike Dr. Whites, Dr. Parker specifically testified that Kennedy's "shortness of breath is caused by COPD, or emphysema, chronic obstructive pulmonary disease or emphysema."[15] Tr. 566. He testified further that the "classic cause of that finding is tobacco smoke." *Id.*

Dr. William Frazier of Jackson, Mississippi, also testified on behalf of Illinois Central as an expert in internal medicine and pulmonary medicine. Tr. 641-2. Dr. Frazier is board certified in internal medicine, pulmonary medicine, critical care medicine and sleep disorder medicine. Tr. 639. Prior to trial, Dr. Frazier conducted an examination of Kennedy at the request of Illinois Central. Tr. 644. Dr. Frazier obtained employment and medical histories from Mr. Kennedy. Tr. 646-7. He conducted a comprehensive physical examination of Mr. Kennedy which included, among other things, listening to Kennedy's chest for breath sounds. Tr. 649-50. Dr. Frazier also ordered and interpreted pulmonary function studies and a chest x-ray. Tr. 654.

Dr. Frazier testified that during his physical examination of Mr. Kennedy he did not hear rales or crackles (Tr. 650) -- a breath sound which Dr. Whites testified was "very common in patients who have interstitial lung disease of which asbestosis is one of those." R.E. 14, Tr. 468. Dr. Frazier

---

[14]Dr. Whites, plaintiff's diagnosing expert, did not review the CT scan. Tr. 495.

[15]Emphysema is one form of COPD or chronic obstructive pulmonary disease. Tr. 475, 658, Ex. C, page 97-98. Throughout the trial, the medical witness for both sides used the terms "emphysema" and "COPD" interchangeably. Tr. 503, 566.

explained that congestive heart failure (CHF), which Mr. Kennedy suffered from, is a very common cause of rales and that while rales caused by CHF come and go depending on the medical status of the patient's CHF, rales caused by asbestosis are persistent and never go away.[16] Tr. 650-51.

Dr. Frazier testified that on physical examination he did not observe any sign or symptoms specifically related to asbestosis. Tr. 658. Dr. Frazier also testified that the pulmonary function studies in June 2007 provided absolutely no evidence that Kennedy had an asbestos-related disease. Tr. 659. According to Dr. Frazier the June 5, 2007, chest x-ray had no findings that suggested asbestos exposure. Tr. 660. In Dr. Frazier's opinion, given to a reasonable degree of medical probability, Mr. Kennedy does not suffer from asbestosis. Tr. 663.

## IV. SUMMARY OF THE ARGUMENT

In FELA cases the plaintiff bears the burden to prove the common law elements of a negligence case: duty, breach, causation and damages. After hearing all of the evidence, the trial court found that Kennedy had failed to meet his burden to prove that he had been damaged by exposure to asbestos and, thus, had failed to establish a *prima facia* case of negligence against Illinois Central. A *de novo* review of the record, considered under the appropriate appellate standard of review, confirms that the trial court was correct.

The Brief of Appellant manifests a fundamental misunderstanding of the trial court's ruling with respect to Kennedy's failure of proof on the fourth element of a negligence claim. The trial

---

[16]Dr. Whites agreed that crackles or rales in a person with asbestosis do not come and go, but remain with the patient for life unless he has a lung removed. Tr. 518. When questioned about numerous references to the absence of breath sounds noted in Dr. Middleton's records, Dr. Whites did not even attempt to explain why these breath sounds appeared and disappeared throughout the many years that Kennedy was treated for emphysema by Dr. Middleton. Tr. 518-20.

court did not grant a directed verdict on the basis that the jury would have difficulty specifically ascertaining the amount of damages and, thus, recovery should be precluded, as argued by Appellant. Rather, the trial court found, correctly, that Kennedy had failed to prove that he had been damaged by asbestos exposure and thus did not provide a basis for a rational jury to award any amount of damages. Under Mississippi law "it is incumbent upon the plaintiff to offer some proof that would bear on the question of the extent of his damage in order for the jury to intelligently deliberate on the question." *McFadden v. United States Fid. and Guar. Co.*, 766 So.2d 20, 23 (Miss. App. 2000), *cert. denied* August 24, 2000. Recognizing the complete absence of probative facts regarding the extent of damage to Kennedy, the trial court properly directed a verdict for Illinois Central as a matter of law. *Id.*

