

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-01831 SCT 1

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 Court of Appeals may evaluate possible disqualification or recusal.

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8. Illinois Central Railroad Company/Appellee
9. Glenn F. Beckham, Counsel for Appellee
10. Lonnie D. Bailey, Counsel for Appellee
11. Honorable Michael M. Taylor, Circuit Court Judge of Pike County



John T. Givens

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STATEMENT OF THE ISSUES

- I. WHETHER THE CIRCUIT COURT ERRED IN DIRECTING A VERDICT FOR ILLINOIS CENTRAL RAILROAD COMPANY ON THE ISSUE OF DAMAGES?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a civil action brought pursuant to the *Federal Employer's Liability Act* for injuries received by Robert Kennedy as a result of exposure to asbestos while working for Illinois Central Railroad Company.

II. PROCEDURAL BACKGROUND

This case was filed on or about August 31, 2006 in the Circuit Court of Pike County. This case was litigated thoroughly over a two (2) year period cumulating in a trial that started on August 25, 2008. The trial of this matter lasted four and a half days. At the end of the trial, Illinois Central moved for a directed verdict. Judge Taylor decided that the Appellant had met his burden of proof for duty, breach of duty, and causation. Judge Taylor then decided that the Appellant had not proven any injury or damages, and therefore, Judge Taylor entered a directed verdict against the Appellant and for Illinois Central Railroad on the issue of damages. The jury was never allowed to consider or decide the issues of damages.

III. STATEMENT OF FACTS

Robert Kennedy was a life long employee of the Illinois Central Railroad Company. Mr. Kennedy developed a severe case of asbestosis. On the 31st day of August, 2006, Robert Kennedy filed a lawsuit against Illinois Central for his exposure to asbestos on his job in McComb, Mississippi. The case was filed in the Pike County Circuit Court. On the 25th day of August, 2008, the case came on for trial. At the conclusion of all the evidence, the Judge issued a directed verdict for the Illinois Central Railroad Company.

IV. SUMMARY OF THE ARGUMENT

Common law liability of an employer is supplanted by the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, thereby making recovery easier for an injured employee such as Robert Kennedy. While the Appellant suffered from two disease processes, emphysema and asbestosis, it is for the jury to determine the amount of injuries attributable to each disease process. Furthermore, under FELA, if the jury is unable to separate out the injuries attributable to each disease process, the Employer is liable for injuries it caused in whole or in part. When the trial court entered a directed verdict, it did so on the basis that the damages could not be determined. It is well established law in Mississippi that damages are a question of fact for the jury to determine. Furthermore, even if damages are difficult to specifically ascertain, that does not preclude recovery for the Appellant. The expert testimony of Barry Whites, M.D. and Arnold Brody, Ph.D clearly established that the Appellant suffered from asbestosis, and asbestosis is an injury to the lung. The testimony of the Appellant established that he has difficulty breathing and has suffered a loss of enjoyment of life. Therefore, it is evident that the Appellant was injured, and the jury should have been allowed to consider damages. The trial court was therefore in error to enter a directed verdict for Illinois Central especially since the trial court found that the Appellant had met his burden of proof in regards to duty, breach, and causation.

V. ARGUMENT

A. WHETHER THE CIRCUIT COURT ERRED IN DIRECTING A VERDICT FOR ILLINOIS CENTRAL RAILROAD COMPANY ON THE ISSUE OF DAMAGES?

At the close of Appellee's case, Illinois Central moved for a directed verdict. The trial court found that the issue of duty was fairly clear. The trial court further found that the Appellant had met their burden regarding breach of that duty. The trial court stated that there was ample evidence that at no time did the railroad provide safety training, safety devices, breathing apparatuses, or safety

information regarding asbestos to the Appellant. The trial court also found that there was no dispute that asbestos was present, and that the Appellant was exposed to respirable asbestos. The trial court also found that based on the expert testimony that the Appellant had also proven causation. Therefore, the trial court found that the Appellant had sufficiently proven there was a duty, a breach of that duty, and that breach was the proximate cause of the Appellant's injuries. (R. 8-9)

The trial court then stated that the final element for the Appellant to prove was damages. The trial court stated that there was no proof, no exhibits offered, and no attempt to establish economic damages for Mr. Kennedy. The trial court stated specifically:

But there's absolutely no evidence to quantify the manner or degree to which it has caused him pain and suffering or other noneconomic damages, even in conjunction with his other disease processes. There was testimony that it can exacerbate the other disease processes, but, again, there was nothing, there was no testimony that would support an award of damages in any particular amount, in any amount whatsoever . . . 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.