Appellant's argument that the standard of proof on the causation element of negligence in an FELA case described by the United States Supreme Court in *Rogers v. Missouri Pacific RR Co.*, 352 U.S. 500 (1957) somehow excuses his failure to establish the fact of damage is the proverbial "red herring". The "even in the slightest" standard for determining whether a case should be submitted to the jury applies only to the causation element. Plaintiff's burden to establish the fact of damage and to provide the jury with some proof of the extent of damage so that it would not be required to resort to rank speculation and conjecture in deliberation remains the same in an FELA case as in any other negligence case.

The trial court recognized that Kennedy had wholly failed to offer any proof to satisfy the damage element of a negligence claim. It properly directed a verdict, as a matter of law, to Illinois Central as a result of plaintiff's failure of proof.

## V. ARGUMENT

### A. Standard of Review.

Kennedy is correct that this Court "conducts a de novo review of a motion for directed verdict." *Morgan v. Greenwaldt*, 786 So.2d 1037, 1041 (Miss. 2001) (directed verdict on several claims affirmed in medical liability case). The Court reviews the evidence in a light favorable to the non-moving party and allows the non-movant the reasonable inferences that can be drawn from the evidence. *Id.* When the evidence is viewed under this well-settled standard of review, "an issue should only be presented to the jury when the evidence creates a question of fact on which reasonable jurors could disagree." *Id.* If, as here, no such question of fact is demonstrated in the record, a directed verdict is proper and should be affirmed.

With regard to Kennedy's argument that the Court should be "mindful of the diminished burden of proof" under the FELA in conducting its *de novo* review, the Court should also be mindful that the "in the slightest" evidentiary burden for a FELA plaintiff at the directed verdict stage of a case applies only to the causation element of common law negligence claims. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) ("Nothing in these cases, then, supports the proposition that the duty of care owed is slight. Rather, the phrase 'in whole or in part' as set forth in the statute, or, as it has come to be known, 'slightest', modifies only the causation prong of the inquiry."). In other words, plaintiff's burden to prove the damage prong of the quartet of negligence elements remains the same as in any other case of common law negligence and is not affected by the "in whole or in part" phrase from the FELA.

### B. The Trial Court Correctly Determined That Kennedy Had Failed to Offer Any Evidence That He Had Been Damaged Such That There was No Issue of Fact to be Resolved by the Jury.

Under the FELA, a plaintiff has the burden to prove each of the traditional elements of common law negligence: duty, breach of that duty, causation and damage. *Seymore v. Illinois Cent. R. Co.*, 25 F. Supp. 2d 734, 738 (S.D. Miss. 1997). When he fails to prove one of these elements, a directed verdict, as a matter of law, is proper. *Id.*

The Brief of Appellant demonstrates appellant's fundamental misunderstanding of the trial court's ruling with respect to his failure of proof on the fourth element of a negligence claim -- damage. Contrary to Kennedy's assertions, the trial court did not direct a verdict on the basis that Kennedy's damages were difficult to specifically ascertain. Brief of Appellant at 9. Rather, the trial court directed a verdict for Illinois Central because Kennedy failed to offer evidence that he had been damaged by exposure to asbestos which would have been sufficient to support an award of damages "in any amount whatsoever." A.R.E. 4 (tab 1); Tr. 726:7-9. Rather than the single snippet from the trial court quoted in the Brief of Appellant at 4, the trial court gave a lengthy explanation of its ruling that makes clear that the basis of the ruling went far beyond a mere difficulty in ascertaining damages. For example, in its ruling granting the directed verdict, the trial court stated:

> But in order for an award of damages to stand, it has to be rational, it has to be based on something. And when viewing all the testimony in this case in the light most favorable to the Plaintiff, accepting as true all that evidence, and accepting all reasonable inferences from that evidence, the Court finds that the Motion for Directed Verdict is well taken and should be granted and is hereby granted. There is simply nothing to tie a rational -- to rationally relate an award of damages to.

A.R.E. 3 (tab 1); Tr. 725. The Court further explained its ruling on the motion for directed verdict, as follows:

> ... but, again, there was nothing, there was no testimony that would support an award of damages in any particular amount, in any amount

> whatsoever. The evidence is simply, in the Court's opinion -- even when viewed under the very deferential standard that the Court's called upon to exercise in this case, and accepting as true all the Plaintiff's evidence, there is simply nothing to tie an award -- certainly an award of economic damages to, and nor has the Court heard anything to tie an award of noneconomic damages to. And so for those reasons the Court will grant the Motion for Directed Verdict.

A.R.E. 8 (tab 1); Tr. 726. When requested by Kennedy's counsel for further clarification of its ruling, the Court clearly explained that its ruling was not related to the difficulty to specifically ascertain damage amounts, but rather to the lack of evidence that Kennedy was damaged.

> BY THE COURT: And I probably didn't speak precisely there. And it's not so much a question -- obviously pain and suffering are always difficult to quantify, and they're not subject to any sort of absolute calculation. My saying that there was no rational basis for any -- to support an award goes more to another issue. And, like I say, I explained it probably poorly, which is to say that I did not hear testimony from the witness stand, even in view -- accepting as true everything your witnesses said, with all reasonable inferences flowing from that, that Mr. Kennedy would be better off today without asbestosis. ... I did not hear -- there is not in the record testimony to support an award that Mr. Kennedy would be better off today without asbestosis, that he would be in any different condition than he is now.

A.R.E. 7 (tab 1); Tr. 729.[17]

The trial court's ruling was clearly consistent with Mississippi law. In *McFadden v. United States Fid. and Guar. Co.*, 766 So.2d 20 (Miss. App. 2000), *cert. denied* August 24, 2000, the trial court granted directed verdicts for the defendants in an action by a physician for common law slander

---

[17]If the trial court's ruling was not clear enough, questions posed by the trial court during argument on the motion for directed verdict made it clear that the trial court was of the opinion that Kennedy had not proven that he was damaged by asbestos.

> BY THE COURT: You're right about that. **But I'm saying how has the testimony proved that asbestos has damaged Mr. Kennedy**? (emphasis added.)

A.R.E. 13 (tab 4); Tr. 713.

and malicious interference with business relationship. The Court of Appeals affirmed the directed verdict on the tortious interference claim on the basis that "there is no evidence in the record of any actual damage suffered by [the physician] in his capacity as a practicing physician arising out of [defendant's] actions." 766 So.2d at 23. (explanatory material added.) The Court noted that under Mississippi law

> it is incumbent upon the plaintiff to offer some proof that would bear on the question of the extent of his damage in order for the jury to intelligently deliberate on the question.

*Id.* Like here, the Court in *McFadden* explained that:

> On the record now before us, an award of damages in any amount for this alleged tortious activity by [defendant] would necessarily be based on the rankest speculation and conjecture, and it is a fundamental precept in our law that damages based on nothing more than that may not be permitted to stand. (citations omitted). Therefore, to permit the case to go to the jury on this claim would have been an act of futility. (explanatory material added.)

*Id.* The Court of Appeals held that, as a matter of law, a directed verdict was proper because the plaintiff failed to prove an essential element of his claim when he failed "to present any credible evidence upon which the jury could deliberate to arrive at an informed estimation" of actual damage. *Id. See also, Finkelberg v. Luckett*, 608 So.2d 1214, 1222 (Miss. 1992), quoting 25 C.J.S. Damages § 27, ("where it is not shown with reasonable certainty that the harm or loss resulted from the act complained of, there can be no recovery of compensatory damages therefore."); *Illinois Cent. R. Co. v. Winters*, 830 So.2d 1162, 1174 (Miss. 2002) (trial court should have granted direct verdict to defendant when plaintiff "failed to offer substantive proof" of damages for emotional distress.)

As noted above, the cases cited on page 9 of the Brief of Appellant, concerning the proposition that recovery will not be precluded for difficulty in ascertaining an amount of damages,

are inapposite. The trial court did not preclude Kennedy's recovery because the amount of damages was difficult of ascertainment. Rather, the trial court precluded recovery and directed a verdict because of Kennedy's failure of proof that he suffered any damage whatsoever.