(R. 10). The reasoning of the trial court was not compliant with the requirements of the Federal Employer's Liability Act nor with Mississippi law regarding non-economic damages. Therefore, the trial court was in error and should be reversed.

i. Standard of Review

This Court's standard of review for a trial court's grant of a directed verdict is de novo. *Robley v. Blue Cross/Blue Shield of Mississippi*, 935 So.2d 990, 996 (¶16) (Miss. 2006). This court examines the granting of a directed verdict under the same standards of the trial court:

In reviewing a motion for directed verdict this Court must decide whether the facts presented, together with any reasonable inferences, considered in the light most favorable to the nonmoving party [appellant], point so overwhelmingly in favor of the movant [appellee] that reasonable jurors could not have returned a verdict for the [appellant].

Robley, 935 So.2d at 996 (¶16); citing *Drennan v. Kroger Co.*, 672 So.2d 1168, 1170 (Miss. 1996).

In conducting this de novo review, this Court must be mindful of the diminished burden of proof required under the Federal Employer's Liability Act compared to common law negligence cases. The Appellant would respectfully submit that when the evidence is considered in the light most favorable to him, this Court should find that reasonable jurors could have returned a verdict for the Appellant.

ii. Federal Employer's Liability Act Imposes a Significantly Lower Burden of Proof Upon the Plaintiff than the Normal Common Law Tort Action in Mississippi.

This action involves a claim brought by an injured railroad employee pursuant to the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 (1939). The employer's common law duty is supplanted by FELA with a "far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." (Emphasis added) *Canadian National v. Hall*, 953 So.2d 1084, 1091 (¶13) (Miss. 2007); quoting *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 507-08, 77 S.Ct. 443, 449, 1 L.Ed.2d 493, 500 (1957). The question the trial court in this case was required to ask was "whether negligence of the employer played any part, however small, in the injury or death which is the subject of this suit." *Hall*, 953 So.2d at 1091 (¶13); quoting *Rogers*, 352 U.S. at 508, 77 S.Ct. 443. The trial court answered this question in the positive, but somehow decided the injuries suffered by Mr. Kennedy were not compensable. The trial court was in error in deciding there was no damages for the jury to consider. This is so because no matter how small a part Illinois Central played in the damages, it was an issue for the jury to decide.

The *Rogers* decision provides other guidance for this Court in applying FELA to the Appellant's cause of action. The United States Supreme Court quoted with approval "The very essence of (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Rogers*, 352 U.S. at 505 FN8; quoting *Tennant v. Peoria &*

P.U.R. Co., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944). The U.S. Supreme Court further held "It does not matter that, from the evidence, the jury may also with reason . . . attribute the result to other causes" *Id.* at 506. The only inquiry the trial court is allowed to make in a FELA action is "whether, with reason, the conclusion may be drawn that negligence of the employer played **any part [however small]** at all in the injury" (Emphasis added) *Id.* at 507-08. "The statute expressly imposes liability upon the employer to pay damages for injury . . . due 'in whole or in part' to its negligence." *Id.*; citing 45 U.S.C. § 51.

Instead of the jury deciding what is most reasonable in this case, the trial court took the jury's function into its own hands. The trial court was only allowed to decide whether the negligence of Illinois Central played any part in Mr. Kennedy's injury, which the trial court answered positively. Therefore, the trial court committed reversible error in not allowing the jury to consider the issue of damages no matter how small the part.