## C. The FELA Does Not Impose a Reduced Burden on the Element of Damage.

Kennedy makes a protracted argument that the FELA imposes a "significantly lower burden of proof" on the plaintiff. Brief of Appellant at 5-6. That argument is misplaced, and amounts to the proverbial "red herring". Throughout his brief, and especially in the FELA burden of proof section, Kennedy relies on an assumption that he proved damage resulting from asbestos exposure -- an assumption neither indulged by the trial court or supported by the record.[18]

The U.S. Supreme Court has construed the "in whole or in part" phrase found in § 51 of the FELA to impose a burden on the plaintiff to prove "that employer negligence played any part, even in the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific RR Co.*, 352 U.S. 500, 506 (1957). The Court made clear that the "slightest" burden applied only in determining whether a case should be submitted to the jury and nothing more.

> Under this statute **the test of a jury case** is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, **in producing** the injury or death for which damages are sought. (emphasis added.)

---

[18]That Kennedy is relying on an assumption of injury is readily apparent from the unsupported assertion on page 6 of the Brief of Appellant that "[t]he trial court acknowledged that Illinois Central breached its duty to the Appellant and was the cause of his injuries. The trial court was therefore in error to not allow the jury to decide what part the employer played in causing Mr. Kennedy's asbestos related lung injuries." This is not so. At most the trial court acknowledged -- to use Appellant's phrase -- that Kennedy offered enough evidence to avoid a directed verdict on the breach element and "arguably" had escaped directed verdict on the causation element. A.R.E. 7 (tab 1); Tr. 725:5-6. Nowhere in the record did the trial court find that Mr. Kennedy suffered asbestos related lung injuries as assumed by Appellant. To the contrary, the lack of that proof was the basis of the directed verdict.

*Id.*

To be sure, courts across the country have misread and misapplied this holding in *Rogers*. In *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) the Fifth Circuit Court of Appeals engaged in a detailed analysis of the effect of the phrase "in whole or in part" as it is used in § 51 of the FELA. Though *Gautreaux* was a Jones Act case, the Court noted that seamen under the Jones Act are "afforded rights parallel to those of railroad employees" under the FELA. 107 F.3d at 335. In an effort to clarify what had become a confusing morass of statutory construction, the Fifth Circuit made it clear that the *Rogers* directed verdict evidentiary burden applies only to the singular causation element of a common law negligence action and does not apply to the other elements of the quartet of factors which must be proven to establish negligence.

> Nothing in these cases [including *Rogers v. Missouri Pacific R. Co.*, cited by Appellant], then, supports the proposition that the duty of care owed is slight. Rather, the phrase 'in whole or in part' as set forth in the statute, or, as it has come to be known, 'slightest', modifies only the causation prong of the inquiry. The phrase does not also modify the word 'negligence'. The duty of care owed, therefore, under normal rules of statutory construction, retains the usual and familiar definition of ordinary prudence. (explanatory material added.)

107 F.3d at 335. Thus too, the phrase does not modify the damage element, despite Kennedy's weakly camouflaged argument to the contrary. Kennedy had the same burden to prove injury/damage as he would have in any negligence action. The record demonstrates that he failed to meet that burden. Recognizing this failure, the trial court appropriately granted a directed verdict to Illinois Central which this Court must affirm.

**D. <u>Illinois Central Cannot Be Held Liable for Kennedy's Emphysema.</u>**

Incredibly, Kennedy makes the preposterous argument that Illinois Central could somehow

be held liable for the emphysema that Kennedy contracted as a result of at least a 60 pack/year history of cigarette smoking. No one disputed that Mr. Kennedy suffers from severe end-stage emphysema.[19] No one testified that exposure to asbestos can cause or contribute to emphysema. Yet, for the first time, Kennedy now argues that Illinois Central can be held liable for Kennedy's emphysema. See Brief of Appellant at 6-8. For several reasons, this argument must fail.