The United States Court of Appeals for the Fifth Circuit has held:

Under the (Federal Employers' Liability) Act, **the right of the jury to pass upon the question of fault and causality must be most liberally viewed . . . the jury's power to engage in inferences must be recognized as being significantly broader than in common law negligence actions.**

Boeing Co. v. Shipman, 411 F.2d 365, 371 (5th Cir. 1969)(overruled on other grounds); quoting *Chicago, Rock Island and Pacific R.R. Co. v. Melcher*, 333 F.2d 996, 999-1000 (8th Cir. 1964). The 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.

iii. Illinois Central is Liable for all Injuries if the Damage from Emphysema can not be Separated from Damages from Asbestos Exposure

It was not disputed by the Appellant that he suffered from emphysema in addition to asbestosis. Part of the reasoning for the trial court's directed verdict appears to be there was no way

to determine what injuries were caused by which disease process. Based on FELA precedent, it was error for the trial court to enter a directed verdict because of this difficulty. Asbestosis is a separate and distinct lung injury from emphysema.

The First Circuit Court of Appeals faced a similar situation to Mr. Kennedy's when it had to decide "which side should prevail on this issue in a FELA action when there is adequate expert testimony that an accident aggravated a pre-existing condition but the jury cannot separate the pain or disability caused by the pre-existing condition from that resulting from the accident. We believe that the balance tips in favor of compensating the FELA plaintiff." *Stevens v. Bangor and Aroostook R.R. Co.*, 97 F.3d 594, 601(1st Cir. 1996). The First Circuit relied upon the *Restatement (Second) of Torts* to hold "a defendant gets the benefit of apportionment of harm only if 'there is a reasonable basis for determining the contribution of each cause to a single harm.' If not the defendant is liable for the whole" *Stevens*, 97 F.3d at 602 (1st Cir. 1996); quoting § 433A(1)(b) at 434. Pursuant to § 433A, "both the defendant's negligence [asbestosis] and the plaintiff's pre-existing condition [emphysema] are deemed the cause of the entire harm, thus imposing the burden of the whole on both. But the tie is broken by the congressional intent [under FELA] to implement a policy benefitting injured railway workers." *Id.* at 602.

It is undisputed that Mr. Kennedy's lungs and his ability to breathe are harmed. Illinois Central argues that his harm is only a result of emphysema while the Appellant argues that it is a combination of the asbestosis and emphysema. Based on the above holding and under FELA, Illinois Central would be liable for both since the congressional intent under FELA is to benefit and compensate an injured railway worker such as Mr. Kennedy.

The reasoning for the above rule is explained in the comments to § 433. The burden of apportionment is placed on the Defendant to prevent the injustice of allowing a proved wrongdoer to escape liability. *Id.* at 603; citing *Restatement (Second) of Torts* § 433(B)(2) cmt. d, at 444. "In

such a case the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing the full responsibility.” *Id.*; citing same. The comment concludes, “As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship . . . should fall upon the former.” *Id.* Based on this reasoning, the First Circuit held that if the jury is unable to separate the injuries caused or exacerbated by [the exposure to asbestos] from those resulting from [emphysema], [Illinois Central] will be liable for all injuries. *Id.* at 603. Here, the trial court should have allowed the jury to consider the issue of damages. The trial court acknowledged that Illinois Central was a wrongdoer and caused some harm. It was Illinois Central’s burden to prove what amount of harm was caused by Mr. Kennedy’s emphysema as compared to his asbestosis. Illinois Central failed to do this and so the jury should have been allowed to consider the total damage to Mr. Kennedy’s lungs.

The Eighth Circuit Court of Appeals has faced this issue also. The Eighth Circuit concluded that “unless the effects of the work-related injury and the subsequent condition are completely separable, it is a question of fact for the jury in FELA cases whether the injury continues to contribute to an inability to work after the advent of the subsequent condition.” (Emphasis added) *Villa v. Burlington Northern and Santa Fe Railway Co.*, 397 F.3d 1041, 1046 (8th Cir. 2005). The reasoning applied by the Eighth Circuit is equally applicable to this case involving a work-related injury, asbestosis, and a pre-existing condition, emphysema.

The Ninth Circuit in analyzing the subsequent condition scenario relied upon and adopted the reasoning of *Jordan v. Atchison, T & S.F.R. Co.*, 934 F.2d 225, 227 (9th Cir. 1991) which held an instruction restricting the calculation of loss of future earnings based on a physical inability resulting from preexisting back problems was too restrictive and limited the jury’s fact-finding role, and it should not have been given. As is the case here, the trial court’s granting of a directed verdict

limited the jury's fact-finding role. The Appellant would respectfully submit that the trial court committed reversible error by granting the directed verdict.

iv. Damages are a Question of Fact for the Jury and Difficulty in Specifically Ascertaining Damages Does Not Preclude Recovery

This Court has held that “[T]he amount of damages to be awarded to an injured litigant is primarily a question of fact for the jury.” *Edwards v. Ellis*, 478 So.2d 282, 289 (Miss. 1985); citing *Boyd v. Smith*, 390 So.2d 994 (Miss. 1980); *New Orleans and N.E. R.R. Co. v. Weary*, 217 So.2d 274 (Miss. 1968); *Jones v. Welford*, 215 So.2d 240 (Miss. 1968). This Court has faced a very similar case to this one before where the damages were difficult to ascertain. This Court found that “[T]he evidence . . . is that the appellant was injured as the result of the defendant’s negligence.” *Williams v. Wiggins*, 285 So.2d 163, 164 (Miss. 1973). “While it is true the injuries received were probably difficult to specifically ascertain since the appellant had previously been injured in the same area of the back, nevertheless **this difficulty does not preclude an award.**” (Emphasis added). *Williams*, 285 So.2d at 164. This Court determined that the jury’s verdict was not responsive to the instructions, and therefore remanded the case for a new trial on damages. *Id.* at 165.

In the case sub judice, the trial court, not the jury, determined that the damages were difficult to specifically ascertain. This difficulty does not preclude an award. *Id.* In *Williams*, this Court reversed a jury verdict on the same issue. The burden required to reverse a jury verdict is substantially higher than reversing a grant of directed verdict. Therefore, this Court should reverse the directed verdict and remand this case for a new trial on damages.

v. Testimony of Barry Whites, M.D. Established that the Appellant was Injured Due to Asbestos Exposure

The Appellant submitted expert testimony that he was injured by his exposure to asbestos. Barry Whites, M.D., a Jackson, Mississippi board certified pulmonologist since 1978, testified on behalf of the Appellant. Dr. Whites examined Mr. Kennedy in 2003 and again in 2007. (R. 11-12).

The medical reports of Dr. Whites entered into evidence as Plaintiff's Exhibits 85 and 86 are found as Record Excerpt "1" and Record Excerpt "2". (R. 1-3 and R. 4-7). It is clear from these medical reports that Mr. Kennedy suffers from asbestosis. As can be seen from the medical reports, Dr. Whites found that Mr. Kennedy's asbestosis was slightly worsening. (R. 4)

Dr. Whites further confirmed his diagnosis of the lung disease asbestosis resulting from exposure to asbestos through his testimony at trial. (R. 13). Dr. Whites testified extensively how Mr. Kennedy's exposure to asbestos has affected his lungs and injured Mr. Kennedy. Dr. Whites testimony was very clear that Mr. Kennedy's lungs were scarred and injured due to his exposure to asbestos. Dr. Whites testified that during his physical examination of Mr. Kennedy that he heard Velcro rales in the bases of both of Mr. Kennedy's lungs, and the Velcro rales indicate scarring in the lung. (R. 14-15). Mr. Kennedy's X-ray was reviewed by Dr. Whites and was assigned a profusion of 2/1, which he found to be clinically significant for asbestosis. (R. 16). Dr. Whites further stated that Mr. Kennedy had a moderate amount of opacities. (R. 17). It was also made clear that the disease of asbestosis is a progressive disease, and it never gets better. (R. 18). In other words, there is no cure.

Dr. Whites also testified about the effects asbestosis had on Mr. Kennedy's breathing. The testimony was clear that from pulmonary function tests performed on Mr. Kennedy, he had severe airflow obstruction, part of which was attributable to his emphysema, but the obstruction is also a major symptom of asbestos related disease. (R. 19). Dr. Whites testified that although asbestosis is typically an airflow restrictive disease, it can also cause airflow obstruction by itself. (R. 20). The fact that Mr. Kennedy's breathing problems were getting worse due to asbestosis was explained later in his testimony. Another pulmonary function test (PFT) was also performed on Mr. Kennedy in 2007. The results of the PFT clearly showed that Mr. Kennedy's airflow obstruction, which is

primarily caused by Mr. Kennedy's emphysema, was getting better, but that Mr. Kennedy's restrictive lung disease is getting worse. (R. 21).