Even if Kennedy's arguments were legally sustainable (which they are not) Kennedy is procedurally barred from raising them on appeal because he did not raise this issue in the trial court.[20] "'It is a rule of almost universal application that questions of whatever nature not raised in the trial court and preserved for review will not be noticed on appeal.'" *Braidfoot v. William Carey College*, 793 So.2d 642, 655 (Miss. App. 2000), quoting *Hans v. Hans*, 482 So.2d 1117, 1122 (Miss. 1986); *see also, Public Employees' Retirement System v. Freeman*, 868 So.2d 327, 329 (Miss. 2004) ("This Court has repeatedly held that an issue not raised before the lower court is deemed waived and is procedurally barred.") Not once during the entire trial did Kennedy claim that he was entitled to recover from Illinois Central for the lung injury from his emphysema caused solely by this sixty-

---

[19]Kennedy's expert witnesses agreed that Mr. Kennedy suffers from severe end-stage emphysema as a result of his smoking history. Dr. Whites described Mr. Kennedy's severe end-stage emphysema as "That's as bad as it gets." Tr. 903. Dr. Brody testified that a patient with end-stage emphysema cannot get much sicker before he dies. Ex. C, page 99:10-22.

[20]Indeed, Kennedy's counsel explicitly disavowed any intention that Illinois Central could be held liable, in any manner, for Kennedy's emphysema. A.R.E. 13 (tab 4); Tr. 713:25-28 ("And our only intention in requesting damages for Mr. Kennedy are to seek only those damages that the jury believes are associated with asbestos exposure, not his emphysema.") Kennedy is judicially estopped to now take a contrary position on appeal. *Pursue Energy Corp. v. Mississippi State Tax Comm.*, 968 So.2d 368, 377 (Miss. 2007) ("'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'", quoting *Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003)); *see also, Rankin v. American General Finance, Inc.*, 912 So.2d 725 (Miss. 2005) (same).

plus pack/year smoking history. To the contrary, Kennedy's counsel specifically told the trial court during argument on Illinois Central's directed verdict that Kennedy sought "only those damages that they jury believes are associated with asbestos exposure, not his emphysema." A.R.E. 13 (tab 4); Tr. 713:25-28. Kennedy is procedurally barred from raising this issue on appeal. The Court need not delve further into this issue.

Procedural bar aside, nothing in FELA jurisprudence suggests that a railroad could be held liable for injury or damage resulting from the employee's personal choice to use tobacco products. The decisions cited by Kennedy do not support the position he takes. First, in the Brief of Appellant at 7, Kennedy argues that "[a]sbestosis is a separate and distinct lung injury from emphysema."[21] Kennedy then cites the decision from the First Circuit Court of Appeals in *Stevens v. Bangor and Aroostook R. Co.*, 97 F.3d 594 (1st Cir. 1996), citing the Restatement (Second) of Torts § 433A, which concerned the issue of how a jury should be instructed on the apportionment of damages resulting from a proven injury and those occurring as a result of a preexisting condition. In *Stevens*, the Court held that only that an instruction to a jury that an FELA defendant may be held liable for all injuries where the jury cannot separate injuries caused by the accident from those resulting from a pre-existing condition. *Id.* at 603. *Stevens* thus fails to support Kennedy's argument here because the issue presented by the trial court's ruling is not an issue of apportionment, even according to Kennedy's argument that asbestosis and emphysema are "separate and distinct" injuries.[22] Brief of Appellant at 7. The trial court made clear that the basis of its ruling was not the inability to

---

[21]Illinois Central agrees. The evidence at trial confirms this.

[22]The Restatement (Second) of Torts § 433A relied on by the Court in *Stevens* is applicable only "[w]here two or more causes combine to produce a single result" which is clearly not the case here.

apportion damages between two causes, but the plaintiff's failure to prove a basis for a jury determination of injury from asbestos exposure. Tr. 712-13. Moreover, Kennedy's counsel arguing in opposition to the directed verdict, again took a position contrary to the position now espoused in his brief. Counsel argued any injury from asbestosis could be quantified by a jury just as easily in this case as damages could be quantified in any personal injury case. A.R.E. 5-6 (tab 1); Tr. 727:15-21; 727:28-728:17. Thus, based on his own prior argument, Kennedy's reliance on *Stevens* is inapplicable and inappropriate.

Perhaps the most important point from *Stevens* applicable to this case is the Court's observation that generally a defendant cannot be held liable for "pain and impairment that plaintiff would have suffered even if the accident had never occurred." 97 F.3d at 601. Dr. Whites, plaintiff's expert, made clear that, based on the evidence in the record of this case, he could not testify to a medical probability that Kennedy would not have suffered shortness of breath and lung impairment even if he never worked for Illinois Central. A.R.E. 11-12 (tab 3); Tr. 521-22.