Dr. Whites testified that since Mr. Kennedy had stopped smoking fifteen (15) years prior to the 2007 PFT, that his airflow obstruction wouldn't be expected to progress, and it did not progress as it actually got better. (R. 22). Dr. Whites testified that Mr. Kennedy's volumes were going down which indicates the restrictive process is getting worse which is more associated with asbestosis. (R. 23-24). The testimony of Dr. Whites further established that the disease process of asbestosis has reduced Mr. Kennedy's lung reserves. (R. 25). Finally, Dr. Whites testified to a reasonable degree of medical certainty that Mr. Kennedy suffers from asbestosis. (R. 26).

It is clear from the above testimony that Mr. Kennedy was injured and therefore damaged by his exposure to asbestos. While the Appellant may not have introduced any proof of economic damages at trial, the jury was still entitled to consider the issue of noneconomic damages. Mississippi Code Annotated Section 11-1-60 defines "noneconomic damages" as damages arising from pain, suffering, physical impairment, disfigurement, and loss of enjoyment of life among other things. It is clear from Dr. Whites' testimony that Mr. Kennedy suffers due to his asbestosis. It is further clear from his testimony that Mr. Kennedy's lungs were disfigured due to his exposure to asbestos. "Where a factual issue is presented to a jury, a directed verdict and/or judgment notwithstanding the verdict are not proper." *Phillips v. Illinois Central Railroad Co.*, 7979 So.2d 231, 237 (¶14) (Miss. Ct. App. 2000); citing *Gatlin v. Methodist Med. Ctr., Inc.*, 772 So.2d 1023, 1026 (¶6) (Miss. Ct. App. 2000)(citing *Pace v. Financial Sec. Life*, 608 So.2d 1135, 1138 (Miss 1992)). It is clear that a factual issue was created from Dr. Whites' testimony. Therefore, it was reversible error for the trial court to enter a directed verdict as to damages.

vi. Testimony of Arnold Brody, Ph.D clearly established that Asbestosis is an Injury to the Lung

One of the world's leading researchers on how asbestos causes lung disease is Arnold Brody, Ph.D. Dr. Brody testified via video deposition at the trial of this matter. Dr. Brody started research in the area of asbestos-related lung disease in or around 1974. (R.. 27 P. 27 Lines 13-14). Dr. Whites established that Mr. Kennedy suffers from asbestosis. Dr. Brody defined asbestosis as scar tissue in the lung from inhaling asbestos. (R. 28 P. 34 Lines 19-20). In explaining how asbestosis affects the lungs, Dr. Brody stated that it causes a person's lungs to become stiff causing a restrictive process that prevents the person from taking a deep breath. (R. 29 P. 41 Lines 2-8). Dr. Brody was asked whether when a lung is exposed to asbestos if it is damaged. To which he responded, "No question. Yes that's damage to the lung." (R. 30 P. 54 Line 22 through P. 55 Line 11). Dr. Brody explained to the jury that the scar tissue that results from being exposed to asbestosis is the same as scar tissue on any other part of the body because injury is what causes the production of scar tissue. (R. 31 P.67 Lines 15-24). According to Dr. Brody, the elastic tissue of the lung is replaced by scar tissue in an individual that has asbestosis. (R. 31 P. 68 Lines 3-9).

Dr. Brody testified that asbestosis causes connective tissue of the lung to grow down between the space between the oxygen and carbon dioxide causing alteration in the defusion of gas resulting in shortness of breath. (R. 32 P. 69 Lines 1-22). Dr. Brody further testified that macrophages damaged by asbestos release growth factors that causes fibroblast to divide making more fibroblasts and scar tissue, which in essence results in a progressive process. (R. 32 P. 71 Lines 1-8). Dr. Brody also established that smoking makes asbestosis worse. (R. 33 P. 78 Lines 5-14). Finally, Dr. Brody established that chronic obstructive pulmonary disease (COPD), an obstructive process, and asbestosis, a restrictive process, can be in the lung simultaneously as in Mr. Kennedy's case. (R. 34 P. 98 Lines 18-20).

It was established by Dr. Whites that the Appellant suffers from asbestosis. Dr. Brody was very clear about the disease process of asbestosis and how it is considered an injury to the Appellant's lungs. Dr. Brody was very clear that asbestosis would affect the Appellant's breathing. Therefore, there was substantial evidence that Mr. Kennedy was damaged, and the issue of damages should have been submitted to the jury.