Kennedy's reliance on *Villa v. Burlington Northern and Santa Fe Railway Co.*, 397 F.3d 1041 (8th Cir. 2005) is equally misplaced. *Villa* concerned the admissibility of evidence and jury instructions related to the issue of whether and how a railroad worker should be compensated for his inability to return to work. Here Kennedy's ability to return to work was not at issue. Unlike here, in *Villa* there was apparently no question of whether the railroad worker had proven that he had been damaged as a result of an employment accident. The issue before the Court in *Villa* was how the jury should apportion lost wages damages, an issue inapplicable in this case.

Again, Kennedy's citation of the Ninth Circuit's opinion in *Jordan v. Atchison, Topeka and Santa Fe Railway Co.*, 934 F.2d 225 (9th Cir. 1991) misses the point. In *Jordan*, the Ninth Circuit

was required to consider whether the jury was properly instructed on how to apportion damages for lost future wages between pre-existing back injuries and on-the-job injury to the rail worker's back. The principal issue decided in that case was whether the railroad could avoid paying lost future earnings damages because of its after-the-fact discovery of an employment disqualifying, pre-existing back condition. The Ninth Circuit's holding in *Jordan* does not, however, support Kennedy's misguided argument that the FELA requires Illinois Central to compensate Kennedy for contracting emphysema caused by more than four decades of cigarette smoking.

## VI. CONCLUSION

The trial court granted a directed verdict to Illinois Central because it found, considering the evidence favorable to plaintiff and allowing all reasonable inferences, that Kennedy failed to prove the fourth element of a common law negligence claim -- that he was damaged as a result of exposure to asbestos. The relaxed standard for proof of causation under the FELA does not salvage plaintiff's failure of proof. Despite plaintiff's contrary assertions, the FELA certainly does not allow a plaintiff to recover damages for his severe, end-stage emphysema -- confirmed by his own experts -- that was brought about by more than forty years of smoking.

For all the foregoing reasons, this Court should affirm the judgment of the Circuit Court of Pike County in this case.

This the 31st day of August, 2009.

Respectfully submitted,

UPSHAW, WILLIAMS, BIGGERS
BECKHAM & RIDDICK, LLP

Attorneys for Appellee Illinois Central
Railroad Company

By: Lonnie D. Bailey

Glenn F. Beckham, [redacted]
Lonnie D. Bailey, [redacted]

OF COUNSEL:

UPSHAW, WILLIAMS, BIGGERS,
BECKHAM & RIDDICK, LLP
Post Office Drawer 8230
309 Fulton Street
Greenwood, Mississippi 38935-8230
Telephone: (662) 455-1613

## CERTIFICATE OF SERVICE

I, Lonnie D. Bailey, Attorney for Appellee, do hereby certify that I have this day mailed via U.S. Mail, postage prepaid, true and correct copies of the above and foregoing document to the following:

William S. Guy, Esq.
C. E. Sorey, II, Esq.
Post Office Box 509
McComb, Mississippi 39648-0509

Timothy W. Porter, Esq.
John T. Givens, Esq.
Porter & Malouf, P.A.
Post Office Box 12768
Jackson, Mississippi 39236-2768

Wayne Dowdy, Esq.
Dowdy & Cockerham
Post Office Box 30
Magnolia, Mississippi 39652-0030

Honorable Michael M. Taylor
Circuit Judge, 14th Judicial District
P.O. Drawer 1350
Brookhaven, MS 39602

This the 3rd day of August, 2009.

Lonnie D. Bailey

## CERTIFICATE OF FILING

I, Lisa Roberts, legal secretary to Lonnie D. Bailey, one of the counsel for the Appellee, do hereby certify that, pursuant to Rule 25(a), M.R.A.P., I have filed the original and three copies of Brief of Appellee by depositing them in the United States Mail, first class, postage prepaid, on this the 3rd day of August, 2009, addressed as follows:

Ms. Kathy Gillis, Clerk
Supreme Court of Mississippi
Post Office Box 249
Jackson, MS 39205-0249

This the 3rd day of August, 2009.

Lisa Roberts

Lisa Roberts