Illinois Central called their own medical expert to testify at trial, William D. Frazier. Dr. Frazier did not believe that Mr. Kennedy suffered from asbestosis. Dr. Frazier did offer significant testimony regarding symptoms experienced by Mr. Kennedy that are indicators of asbestosis. Dr. Frazier testified that he found clubbing of Mr. Kennedy's digits and agreed that clubbing can appear in cases of advance asbestosis. (R. 35). Dr. Frazier also agreed that shortness of breath is a symptom of asbestosis. (R. 35). Dr. Frazier also agreed that if a patient suffers from chronic obstructive airway disease like Mr. Kennedy that it may hinder the recognition of asbestosis. (R. 36-37).

vii. Robert Kennedy's Testimony Established He Has Difficulty Breathing and Has Suffered a Loss of Enjoyment of Life

This Court has also made clear that the loss of enjoyment of life is an element of damages to be considered by a jury. *Kansas City Southern Railway Co., Inc. v. Johnson*, 798 So.2d 374, 380 (¶21) (Miss. 2001) (superseded by statute on other grounds). "The loss of enjoyment of life should be fully compensated and should be considered on its own merits as a separate element of damages, not as part of one's pain and suffering." *Johnson*, 798 So.2d at 380 (¶23). The loss of enjoyment of life relates to one's daily activities which could include "going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities." *Id.* at 381 (¶23). In the *Johnson* case, evidence was presented that the plaintiff enjoyed hunting, fishing, and yard work prior to the accident, and that the plaintiff was no longer able to enjoy these activities. *Id.* at (¶24). This Court stated "[W]e hold today that these restrictions are significant enough to warrant compensation

as a separate and distinct element of damages.” *Id.* at (¶25). Evidence was presented in the case sub judice that Mr. Kennedy was not able to enjoy his yard work, hunting, fishing, or gardening as he previously was able to do. Therefore, the trial court was incorrect in ruling that the Appellant had failed to show any damages that would allow the case to go to the jury.

Robert Kennedy testified at trial. Mr. Kennedy testified that he had no problems breathing when he quit smoking and retired in 1992. (R. 38). Mr. Kennedy testified that his breathing has gotten worse since 1992 even though he no longer smokes. (R. 39). Mr. Kennedy was asked about his daily activities to which he responded that he has to use a riding lawn mower to cut his yard, that he can’t crank his chainsaw because he is out of breath after trying, and he had to buy an electric weedeater because cranking a gas one leaves him out of breath. (R. 40). Mr. Kennedy further testified that before he had his breathing problems he could hunt, fish, garden, and that he was pretty active. (R. 40). It is clear from his testimony that he is no longer able to do those things due to his lungs being damaged. On cross examination, Mr. Kennedy made it clear that he was not short of breath when he stopped smoking and working in 1992. (R. 41). It is clear from the Appellant’s testimony, that he has suffered a physical impairment and loss of enjoyment of life. “The loss of enjoyment of life should be fully compensated and should be considered on its own merits as a separate element of damages, not as part of one’s pain and suffering.” *Johnson*, 798 So.2d at 380 (¶23). Therefore, it was reversible error for the trial court to not allow the jury to consider Mr. Kennedy’s damages.

CONCLUSION

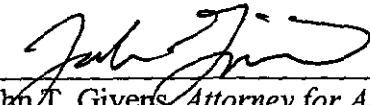
The trial court clearly found that the Appellant had proven a duty, a breach of that duty, causation, and even injury. The trial court determined that no reasonable jury could assign damages based on the evidence submitted at trial. Based on the foregoing, it is clear that the trial court was in error to enter a directed verdict on the issue of damages. Under FELA, the employer is liable for

an injury caused in whole or in part by its negligence. Therefore, Illinois Central would be liable for the injury of asbestosis suffered by the Appellant. Furthermore, difficulty in specifically ascertaining damages does not preclude recovery by the Appellant. Therefore, the Appellant would respectfully submit that this Court should reverse the directed verdict entered by the trial court.




DATED, this the 2nd day of June, 2009.



Respectfully Submitted:


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